PENNSYLVANIA ASSOCIATION OF ELEMENTARY AND SECONDARY SCHOOL PRINCIPALS

October 25, 2011

Furloughs, Seniority Rights and Act 93 Agreements in Tough Budgetary Times

---

David P. Andrews, Esquire
[dandrews@andrewsbeard.com]

ANDREWS & BEARD
3366 Lynnwood Drive
Altoona, PA 16602
814-943-7796
814-943-0519

www.AndrewsBeard.com

I. Furlough of Professional Employees

24 PS 11-1106 Duty to Employ

> The board of school directors in every school district shall employ the necessary qualified professional employes, substitutes and temporary professional employes to keep the public schools open in their respective districts in compliance with the provisions of this act. Except for school districts of the first class and first class A which may require residency requirements for other than professional employees, substitutes and temporary professional employees, no other school district shall require an employee to reside within the school district shall require an employe to reside within the school district as a condition for appointment or continued employment.

Pursuant to Section 1124 of the Public School Code, professional employees may be suspended (i.e. furloughed) for only four (4) specifically enumerated reasons. For all intents and purposes, however, the two most frequently cited reasons are 1) substantial decrease in pupil enrollment in the school district (§1124.1 PSC); or 2) curtailment/alteration of the educational program (§1124.2 PSC).

24 PS 11-1124 1124 Causes for Suspension provides as follows:

> Any board of school directors may suspend the necessary number of professional employes, for any of the causes hereinafter enumerated:
>
> (1) Sustained decrease in pupil enrollment in the school district;
>
> (2) Curtailment or alteration of the educational program on recommendation of the superintendent, concurred in by the board of school directors, approved by the Department of Public Instruction, as a result of substantial decline in class or course enrollments or to conform with standards of organization or educational activities required by law or recommended by the Department of Public Instruction.
>
> (3) Consolidation of schools, whether within a single district, through a merger of districts, or as a result of joint board agreements, when such consolidation makes it unnecessary to retain the full staff of professional employes.
>
> (4) When new school districts are established as a result of reorganization of school districts pursuant to Article II., subdivision (i) of this act, and when such reorganization makes it unnecessary to retain the full staff of professional employes.

A. Substantial Decrease in Pupil Enrollment (PSC 1124.1)

Appellate Authority

The School Code does **not** define a specific number of what constitutes a "substantial decrease" in pupil enrollment. However, almost without exception, courts have allowed school districts to determine what constitutes a substantial decrease in pupil enrollment. In Phillippi v School Dist. Of Springfield Tp., 367 A.2d 1133 (Pa.Cmwlth.Ct.1977), the court said:

> With respect to whether this decrease was "substantial" within the meaning of Section 1124 of the Code, we note that there is not and cannot be a precise

> definition of what is a "substantial" decrease sufficient to justify a given number of job eliminations. This is an area in which school boards must exercise discretion and board action will not be disturbed absent a showing that such discretion was abused, or that the action was arbitrary, based on a misconception of law or ignorance of facts. Board of School Directors of the School District of Scranton v. Roberts; Smith v. Board of School Directors of Harmony Area School District.

Under the Phillippi standard, the following pupil decreases have been held to be "substantial":

(1) One hundred and fourteen students (15.6%) over a ten-year period. Smith v.Board of School Directors of Harmony Area School District, 403 A.2d 621 (Pa.Cmwlth.1979).

(2) Four hundred and eighty-six (11.7%) over a five-year period or six hundred and sixty-one over a six year period. Phillippi v. School Dist. Of Springfield Tp., 367 A.2d (Pa.Cmwlth.1977).

(3) Two hundred and fifty students over three years (3.5%). Tressler v. Upper Dublin School Dist., 373 A.2d 755 (Pa.Cmwlth 1977).

(4) Seven hundred and eighty-seven (13%) decline over seven years. Platko v. Laurel Highlands School Dist., 410 A.2d 960 (Pa.Cmwlth. 1980).

(5) Thirty students in one department over six years. Penzenstadler v. Avonworth School Dist., 403 A.2d 621 (Pa.Cmwlth. 1979).

(6) 379 students (11%) over five years. Andresky v. West Allegheny School Dist., 437 A.2d 1075 (Pa.Cmwlth.1981).

(7) 643 students over three years. Mongelluzzo v. School Dist. Of Bethel Park, 503 A.2d 63 (Pa.Cmwlth1985).

