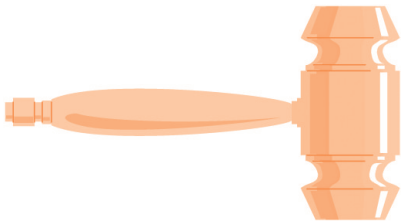
Legal Corner



By Michael I. Levin, Esq., PA Principals Association General Counsel

Due Process in Relationship to Furloughs and Demotions

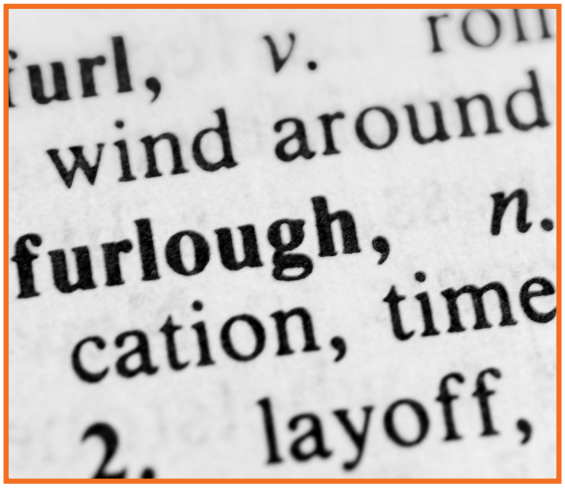
The question was recently posed as to whether and to what extent a school district may demote or terminate a school administrator due to "economic" reasons or "restructuring" without due process? The short answer is that in most instances, where school administrators are deemed "professional employees" under the School Code, demotions and terminations due to "economic" reasons or "restructuring" are subject to due process.

Initially, however, it is appropriate to describe what is meant by "due process." Simply stated, due process contemplates notice and a hearing opportunity. Related to furloughs and demotions, that means that the school district must provide notice of the furlough or demotion and allow the employee to invoke a hearing process that complies with applicable law, such as the Local Agency Law, 2 Pa.C.S.A. §751 *et seq*., the School Code 24 P.S., Article XI and/or constitutional concepts of due process.

As all school administrators are intimately aware, school districts are often faced with the prospect of furloughing or demoting professional staff, including professional administrators. As professional employees, however, school principals are subject to the protections conferred upon professional employees under the School Code and Local Agency Law.

As most of you know, furloughs (or "suspensions" as used by the legislature) are governed by Sections 1124 and 1125.1 of the School Code, 24 P.S. §§11-1124, 11-1125.1. Section 1124 outlines the permissible reasons for furloughs and Section 1125.1 identifies the professional employees to be furloughed and the procedures to be followed in furloughing (and reinstating) professional employees.

For years, the primary reason most often cited for furloughs was declining student enrollment. However, in the past decade or so, school districts increasingly began furloughing professional employees, including administrators, due to the curtailment or alteration of educational programs. Under Section 1124, with limited exception, school districts could not furlough professional employees for any other reason, chief among them, economic reasons. However, in reality, most furloughs undertaken, especially under the curtailment or alteration of programs premise, were often prompted by economic reasons which begot the "operational" or "educational" changes declared by the school districts.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In 2017 and 2018, with the passage of Act 55 and Act 39, respectively, the legislature amended Sections 1124 and 1125.1 of the School Code to permit school districts to furlough professional staff for "reasons of economy" and effectively eliminate seniority as the primary method for choosing the applicable professional employee(s) to furlough, and greatly reducing bumping rights.

When the only grounds for a furlough of professional employees is economic under section 1124(a)(5) of the School Code, 24 P.S. §11-1124(a)(5), there are several procedural requirements that must be met, but that are not required when a furlough is based on a substantial decline in enrollment or a curtailment or alteration of the program. Economic furloughs require a school district to obtain board approval of economic furloughs at a public meeting and not later than 60 days prior to the date of adoption of the final budget, that the school board adopt a "resolution of intent" to furlough the professional employees in the following fiscal year.

As noted, Act 55 also modified Section 1125.1. As I explained in a previous article at that time: For years, under Section 1125.1, the selection of professional employees to be furloughed was required to be based solely upon seniority and subject to realignment of staff to ensure that the least senior employees were furloughed, i.e., by bumping, "straight line" realignment and/or "checkerboarding." Under that scenario, once the number of employees to furlough and the

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areas in which the furloughs will take place was determined, the school entity would then have to determine which employees to suspend. Until the passage of Act 55, the law was clear that the least senior employees were to be the ones furloughed. Therefore, in order to ensure that the least senior employees were furloughed, employees slated for furlough were entitled to "bump" less senior employees. For example, if the school entity decided 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 was certified, as long as the position was equal to or higher than the position of the assistant principal position. Thus, the certifications held by the assistant principal on the effective date of the suspension would determine the positions for which the employee would be able to bump. Unless school board policy or an applicable agreement provided otherwise, only "straight-line" bumping was required, not "checkerboard" bumping or realignment.

> ***"Until the passage of Act 55, the law was clear that the least senior employees were to be the ones furloughed."***

Under Act 55, the legislature did away with that entire scheme. Thus, under Section 1125.1, the selection of tenured employees for furlough was based first upon performance evaluation ratings, with seniority maintained and to be used as a "tie breaker" only within groupings of like-rated employees in the positions in which the employees are currently teaching.

