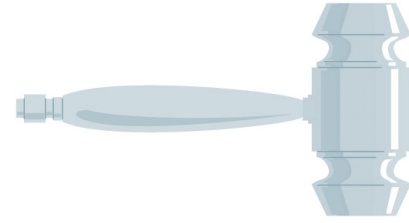


Legal Corner



By Michael I. Levin, Esq., PAESSP General Counsel

Suspensions and Seniority Implications for Suspended Employees



The General Assembly uses the word “suspension” in the School Code to describe what is usually referred to as a furlough. This article seeks to address permissible reasons under the School Code for the suspension or furlough of professional employees. It will then briefly address the tenure rights of a professional employee following a suspension.

Since the early to mid-1970s, virtually all school districts statewide have suspended professional employees at one time or another. To effectuate the suspensions, school districts have frequently reached tacit if not express agreements with the union representing the employees as to how the various questions concerning seniority calculations and realignment should be resolved. It is advised that before any suspension is attempted, past practice and the applicable collective bargaining agreements be reviewed and that the effects of those past practices and collective bargaining agreements be considered. Such review and consideration may lead to a conclusion that the legal standards set forth in the School Code may be impacted in one way or another by the past practices or provisions contained in a collective bargaining agreement.

This article discusses suspension implications of the School Code without the practical, district-specific considerations of past practices or collective bargaining agreements.

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Suspension Under the School Code

The suspension contemplated in Section 1124 of the School Code¹ is in the nature of a temporary discontinuance until conditions readjust.² Therefore a suspension anticipates a rehiring. Demotions and reassignments do not constitute a suspension and are dealt with separately in the School Code.³ The Pennsylvania Supreme Court has stated when interpreting section 1124 of the School Code that the suspended employee⁴ is released with no stigma, dishonor or discredit. All suspension situations involve two fundamental questions: (1) whether grounds for suspension exist, and (2) whether the proper employee has been suspended.

Section 1124 of the School Code provides the following grounds for suspension of professional employees⁵:

- Substantial decrease in pupil enrollment in the school district.
- Curtailment or alteration of the education program on recommendation of the superintendent, concurred 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.
- 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 employees.
- When new school districts are established as a result of reorganization of school districts pursuant to Article II, subdivision (i) of the act, and when such reorganization makes it unnecessary to retain the full staff of professional employees.

In general, these four grounds are an exclusive list of potential reasons for suspension of a professional employee.⁶ However, because of the pressure on school districts to restrict expenditures and to keep taxes to a minimum, school districts have occasionally attempted to sus-

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pend professional employees where the facts did not fit neatly into the statutory framework. With some exceptions, the efforts of school districts have

failed in that regard. But the courts have difficulty in adhering blindly to the statutory language in the face of the realities involved.

Usually budgetary concerns are involved, if not directly cited, in the decision to suspend a professional employee. Simply stated, financial savings can be the motive to suspend a professional employee, but a section 1124 cause is needed for adherence to the School Code. Where section 1124 grounds exist, motive, financial or otherwise, for the suspension is irrelevant.

The courts will not adopt an interpretation that results in a school district having to employ unnecessary employees.⁷ Although some room possibly remains to argue that suspensions required to meet financial or other exigencies may be permitted in the absence of section 1124 grounds, school districts would be taking a significant chance by suspending any professional employee in the absence of such a cause. We will now briefly examine each section 1124 cause.

Substantial Decrease in Student Enrollment

By far, most suspensions of school district employees are based on a substantial decrease in pupil enrollment.⁸ Without exception, the courts have allowed school districts to determine what constitutes a "substantial decrease" in pupil enrollment. Courts defer to the discretion of the school board to determine what a substantial decrease is, and will not disturb the board's decision absent a showing that the discretion was abused, or arbitrary based on a misconception of the law or ignorance of the facts.⁹

There are two methods by which the board can prove a substantial decrease in enrollment to justify a suspension. First, the board may present evidence of a general, cumulative 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.¹⁰

Where a school district attempts to establish a substantial decline of enrollment over a lengthy period of time, the school board must provide reasonable justification for the board's use of the particular period of time chosen. There will be heightened scrutiny by the court where the period chosen does not encompass the two-year period

immediately prior to the dates of suspension.¹¹ But a court can find substantial decline over a reasonably justified period of time even if enrollment increased during the two-year period prior to the suspension.¹²

Although most cases are based on actual decreases in enrollment occurring during the year(s) preceding the suspension, school districts also may be able to consider projections of future pupil enrollment.¹³ The use of projections is a necessary planning tool of school districts, the use of which courts do not want to discourage.

Curtailment or Alteration of the Education Program

School districts commonly suspend professional employees due to the curtailment or alteration of an educational program. Section 1124(2) requires the satisfactions of the following conditions:

- Recommendation of curtailment or alteration by district superintendent;
- Concurrence in curtailment or alteration by school board;
- Approval of curtailment or alteration by Secretary of Education; and
- Curtailment or alteration of educational program as a result of substantial decline in class or course enrollment or to conform with standards of organization or educational activities required by law or recommended by the Department of Education.