(8) Five hundred and eight students (36.6%) over a ten year period of time. Newell v. Wilkes-Barre Area Vocational Technical School, 670 A.2d 1190 (Pa.Cmwlth.1996).

(9) 396 students of 2002 (approximately 20%) over a ten year period. Battaglia v. Lakeland School Dist., 677 A.2d 1294 (Pa.Cmwlth.1996).

NOTE: In the case of Riverside School District and Riverside Education Association, PSA Vol. 19, No. 21 (1992) the arbitrator upheld the furlough/suspension of a professional educator pursuant to 1124.1. In addition to holding that the union had the burden of proof in a grievance challenging the teacher's layoff, the Arbitrator also upheld the District's decision to furlough staff in light of 1124.1. Arbitrator Mullen at the time

acknowledged the case of Tressler v. Upper Dublin School District, Supra. On page 10 of her award, Arbitrator Mullen stated as follows: "The decision to curtail classes was made by the Board in June 1991 and those numbers clearly show, whether 5, 6, 7 or 10 years are used to illustrate the point or whether the District' or the Association's figures are used, there has been considerably more than a three and one-half per cent (3 ½%) decline in enrollment over a period of time. (This figure is used since it is the lowest one which the courts have considered to be "substantial.")"

The courts have held that once a reason for the furlough under Section 1124 of the Public School Code has been shown, the school board should have the discretion to decide in what program would be best to cut teaching positions. Mongelluzzo v. School District of Bethel Park, 503 A.2d 63 (Pa.Cmwlth. 1985). According to the Court, the District need only show that the suspensions were based on any one of the causes permitted by the Code. Of particular note, the Court stated as follows:

> It is implicit in the statutory scheme that the School District has such discretion. The School District need only show that the suspensions were based on any one of the causes permitted by the Code. Platko. The language of Subsection 1124.1 puts no restrictions on the School District's discretion once it shows that it has experienced a decline in pupil enrollment. **Subsection 1124(2) applies only when there has been no overall decline but where there has been a decline in enrollments in a particular course or a program change. In these situations, approval of the Department of Education is required.**

Query: What if enrollment increases prior to the furlough?

> In Newell v. Wilkes-Barre Area Vocational Technical School, 670 A.2d 1190 (1996) the court held that there was a substantial decline over a reasonably justified period of time even though enrollment increased during the two year period prior to the suspension.

Query: What about relying on enrollment projections?

> In Tressler v. Upper Dublin School District, 373 A.2d 755 (Pa.Cmwlth.1977), the Court held that the use of projections could be a consideration in determining whether a substantial decrease in enrollment has occurred.

Arbitrations

In Canon-McMillan School District, PSA Vol. 20, No. 8 (1993), Arbitrator William A. Radcliffe upheld a furlough/suspension under PSC 1124.1 of a nurse as the result of decline in enrollments of 7% over a seven year period.

In Brownsville Area School District, PSA Vol. 29, No. 21 (2002), Arbitrator Elliot Newman upheld the furlough of nine teachers under PSC 1124.1 as a result of an 11% decline in student enrollment over seven years. In denying the grievance in Brownsville

and relying upon the Riverside case referenced above, Arbitrator Newman clearly acknowledged the determination as to what is a substantial decline in enrollment to be deferred to the school board and it is not proper for an arbitrator to substitute his judgment for that of the school board. In Brownsville, Arbitrator Newman stated as follows:

> The Public School Code grants School District discretion to determine when such a "substantial" decrease in public enrollment has taken place. North Star School District v. North Star Education Association, 625 A.2d 159 (Pa.Cmwlth.Ct. 1993). In Phillippi v. Springfield School District, 367 A.2d 1133 (Pa.Cmwlth.Ct. 1977), the Court stated:
>
>> With respect to whether this decrease was "substantial" within the meaning of Section 1124 of the Code, we note that there is not and cannot be a precise definition of what is a "substantial" decrease sufficient to justify a given number of job eliminations. This is an area in which school boards must exercise discretion and board action will not be disturbed absent a showing that such discretion was abused, or that the action was arbitrary, based on a misconception of law or ignorance of facts.
>
> **As such, it is not proper for an arbitrator to substitute his judgment for that of the School Board as to what constitutes declining enrollment. What constitutes a "substantial" decline in enrollment must be decided on a case-by-case basis considering the individual circumstances of each school district and with deference to the decision of the School Board. The District has appropriately exercised its discretion granted by Section 1124(1) to conclude that a "substantial decline" in pupil enrollment has taken place. There is a pattern of declining enrollment in the District over the past ten years, and the District has never before taken action to address this decline with the furlough of teachers. Such decline is evident in any chosen time period within the past ten years. As is noted by the District, the number of teachers it furloughed is appropriate relative to the total percentage decline in student enrollment. The District's suspension of nine teachers (evidently 5% of the professional staff) meets the requirement for permissible suspensions for a "substantial decline" in pupil enrollment as set forth in Section 1124(1).**

