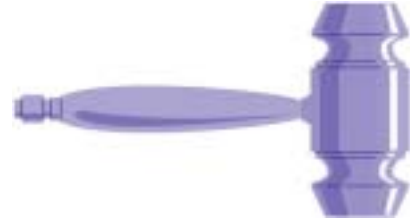


# Legal Corner



By Michael Levin, Esq., PAESSP Chief Legal Counsel

## ***Furloughing Professional Employees***



With school districts' budgets ever tighter and state and federal funding of public education not keeping pace with increased costs, many school boards are taking action to furlough professional employees. Principals are affected in two ways. First, teachers that principals supervise may be furloughed, resulting in increased class sizes, the elimination

of class offerings and/or juggling of staff. Second, some principals and assistant principals may also be identified for furlough. Therefore, it is important for principals to know the rules pertaining to the furlough of professional employees.

### **What is the difference between suspensions and furloughs?**

The job security provisions of the School Code are not limited to dismissal of professional employees, but also extend to furloughs or reductions in force. Peculiarly, the General Assembly uses the word "suspension" in Section 1124 of the School Code to describe what is usually referred to as a furlough. For ease of reference, a Section 1124 "suspension" will be referred to as a furlough throughout this article. A furlough is not to be confused with a disciplinary suspension that may be imposed on an employee as punishment for engaging in improper conduct. A furlough is in the nature of an impermanent separation from employment, similar to being laid off. The furlough provisions of the School Code apply to all professional employees, including administrative employees who are professional employees as defined in the School Code. Conversely, the furlough provisions of the School Code do not apply to employees who are not professional employees.

### **In what situations can professional employees be furloughed?**

Professional employees may be furloughed only for the limited reasons set forth in Section 1124 of the School Code<sup>1</sup>. The only permissible reasons for the suspension of professional employees are:

1. Substantial decrease in pupil enrollment in the school district;
2. Curtailment or alteration of the educational program in the school entity;
3. Consolidation of schools; or
4. The establishment of a new school district.

By far, most furloughs of school district employees are based on Section 1124(1) of the School Code, due to a substantial decrease in enrollment. School districts essentially have significant discretion in determining what constitutes a "substantial decrease" in pupil enrollment. Essentially, the school board must be able to present evidence that there has been a general, cumulative decline in enrollment over a reasonably justifiable period of time, or, alternatively, show that there was a decrease in enrollment from one year to the next that was so prominent that it did not require inclusion of statistics from additional years. Absent an inability to show such a decrease, the judgment of the school board will not be disturbed by the courts. The following enrollment decreases have been upheld as "substantial" by the courts:

1. 114 students over 10 years, *Smith v. Board of School Directors of Harmony Area School District*, 328 A.2d 883 (Pa.Cmwlth. 1974);
2. 486 students over five years or 661 students over six years, *Phillippi v. School District of Springfield Twp.*, 367 A.2d 1133 (Pa.Cmwlth. 1977);

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3. 250 students over three years, *Tressler v. Upper Dublin School District*, 373 A.2d 755 (Pa.Cmwlt. 1977);
4. 787 students over seven years, *Platko v. Laurel Highlands School District*, 410 A.2d 960 (Pa.Cmwlt. 1980);
5. 30 students in one department over six years, *Penzenstadler v. Avonworth School District*, 403 A.2d 621 (Pa.Cmwlt. 1979);
6. 379 students over five years, *Andresky v. West Allegheny School District*, 437 A.2d 10975 (Pa.Cmwlt. 1981);
7. 643 students over three years, *Mongelluzzo v. School District of Bethel Park*, 503 A.2d 63 (Pa.Cmwlt. 1985);
8. 508 students (or 36.6 percent) over 10 years, *Newell v. Wilkes-Barre Area Vocational Technical School*, 670 A.2d 1190 (Pa.Cmwlt. 1996);
9. 396 students (or 20 percent) over 10 years, *Battaglia v. Lakeland School District*, 677 A.2d 1294 (Pa.Cmwlt. 1996)2.

School districts have also furloughed professional employees under Section 1124(2), due to the curtailment or alteration of an educational program. Four criteria must be met for a school district to proceed under Section 1124(2):

1. There must be a recommendation for curtailment or alteration by the superintendent;
2. The school board must concur in the recommendation;
3. The Secretary of Education must approve the curtailment or alteration; and
4. The curtailment or alteration must be as a result of the substantial decline in class or course enrollment or to conform with standards of reorganization or educational activities required by law or recommended by the Department of Education. If even one of the four conditions is not satisfied, the school district may not furlough any employees under the section.

Although school districts generally may not furlough professional employees for reasons not enumerated in Section 1124, where reasons permissible under Section 1124 do exist, furloughs are proper even if motivated, for example, by financial considerations, lack of funds or the desire to reorganize the staff. If no permissible reason under Section 1124 exists (e.g. where a school board eliminated a program solely

because the program lost its federal funding), the furlough will be invalidated. However, where a dispute arises as to the meaning of Section 1124, the courts will **not** adopt an interpretation that results in a school district having to employ unnecessary professional staff.