If even one of the four conditions is not satisfied, a suspension will not be permitted under section 1124(2).

The courts have held that only loose adherence to the School Code is required where the school board acts in good faith and in the best interests of the students.¹⁴ This gives school boards significant discretion over their curricula and staffing, but such discretion is not without limits. "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."¹⁵ For example, whereas the approval of program changes which necessarily implicate the discontinuation of a program will be deemed satisfactory approval by the Department for purposes of section 1124(2), mere discontinuance of federal funding by the Department will not be deemed so.

No statutory or regulatory provisions govern either the substance or the procedure of the approval process of the Secretary of Education under section 1124(2). However, the Secretary has issued a Basic Education Circular¹⁶ addressing the issue. It applies the following criteria:

- (1) must include a copy of the board action;
- (2) if curtailment or alteration is the result of a substantial decline in class or course enrollments;
- (3) if curtailment or alteration is necessary to conform with standards of organization;
- (4) if curtailment or alteration is necessary to conform with educational activities recommend by the Department; and
- (5) if curtailment or alteration is necessary to conform with educational activities required by law.

For the purposes of this section, certification that the district will remain in compliance with minimum curriculum requirement is not adequate proof that the curtailment or alteration is necessary to conform to educational activities required by law. Still, no formal procedures exist by which such Secretary approval will be granted or denied. In other words, the process for approval appears deficient; attainment of the proper approval is sometimes a hit-or-miss proposition.

If suspensions are going to be predicated on section 1124(2), the case law illustrates that absent a substantial decline in enrollment a school district must take care to insure that the Secretary's approval is in the proper form that specifically approves the curtailment.

Where the Department of Education disapproves a curtailment or alteration request, or rescinds an approval previously granted, the school district has 10 days to file an appeal to the Secretary pursuant to the General Rules of Administrative Practice and Procedure.¹⁷ The teachers' union has no right to participate in proceedings before the Secretary to approve or disapprove a school district request; nor does the union have standing to challenge the Secretary's decision.¹⁸

Consolidation of Schools

Section 1124(3) explicitly allows a school district to suspend professional employees when a consolidation of schools makes it unnecessary to retain all employees. Where two or more schools are consolidated and the nature of the staffs is such that suspensions are needed in certain subject areas and new hires are needed in others, section 1124(3) should be read to allow such suspensions even though the consolidated staff is equal to or larger than individual staffs prior to consolidation. The consolidation of schools suggests the situation where one or more schools or departments are closed.

When New School Districts are Established as a Result of Reorganization

Suspensions of professional employees are permissible when school districts reorganize into one or more new school districts.¹⁹ This provision is rarely, if ever, used.

Bumping and Realignment Issues Resulting from Suspensions

The major principles contained in section 1125.1 of the School Code are as follows: (1) the suspensions are to occur on the basis of seniority; (2) school district must realign staff; and (3) procedures contained in collective bargaining agreements may validly establish other criteria for selecting employees to be suspended. "Seniority shall continue to accrue during suspension and all approved leaves of absence."²⁰

From time to time, disputes arise between school districts and their employees as to the proper calculation of seniority. Where those disputes are litigated, they are binding only as to the participants in the litigation, and any decision affecting the seniority calculation of a nonparty will

not be binding on that nonparty.²¹ As mentioned earlier, but worth noting again, the past practice in a district and the collective bargaining agreement in place for each district must be examined in calculating seniority.

The duty to realign staff to protect more senior employees was first announced, not by the General Assembly in the School Code, but by the Pennsylvania Supreme Court²² and subsequently codified in 1979 by the enactment of section 1125.1.

The disagreement between school districts and representatives of professional employees generally centers on the question whether section 1125.1 requires a "straight-line" realignment or instead requires "checkerboard" realignment.²³ Checkerboard realignment is permissible, but not mandatory, under the School Code.²⁴ An employee has no right to use the tenure provisions of the School Code to gain a promotion.²⁵

Conclusion

The School Code requires one of the four following criteria for the suspension of a professional employee: (1) Substantial decrease in pupil enrollment in the school district; (2) Curtailment or alteration of the educational program; (3) Consolidation of schools; or (4) When new school districts are established.

If a suspension occurs:

- The suspensions are to occur on the basis of seniority
- School district must realign staff
- Procedures contained in collective bargaining agreements may validly establish other criteria for selecting employees to be suspended.

"Seniority shall continue to accrue during suspension and all approved leaves of absence."²⁶

As mentioned at the beginning, the basic principle of a suspension of a professional employee is that it anticipates a rehiring. Therefore, the suspended employee continues to accrue seniority while awaiting such a rehire and has a right to recall, provided the employee meets the statutory requirements.



Endnotes continued on next page

Endnotes

¹24 P.S. § 11-1124.

²*Kaplan v. School District of Philadelphia*, 130 A.2d 672 (Pa. 1957). In this case the court made clear the distinction between a suspended employee through no fault of the employee, and an employee who is removed for cause.

³*Kemp v. City of Pittsburgh Public School Dist.*, 933 A.2d 130 (Pa. Cmwlth. 2007).