Brownsville Area School District, PSA Vol. 29, No. 21 (2002)

In the case of Reynolds Area School District v. Reynolds Education Association, PSA Vol. 31, No. 1 (2004), Arbitrator Edward J. O'Connell upheld the furlough of 13 teachers under PSC 1124.1 because of a substantial decrease in pupil enrollment (12.5%) over a six year period.

In Chester Upland School District v. Schaffer, PSA Vol. 34, No. 25 (2007), Arbitrator Denise M. Keyser upheld the furlough of a professional employee under PSC 1124.1 when student enrollment decreased over a four year period.

In Bedford Area Education Association v. Bedford Area School District, PSA Vol. 37, No. __ (2011), Arbitrator Ronald Talarico denied grievance finding that the District met its burden of proof in demonstrating that there was a substantial decline under PSC 1124.1 for the suspension of a bargaining unit member. Arbitrator found overall decline in student enrollment in the District of 4.56% over a 5 year period was reasonable and not arbitrary or capricious or an unreasonable determination to justify the suspension of a professional employee. Arbitrator held that once a substantial decline in overall enrollment has been shown (PSC 1124.1), school board should have the discretion to decide in what programs would be best to cut teaching positions. The arbitrator further held that although the district eliminated a full time administrative position (Coordinator of Instructional Technology), that individual possessed the necessary certification and seniority to realign/bump into a bargaining unit position held by a less senior teacher. In denying the grievance the Arbitrator declined to accept the Association's argument that the 20% decline in class or course enrollment over a 5 year period under Section 1124.2 pursuant to PDE's Basic Education Circular should have application in a furlough under 1124.1.

B. Legal Standard to Support Furlough under PSC 1124.1

Cases cited previously under I(A) above; **HOWEVER**,

Colonial Edu. Ass'n v. Colonial Sch.Dist., 645 A.2d 336 (1994 Pa.Cmwlth).

Two (2) Issues:

1) Whether the suspension of Employee was based on declining enrollment?

2) Whether the evidence presented showed a substantial decline in pupil enrollment?

In Colonial School District, Commonwealth Court stated:

There are two means by which the Board can prove a substantial decrease in enrollment to justify [the employee's] suspension. **First**, the Board may present evidence of a general, curriculum enrollment decline over a reasonably justifiable period of time. **Second**, the Board may present evidence of a decrease in enrollment from one year to the next that is so prominent as to not require the inclusion of the statistics of additional years. Here, the District failed to establish that the Board properly based [the employee's] suspension on a substantial decrease through either standard.

Because the student population increased in the year prior to [the employee's] suspension, the Board attempted to justify the suspension under the first standard; however, the District failed to provide us with any justification for the Board's use of an eighteen year review period. **Without any justification, use of such an excessively long period of time is unreasonable with regard to the time standards we have previously found accountable. Because the District has failed to provide us with a reasonable basis for considering the eighteen year time span, we cannot accept such an arbitrary period.**

The District failed to offer relevant factors that would render such a time period for reviewing an enrollment decrease reasonable. Additionally, the District failed to suggest any other reasonable time period for reviewing the District's enrollment decrease. Although we have never recommended a reasonable number of years that a board may use to determine such a general progressive decrease in enrollment, we have permitted boards that govern districts comparable in size to the District to review progressive declines, at most, over a seven year period. Platko.

Because the record provides us with comparative enrollment figures from both the Department of Education and the District for a period of five years only, we have analyzed the enrollment figures for that five year period here:

School Year	Dep't of Ed*	District**
1985-86	3727	3682
1986-87	3655	3582
1987-88	3619	3575
1988-89	3522	3438
1989-90	3590	3464
1990-91 (projected)	3544	3497

*The Department of Education's figures include kindergarten and non-graded special education students.