### **Where there are proper grounds to furlough professional employees, which employees will be furloughed?**

If there is a valid basis for furloughing professional employees under Section 1124, the next questions that a school board must answer are:

- How many employees must be furloughed?;
- In what areas must staff be furloughed?; and
- Which employees must be furloughed?

School boards have virtually unlimited discretion to determine the number of employees to furlough and the areas of the school district from which to furlough employees. The number of employees to furlough is not required to be proportionate to the decrease in student enrollment, for example. Even if all of the decrease in students has occurred in the elementary grades, it is perfectly permissible for a school board to furlough secondary school employees.

Once the number of employees to furlough and the areas where staff will be reduced are determined, the school entity will have to decide which employees to furlough. Section 1125.1 of the School Code sets forth the rules pertaining to the selection of employees for furloughing. The law is clear that the least senior employees are to be furloughed. Seniority is to be calculated according to several well-established rules. They are as follows:

1. Seniority is to be calculated only with respect to the school entity of current employment. 24 P.S. §11-1125.1(a).
2. Seniority rights do not commence until the employee has acquired temporary professional status and proper certification. Substitutes do not accrue seniority.
3. Part-time employees are to be given pro-rata credit, 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.
4. Time spent on approved leaves after November 20, 1979 must be counted for seniority purposes and time spent on approved leaves prior to November 20, 1979 may be counted.

5. Time worked before a break in service with the school entity may or may not be counted depending upon a variety of factors too numerous to mention here.
6. School entities can select a reasonable method of determining the relative seniority of those employees who were hired at the same time.
7. Years spent in the military must be added to years served.
8. School entities may use the date of hire rather than the first day of work for purposes of calculating seniority.
9. Seniority is to be determined as of the effective date of the furlough, 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.

In order to ensure that the least senior employees are furloughed, employees slated for furlough are entitled to “bump” less senior employees. For example, if the school entity decides to eliminate one of two assistant principal positions in the high school, the least senior assistant principal in the school district would be identified for furlough and the other assistant principals would be assigned to the available assistant principal slots. The least senior assistant principal would then have the ability to bump less senior employees in positions for which he or she is certified, as long as the position is equal to or below the position of the assistant principal.

The simple concept of “bumping” implicates numerous questions. How is seniority to be calculated? Is seniority based on administrative service or all service with the school entity? Is bumping going to be accomplished in a “straight line” format or a “checkerboard” format? Can an administrator bump into a promotion? Is it a promotion if an elementary school principal would bump a high school principal? These are just some of the questions that are asked when it comes to downsizing of public school entities.

**No Promotions.** In various contexts, professional employees have attempted to use the furlough provisions to gain a promotion. The courts are clear that Sections 1124 and 1125.1(a) cannot be used to assist professional employees to bump into a promotion. This situation often arises when administrative professional staff are to be furloughed. It is generally considered that a high school principal has greater status than a junior high school or elementary principal. To the extent that may be true, in *Gibbons vs. New Castle Area School District*, 518 Pa. 443, 543

A.2d 1087 (1988), the court held that a junior high school principal could not bump a senior high school principal.

**Certification areas.** Because professional employees may add and delete areas of certification, realignment issues can be determined differently depending on the date that the credentials of the members of the professional staff are reviewed. The courts have ruled that an employee’s certification on the effective date of the furlough is to be used by the school district, and the school district is not required to consider a professional employee’s anticipated additional certification when it makes a furlough decision.

**Types of bumping.** There are two methods of permissible staff realignment in furlough situations: “straight line” bumping and “checkerboard” bumping. Both are permitted under the School Code, and the school district may use its discretion to pick which method it will utilize, unless school board policy, an applicable collective bargaining agreement or past practice requires a particular method to be used. “Straight line” bumping refers to the process of identifying the particular area or department in which furloughs are to be made; listing in order of seniority the employees in that area or department; identifying for furlough the least senior employees in that area or department; and realigning those least senior employees to other areas or departments in the school district only if they possess proper certification and less senior employees occupy positions in the other departments whom the affected employees can bump. If the least senior employees in the areas or department from which the furloughs are to be made do not have dual certification, the process of realignment ends and the least senior employees are furloughed. This method of realignment is thought to minimize the adverse impact of furloughing on the educational program and morale of the professional staff.

With “checkerboard” bumping, the entire professional staff is enumerated in order of seniority within certification areas, and the school district furloughs the least senior employees while filling its teacher complement. This method of realignment is more disruptive of both the educational program and the morale of the staff because it ignores practicalities and causes more senior employees to be transferred into other positions so less senior employees can escape furlough or transfer.

**Effect of collective bargaining.** A question that is frequently raised is how and whether collective bargaining agreements affect the furloughs of administrative staff. Such agreements do not and cannot

affect the seniority rights of tenured administrators. However, if an administrator is to bump into the bargaining unit, the collective bargaining agreement will govern the wages, benefits and other terms and conditions of employment, unless past practice or agreement with the union is otherwise.