⁴Suspensions do not apply to employees who are not professional employees. *Collins v. Lebanon County Vocational Technical School*, 660 A.2d 231 (Pa. Cmwlth. 1995).

⁵24 P.S. § 11-1124 (1)-(4).

⁶*Houtz v. School Dist. of Borough of Coraopolis, Allegheny County*, 55 A.2d 375 (Pa. 1947).

⁷*Bricillo v. Duquesne City School Dist.*, 668 A.2d 629 (Pa. Cmwlth. 1995).

⁸*Proch v. New Castle Area School Dist.*, 430 A.2d 1034 (Pa. Cmwlth. 1981).

⁹*Phillippi v. School Dist. of Springfield Tp.*, 367 A.2d 1133 (Pa. Cmwlth. 1977). Using the *Phillippi* standard, the following pupil decreases have been held to be substantial: (1) 114 students over a 10-year period. *Smith v. Board of School Directors of Harmony Area School Dist.*, 328 A.2d 883 (Pa. Cmwlth. 1974); (2) 486 over a five-year period. *Phillipi*; (3) 250 students over three years. *Tressler v. Upper Dublin School Dist.*, 373 A.2d 755 (Pa. Cmwlth. 1977); (4) 787 over seven years. *Platko v. Laurel Highlands School Dist.*, 410 A.2d 960 (Pa. Cmwlth. 1980); (5) 30 students in one department over six years. *Pennzenstadler v. Avonworth School Dist.*, 403 A.2d 621 (Pa. Cmwlth. 1979); (6) 379 students 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. Cmwlth. 1985); (8) 508 students (36.6%) over a 10-year period. *Newell v. Wilkes-Barre Area Vocational Technical School*, 670 A.2d 1190 (Pa. Cmwlth. 1996); and (9) 396 students of 2,002 (20%) over a 10-year period. *Battaglia v. Lakeland School Dist.*, 677 A.2d 1294 (Pa. Cmwlth. 1996).

¹⁰*Colonial Educ. Ass'n v. Colonial School Dist.*, 645 A.2d 336 (Pa. Cmwlth. 1994).

¹¹*Bachak v. Lakeland School Dist.*, 665 A.2d 12 (Pa. Cmwlth. 1995).

¹²*Newell v. Wilkes-Barre Area Vocational Technical School*, 670 A.2d 1190 (Pa. Cmwlth. 1996).

¹³*Tressler v. Upper Dublin School Dist.*, 373 A.2d 755 (Pa. Cmwlth. 1977). The court did not specifically hold that the use of future projections was permissible as the facts of the case did not require it to do so. But it did discuss their usefulness and the court recognized the necessity of future projections for school district planning.

¹⁴*Sporie v. Eastern Westmoreland Area Vocational-Technical School*, 408 A.2d 888 (Pa. Cmwlth. 1979).

¹⁵*Ehret v. School Dist. of Borough of Kulpmont*, 5 A.2d 188 (Pa. 1939).

¹⁶(BEC §1124) (issued 09-01-1997).

¹⁷1 Pa. Code § 31.1 - 1 Pa. Code § 35.251.

¹⁸*Wilkinsburg Education Association v. Wilkinsburg School District*, 33 SLIE 46 (Pa. Cmwlth. 1996) (unreported).

¹⁹*Appeal of Walker*, 2 A.2d 770 (Pa. 1938).

²⁰24 P.S. § 11-1125.1.

²¹*Arcurio v. Greater Johnstown School Dist.*, 630 A.2d 529 (Pa. Cmwlth. 1993).

²²*Welsko v. School Bd. of School Dist. of Foster Tp., Luzerne County*, 119 A.2d 43 (Pa. 1956).

²³*Greater Johnstown Area Vocational-Technical School v. Greater Johnstown Area Vocational-Technical Educ. Ass'n*, 521 A.2d 965 (Pa. Cmwlth. 1987). This article does not provide the space to provide an in-depth comparison between "straight line" and "checkerboard" realignment. Succinctly, straight line realignment applies seniority to a particular department(s), while checkerboard realignment enumerates the seniority of the entire professional staff within certification areas.

²⁴*Duncan v. Rochester Area School Bd.*, 571 A.2d 365 (Pa. 1990); *McKeesport Area School Dist. v. Cicogna*, 558 A.2d 116 (Pa. Cmwlth. 1989).

²⁵*Derry Tp. School Dist. v. Finnegan*, 498 A.3d 474 (Pa. Cmwlth. 1985); *Ginocchi v. Burrel School Dist.*, 522 A.2d 707 (Pa. Cmwlth. 1987); *Gibbons v. New Castle Area School Dist.*, 543 A.2d 1087 (Pa. 1988); *Hritz v. Laurel Highlands School Dist.*, 648 A.2d 108 (Pa. Cmwlth. 1994).

²⁶24 P.S. § 1125.1.

Principals' Voices Heard!

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The Pennsylvania principals' delegation also met with Kenneth Altman (center), an aide for Sen. Arlen Specter (D-PA).



Pictured above with U.S. Representative Jim Gerlach (R-PA), 6th Congressional District (second from right), from left to right are: Mr. Sigafos, Dr. Patschke and Dr. Hartman.