**The District's figures do not include kindergarten students.

The District's figures indicate that student enrollment decreased by 185 students, or by 5% over a five year period; however, the Department's figures show a decrease of only 83 students, or 2% over that same period. We have never held that such a small decline in student enrollment has constituted a substantial decrease. In Phillippi, we held that a decrease of 12% of the student population over a five year period was substantial; in Platko, 13% over seven years; in Andresky, 11% over five years; and in Mongelluzzo, 10T over three years. In Tressler, we held that a 2% decrease of a student population over two years was substantial; however, Tressler is inapplicable here because the District actually had an increase in student enrollment from 1988-89 to 1989-90. See Smith v. Board of School Directors of Harmony Area School Dist, 328 A.2d 883 (1974).

Practice Note: The District has the burden to establish that a suspension is proper under PSC 1124 of the Code and is not being used to circumvent the tenure provisions. Glendale School District v. Feigh, 513 A.2d 1093 (Pa.Cmwlth.Ct. 1996). **Remember**: "Loose Lips Sink Ships." In Glendale, the Association argued the District had a hidden agenda to furlough the employee. **Remember**: You cannot use the same substantial decline over and over again to justify furloughs year after year.

II. Alteration/Curtailment of the Educational Program (PSC 1124.2)

Where a school board proceeds to furlough professional employees due to a curtailment or alteration of programs, it is important to ensure that all of the conditions of section 1124.2 are met. Specifically, the conditions are as follows:

1) There must be a curtailment or alteration of the program;
2) The curtailment or alteration must be recommended to the Board by the Superintendent;
3) The school board must approve the curtailment or alteration; and
4) The curtailment or alteration must be approved by the Secretary of Education.

If any of these conditions have not been fulfilled, the furloughs will not be upheld by the courts or arbitrators.

NOTE: Districts must consult Basic Education Circular 24 PS §11-1124.

Appellate Authority

Sporie v. Eastern Westmoreland Area Vocational Technical School(+), 408 A.2d 888 (1979). "A professional employee may not be suspended upon a mere finding that he is unnecessary, or else the tenure provisions of the Code would be meaningless. See Langan v. School District of Pittston. A school board must establish by substantial evidence that the alteration or curtailment of the educational program which results in the suspension of a professional employee is motivated solely by a desire to provide a more efficient and effective school program. As stated in Ehret, 'a department may not be abolished merely to circumvent the [tenure provisions] and to accomplish the dismissal of a teacher for political or arbitrary reasons by unlawful subterfuge.'"

Practice Note: The school entity must ensure proper approval from PDE has been secured. See Altoona Area Vocational Technical School v. Pollard (-), 520 A.2d 99 (1987). Mere discontinuance of federal or state funding is insufficient alone to support an alteration/curtailment. School entity must affirmatively seek and secure PDE approval.

Arbitrations

Clearfield County Vocational Technical School, PSA Vol. 13, No. 39 (1986). Arbitrator held that vo-tech's elimination of remedial program was in compliance with

PDE standards and that the basis for the change was neither arbitrary or capricious; Section 524 was not applicable to the dispute.

Mifflin County School District, PSA Vol. 21, No. 38 (1994). Arbitrator upheld the furlough of two foreign language teachers for reasons of "standards of organization approved by the Department of Education," pursuant to 24 P.S. §11-1124(2).

DuBois Area School District, PSA Vol. 25, No. 32 (1998). Arbitrator held the grievance arbitrable because the Public School Code was referenced in the Rights and Responsibilities Article of the collective bargaining agreement. Members of the bargaining unit may challenge the district's actions under the code using the grievance procedures, which culminates in arbitration. He further held that the District's furloughing of professional employees was justified by the impact of reorganization within the district, curriculum changes and the elimination of courses with declining enrollment. Every furlough has economic implications but, if the underlying rationale passes muster under the code, the furloughs will be upheld.

Northern Bedford County School District, PSA Vol. 28, No. 49 (2001). The arbitrator held the school district properly furloughed an elementary guidance counselor under the Public School Code. The district complied with Section 1124.2 of the School Code where it changed its prereferral services at the elementary school level and subsequently sought to furlough the affected employee. The elementary counselor did not have the right to bump the middle school guidance counselor where, in the district's judgment, removal of the later counselor would impair the secondary guidance program.

Practice Note: Districts may properly consider the **educational soundness** and **practical implications of its decisions**, as well as **seniority**. Witling v. Keystone School District, 560 A.2d 909 (1989), Gibbons v. New Castle Area School District, 543 A.2d 1087 (Pa.1988).