*By way of example, the following are likely outcomes of several common furloughing scenarios that may confront principals.*

**Scenario 1:** The district is going to reduce administrative staff. Principal A and principal B both have five years of administrative time in the district. Principal A has no teaching time in the district. Principal B has 20 years teaching time in the district. Which principal will be furloughed? Does the furloughed principal have bumping rights to move into the classroom?

**Answer:** Principal A will be furloughed, subject to the right to bump less senior professional or temporary professional employees in positions for which he or she is certified, including teaching positions and administrative positions which would not be a promotion. The reason that A will be the administrator subject to furlough, unless he or she can bump, is that B has 25 years of seniority and principal A has only five.

**Scenario 2:** The district is going to reduce administrative staff. Principal A and principal B both have five years of administrative time in the district. Both principals also have 20 years of teaching time in the district. Which principal will be furloughed? Does the furloughed principal have bumping rights to move into the classroom?

**Answer:** In this scenario, we do not have sufficient information to make a determination. On the face of the scenario, both principals have the same seniority. However, is one of the principals the high school principal and the other an elementary principal? If so, and if the high school position is considered to be a higher ranking position, then the elementary principal may not be able to survive over the high school principal because the bumping rules cannot be used to effectuate a promotion. However, assuming that all factors are entirely equal, in this scenario, there is a tie when it comes to seniority. When that happens, the school entity must break the tie. School districts can use any reasonable method for that purpose.

**Examples:** drawing lots, determining who was listed first in the minute books or determining who appeared at work first. However, the courts have shown in some circumstances a willingness to give school



entities greater flexibility with respect to determining the management team. Therefore, the usual rules of seniority may be trumped by management considerations.

**Scenario 3:** The district is going to reduce administrative staff by eliminating an assistant principal position. Principal A has five years of administrative time in the district. Assistant Principal B has 10 years of administrative time in the district. Principal A has no teaching time in the district while Assistant Principal B has 10 years of teaching time in the district. Which principal will be furloughed?

**Answer:** The assistant principal will be furloughed. Professional employees cannot bump into a promotion.

**Scenario 4:** The school district is going to close one of the elementary schools and furlough one principal because of the closing of the elementary school. High School Principal A has five years of administrative time in the district. Elementary Principal B has 10 years of administrative time in the district. Both are certified as an elementary and secondary principal. Neither principal has teaching time in the district. Which principal will be furloughed? Would the issue of promotion come into play?

**Answer:** As stated previously, the right to bump does not include the right to bump into a promotion. Principal B will be furloughed, assuming the high school principalship would be a promotion for Principal B.

## What procedural protections do furloughed employees have?

Section 1125.1(f) of the School Code expressly states that a decision to furlough shall be considered an adjudication within the meaning of the Local Agency Law. Pursuant to the Local Agency Law, a furloughed professional employee must be provided with reasonable notice of the furlough and the right to request a hearing to protest either the grounds for the furlough or the employee's selection as the least senior employee before the school board. Furloughed professional employees may appeal the school board's hearing decision to the court of common pleas of the county in which the school district is located and then to the Commonwealth Court.

## What right does a furloughed employee have to be recalled?

All furloughed professional employees have a right of recall, subject to certain limitations and conditions set forth in Section 1125.1 of the School Code. Furloughed employees shall be reinstated on the basis of their seniority. The school district may not hire a new employee while a furloughed employee is available who is properly certified to fill the vacancy. However, a school district may hire new teachers immediately after the furloughs if the new teachers are not certified in the teaching areas of the furloughed teachers and are assigned to teach in areas different from where the furloughed teachers had taught.

The right to recall extends to vacant permanent and long-term temporary positions. If the recall is to a long-term temporary position, the recalled employee

will be considered a professional employee during the term of reinstatement.

To be eligible for recall, a furloughed professional employee must annually report to the school district in writing his or her current address and his or her intent to accept "the same or similar position" when offered. It is somewhat unclear what "the same or similar position" means – is it any other teaching position for which the teacher is certified even if the position is in a different building, subject or grade level or is it a position in the same subject area or certification area as the teacher occupied prior to the furlough? The courts have not yet clarified this issue.

*Author's Note: Allison S. Petersen, Esq., of the Levin Legal Group, P.C., contributed to this article.*

### Footnotes

<sup>1</sup> The existing case law provides that the reasons set forth in Section 1124 of the School Code are the exclusive reasons. However, in 1981, which was the last time that this question was addressed by the Pennsylvania Supreme Court, that court was evenly divided on whether the reasons in Section 1124 were the exclusive reasons or whether professional employees could be furloughed purely for reasons of economy. Nonetheless, the efforts of school districts to furlough employees where the facts did not fit neatly into the statutory framework have failed in some cases and been successful in others.

<sup>2</sup> But see, *Colonial Education Ass'n v. Colonial School District*, 645 A.2d 336 (Pa.Cmwlth. 1994), in which the court held that an 18-year record of decline was too long of a period of time to justify an enrollment decline, absent specific justification for such a long period of time.

<sup>3</sup> All scenarios assume proper certification to bump into the other position described in the scenario.