III. Consolidation of Schools (PSC 1124.3)

Furlough/suspension of professional employees as a result of "closing" or consolidation of schools does **not** require PDE approval. HOWEVER, there is an obligation to get approval of PDE when changing the reconfiguration of schools. PDE will approve between June 15 and August 15. (NOTE: This is **not** referenced anywhere in a Basic Education Circular; however the implementing regulations to the Public School Code do address a PDE notification and approval process. (See 22 Pa.Code 349.28). See also, 22 Pa.Code 4.41(c) regarding PDE approval that provides: "A school district shall obtain approval of the Department prior to establishing a new school or changing school organization."

A. Closing Schools

24 PS 7-780 Public Hearing prior to closing school

In the event of a permanent closing of a public school, a public hearing must be held at least three (3) months before the decision of the board relating to the school closing. Notice of the hearing must be given in a newspaper of general circulation in the school district at least 15 days prior to the hearing date.

24 PS 13-1311 Closing schools

The board of school directors of any school district may, on account of the small number of pupils in attendance, or the condition of the then existing school building, or for the purpose of better graduation and classification, or other reasons, close any one or more of the public schools in its district. Upon such school or schools being closed, the pupils who belong to the same shall be assigned to other schools, or upon cause shown, be permitted to attend schools in other districts.

Whenever the average term attendance of pupils regularly enrolled at any one-room school in any school district of the fourth class or in any district of the third class, which is located wholly within the boundary lines of a township, it ten (10), or less than ten (10), the board of school directors shall close such school. If the board of school directors does not deem it feasible to close such school, it may present its petition to the Department of Public Instruction, showing the reasons why such school should not be closed. Thereupon the department shall consider such petition, and shall make such order as may seem just in the premises. If any school has been closed because the average term attendance of pupils enrolled was ten (10), or less than ten (10), and has been reopened upon order of the department, and the average term attendance is twelve (12), or more, after such reopening, such school shall be considered re-established.

24 PS 5-524 Closing school or department; notice to, and suspending employes; other employment

The board of school directors of any school district, including merged or union districts, and any boards of school directors establishing any joint school or department, shall not close any school or department during the school term, unless such action shall advance the orderly development of attendance areas within an approved administrative unit and has been approved by the Department of Public Instruction. In the event a school board shall determine prior to the beginning of the next school term to close any school or department, sixty (60) days' notice, in writing, prior to the closing of any school or department, shall be given to all temporary professional and professional employes affected thereby, unless such action shall advance the orderly development of attendance area within an approved administrative unit and has been approved by the Department of Public Instruction. Upon failure to give written notice of intention to close any school or department, the school district shall pay such employes their salaries until the end of the school year during which such schools or departments were closed.

Temporary professional or professional employes, whose positions are abolished as a result of the action of the board of school directors in closing a school or department, or reassigning pupils in its effort to consummate partially or wholly the orderly development of approved administrative and attendance areas, may not be suspended until the end of the school year if such action is taken during the school year or later than sixty (60) days prior to the opening of the next school term.

The payment of salary to any temporary professional or professional employe shall be discontinued immediately, if such employe obtains other employment which, in the judgment of the board of school directors, could not have been obtained or held if such school or department had not been closed: Provided, however, That if the salary in the new position is less than the salary the professional employe would have received had he remained in the employment of the school district, the school district shall be liable for the difference.

IV. Realignment/Bumping Under PS 11-1125.1

24 PS 11-1125.1 Persons to be suspended

(a) Professional employes shall be suspended under section 1124 (relating to causes for suspension) in inverse order of seniority within the school entity of current employment. Approved leaves of absence shall not constitute a break in service for purposes of computing seniority for suspension purposes. Seniority shall continue to accrue during suspension and all approved leaves of absence.

(b) Where there has is or has been a consolidation of schools, departments or programs, all professional employes shall retain the seniority rights they had prior to the reorganization or consolidation.

(c) A school entity shall realign its professional staff so as to insure that more senior employes are provided with the opportunity to fill positions for which they are certificated and which are being filled by less senior employes.

(d) (1) No suspended employe shall be prevented from engaging in another occupation during the period of suspension.
(2) Suspended professional employes or professional employes demoted for the reasons set forth in section 1124 shall be reinstated on the basis of their seniority within the school entity. No new appointment shall be made while there is such a suspended or demoted professional employe available who is properly certificated to fill such vacancy. For the purpose of this subsection, positions from which professional employes are on approved leaves of absence shall also be considered temporary vacancies.
(3) To be considered available a suspended professional employe must annually report to the governing board in writing his current address and his intent to accept the same or similar position when offered.
(4) A suspended employe enrolled in a college program during a period of suspension and who is recalled shall be given the option of delaying his return to service until the end of the current semester.

(e) Nothing contained in section 1125.1(a) through (d) shall be construed to supercede or preempt any provisions of a collective bargaining agreement negotiated by a school entity and an exclusive representative of the employes in accordance with the act of July 23, 1970 (P.L. 563, No. 195), known as the "Public Employe Relations Act"; however, no agreement shall prohibit the right of a professional employe who is not a member of a bargaining unit from retaining seniority rights under the provision of this act.

(f) A decision to suspend in accordance with this section shall be considered an adjudication within the meaning of the "Local Agency Law".

A. Selecting the proper person for furlough – Seniority and Certification

Seniority

- Seniority is to be calculated only with respect to the school entity of current employment. 24 PS §11-1125-1(a).

- Seniority rights do not commence until the employee has acquired temporary professional employee status and proper certification. Marnell v. Mount Carmel Jt. School System, 110 A.2d 357 (1955).

- Substitutes do not accrue seniority. Waslo v. North Allegheny School District, 549 A.2d 1359 (Pa.Cmwlth 1955).

- Part-time employees are to be given pro rata credit for purposes of calculating seniority, except where the employee was a full-time employee who was reduced to part time service temporarily due to funding and the employee never consented to a reduction in seniority. School District of City of Duquesne v. Sturm, 547 A.2d 891 (Pa.Cmwlth 1988).

- School districts can select reasonable methods of determining the relative seniority of those employees who were hired at the same time. Platko v. Laurel Highlands School District, 410 A.2d 969 (Pa.Cmwlth 1980).

- Years spent in the military during time of war must be added to years served as a teacher for purpose of calculating seniority pursuant to Section 7107 of the Veterans Preference Act.

- Seniority is to be determined as of the effective date of the suspension and not the date on which the school board determines to furlough employees or the date on which the employee is notified of the intent to furlough. Jarrett v. Wattsburg Area School District, 533 A.2d 1008 (1987).

Practice Note: Although TPEs technically do **not** accrue seniority until tenured, by CBA/contract, seniority rights can be given. Upper Merion Area School District v. Upper Merion Area Education Association, 555 A.2d 292 (1989) wherein Commonwealth Court upheld arbitrator's conclusion that non-tenured teacher could be granted continuing seniority.

Remember: Procedures in CBAs may validly establish other criteria for selecting employees to be suspended.

Certification - Certification at time of furlough is controlling.

General Rule: Employees may bump/realign into a position where they have certification and their seniority will allow them to go.

See also: Bedford Area Education Association v. Bedford Area School District, PSA Vol. 37, No. __ (2011).

Practice Note: Districts must be mindful when dealing with bumping/realignment issues to watch positions that do not require specific certifications, e.g., Gifted, PSSA and Technology Coaches, Classroom of the Future positions, etc.

Exceptions: Educational Practicality/Qualification.

Greater Johnstown Career and Technology Center v. Greater Johnstown Area Vocational-Technical Education Association, PSA Vol. 32, No. 23, 2005. Grievant, a business data processing teacher, was suspended/furloughed due to an alteration/curtailment of educational programs. Grievant asserted that she was entitled to bumping rights because she was the most senior teacher with certification for a vocational education facilitator position occupied by a teacher with less seniority. The arbitrator denied the grievance after concluding the position required special qualifications that Grievant did not possess. The position required hands-on shop instruction that included the operation of machinery. Therefore, the district was not required to place Grievant into the position because of the special qualifications and the health and safety risks associated with putting an individual without hands-on experience into the position.

B. Realignment Issues

1. Straight Line Realignment

Straight line realignment means that the District lines up the employees by way of area of certification and department that is to be furloughed. The employee(s) who is least senior in that line up is to be furloughed, unless the individual has more seniority than another individual in an area for which the least senior employee is properly certified.

2. Checkerboard Realignment

In "checkerboarding," the entire professional staff is organized in order of seniority and spots in the district that need to be filled are filled with the most senior employees.

Practice Note: Courts have generally held there is no requirement for "checkerboard" realignment. Godfrey v. Penns Valley Area School District, 449 A.2d 765 (1982). Arbitrators have likewise agreed. See Harmony Area School District and Harmony Area Education Assoc., PSA, Vol. 26, No. 21, 1998. Arbitrator held that a grievance concerning furloughing of a professional employee arbitrable as timely filed. However, he found that the district was not obligated, under the collective bargaining agreement, to realign across areas of certification based on seniority so as to maintain full-time employment of a teacher. District only was obligated to provide an opportunity for the teacher to avoid suspension by realigning to a position of a less senior employee.

C. Bumping Rights of Principals

As evidenced by the recent Bedford Area School District case, furloughed Principals can bump into a teacher position for which he or she is certified. Even if the Principal's teacher experience is from a different school, the Principal can bump into his/her school to a teacher position.

D. **Employment Discrimination Implications**

Furloughs of Principals must also take into account employment discrimination issues for protected classes of sex, age, disability, race, national origin, and religion.

V. Recall Rights

Return to long term or short term vacancies.

Pickup v. Sharon City School District, 486 A.2d 543 (1985). Court held suspended professional employee has the right to return to long term vacancy and get per diem pay.

Nelson v. Western Beaver County Schools, 23 SLIE 97 (1986). Court said per diem vacancies due to sickness or discipline don't require recall.

VI. Demotions (PSC 1151)

24 PS 11-1151 Salary increases; demotions

The salary of any district superintendent, assistant district superintendent or other professional employe in any school district may be increased at any time during the term for which such person is employed, whenever the board of school directors of the district deems it necessary or advisable to do so, but there shall be no demotion of any professional employe either in salary or in type of position, except as otherwise provided in this act, without the consent of the employe, or, if such consent is not received, then such demotion shall be subject to the right to a hearing before the board of school directors and an appeal in the same manner as hereinbefore provided in the case of the dismissal of a professional employe.

Outlined below are some reasons to support a demotion of professional staff

- Maintenance of an efficient and competent school system
- School district reorganization
- Enrollment decline
- School closings
- Budget reductions or cost savings
- Consolidation of administrative positions for budgetary reasons
- Curtailment of programs or classes

NOTE: Do not need PDE approval for same. Be aware substantive and procedural requirements differ from furloughs, e.g. notification of action.

Distinguish between "pure demotion" and "realignment" demotions. PSEA will argue if more than one (1) action of demotion and/or furlough that it is a realignment demotion. Citing Boris v. Saint Clair School District, 668 A.2d 264 (1995).

Postulates

- Demotions are presumptively valid
- Decision will not be overturned unless arbitrary, capricious or discriminatory

VII. Act 93 Agreement Issues

1. Act 93 agreements should address issues other than the typical salary and health insurance issues. All benefit issues, including issues such as early retirement incentives, should be addressed in Act 93 agreements. Issues such as payout of unused sick leave at retirement or termination of employment, as well as issues such as mandatory arbitration of employment disputes, should be issues on the table for Act 93 discussions.

2. The obligation under law for Act 93 is for the District to have a Meet and Discuss on salary and benefits issues. The Meet and Discuss can be performed for the District either by the full Board, a designated committee of the Board, or the Superintendent if so designated by the Board of School Directors. In the event a District refuses to meet under Act 93, a formal request for such a meeting should be made in writing on at least two occasions. If the District would still refuse to meet, a petition in Court for Mandamus could be filed to force such a meeting. Principals could force the giving of an Act 93 agreement through Court proceedings. However, obviously, Principals want to proceed as much as possible on an amicable basis.

3. Once an Act 93 agreement is passed, the District is not able to change any provisions of that agreement. Even though there is no obligation to "bargain" such an agreement, since the School Code provides for the adopting of an Act 93 agreement concerning salaries and benefits, those matters adopted by the School Board cannot be changed until the expiration of that Act 93 agreement.

4. The question also arises as to what happens when an Act 93 agreement expires, and the District does not act to replace with a new agreement. Once again, formal notification should be given to the District to press the Board of School Directors to fulfill its obligation to pass an Act 93 agreement. The question also arises in such circumstances as to whether benefits provided in the prior Act 93 agreement continue. For example, would graduate credit reimbursements continue that were provided in the prior Act 93 agreement after it has expired? Although there is no case law on point on this issue, I would argue that since it is the affirmative duty of the District to adopt an Act 93 agreement by law, the benefits provided in the prior Act 93 agreement would continue until the adoption of a new Act 93 plan.