However, given the fact that most professional employees (over 75%) are rated satisfactory (proficient), in reality, in most instances, seniority still will have been the predominate criteria upon which employees were selected for furlough. The actual *significant* change in the legislation was that the comparison of seniority was limited to the similarly rated employees within the area of certification required by law for the professional employee's current position. The legislature made this clear by the use of the following language:

> Professional employes shall be suspended under section 1124 in the following order, within the area of certification required by law for the professional employe's current position:
>
> …
>
> (a.1) When more professional employes receive the same overall performance rating than there are suspensions, seniority within the school ***entity and within the area of certification required by law for the professional employe's current position*** shall be used to determine suspensions among professional employes with the same overall performance rating…

24 P.S. § 11-1125.1 (Emphasis added)

As noted, in 2018, the legislature enacted Act 39, which among other things, reinstated the realignment (bumping) provisions of Section 1125.1 which were eliminated under Act 55. However, as written, realignment is subject to the order prescribed in 1125.1(a), which first requires consideration of the educators' recent evaluations and further requires that when two or more educators are in the same evaluation category, the least senior employee(s) will be "bumped" so more senior employee(s) are retained. Although the above-referenced provisions of Sections 1124 and 1125.1 arguably make it easier to furlough school administrators, given that most school principals will continue to receive satisfactory evaluation ratings, most instances of furlough among school principals have, and will continue to be, based upon relative seniority.

In addition to furloughs, both Sections 1124 and 1125.1 tacitly apply to demotions undertaken for the reasons articulated in Section 1124, primarily as to selection and reinstatement. There has always been some confusion about demotions and how demotions fit into the downsizing of administrative staff. In light of the recent changes in the rules noted above and given the less than perfect evaluation processes, such confusion will probably continue. However, with some exception, the rules are simple and straight forward. To that end, where a demotion is part of an overall reorganization or based upon reasons stated under Section 1124, the bumping and reinstatement requirements of Section 1125.1 may come into play. On the other hand, where there is a "pure" demotion (i.e., not for any of the reasons stated in Section 1124), any bumping and reinstatement rules do not apply.

Further, unlike demotions undertaken for reasons stated in Section 1124, "pure" demotions may occur for any rationale that is not arbitrary or capricious. That includes economic reasons or disciplinary reasons. Simply stated, if performance issues suggest that there is not a good fit for a principal to be the principal of a school, he or she can be demoted to an assistant principal position, a teaching position or any other position for which he or she is properly certificated. Bumping does not apply.

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In terms of process, Section 1125.1 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 before the school board to protest either the grounds upon which the furlough is based or as to the particular employee's selection. A furloughed professional employee 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.

In terms of demotions, as stated above, as a matter of law, "pure demotions" of professional employees are subject to School Code Section 1151 (24 P.S. §11-1151). Under Section 1151, such demotions may occur where the school district has any rationale that is not "arbitrary or capricious" including economic or disciplinary reasons. Courts have long held that any rational reason is sufficient to support a demotion and that a demotion will be overturned only if it is shown to be arbitrary and capricious. As such, demotions are presumptively valid.

Procedurally, Section 1151 states that no demotion in salary or in type of position can occur without the consent of the employee, or subject to the right to a hearing before the board of school directors and an appeal in the same manner as provided in the case of the dismissal of a professional employee. (An appeal to the Secretary of Education and to the Commonwealth Court.)

When it is clear that a demotion is being imposed, due process and sections 1127 and 1151 of the School Code, 24 P.S. §§11-1127, 11-1151, require notice of the proposed action in the form of a statement of charges. If the administrator requests a hearing, a school board hearing will be held in accordance with applicable law, including section 1126 of the School Code, 24 P.S. §11-1126. However, it is not always clear whether a transfer constitutes a demotion. In that situation, the employee can initiate the due process procedures by asserting that the transfer is a demotion, and the school district will be required to implement that hearing processes required by the School Code.

Of course, not all administrative positions are "certificated" and so, not all school administrators are "professional employees" as is defined under the School Code, Pennsylvania regulations and Pennsylvania case law.[1] In fact, for many administrative positions, the Pennsylvania Department of Education (PDE) does not require the administrator hold any certification issued by PDE, nor are they referenced in the PDE regulations (Chapter 22) or PDE's guidelines[2] as requiring certification. Many administrative positions do not encompass what would be described as "professional duties" defined by the PDE regulations as "[a] duty the performance of which is restricted to professional personnel by the scope of their certificate." 22 Pa. Code §49.1. Certain administrators are employed with the recognition that they are not professional employees and will not attain tenure status.

In instances where school administrators are not deemed professional employees under the School Code, there are no School Code requirements or applicable procedures related to the elimination of non-professional positions or the resulting furlough and/or demotion of non-professional employees similar to those expressly found for professional employees. Thus, where an administrator is not a professional employee, he/she has no property right in his/her employment and further, under section 514 of the School Code,[3] when a nonprofessional employee's job is eliminated for reasons of economy, there is no right to a hearing. Citing *Genco v. Bristol Borough School Dist.*, 55 Pa. Comwlth. 78, 80-81, 423 A.2d 36, 37-38 (1980); *Sergi v. School Dist. of City of Pittsburgh,* 28 Pa. Comwlth. 576, 580-582, 368 A.2d 1359, 1361-1362 (1977). Moreover, Section 514 has been read by the courts to the effect that "removal" has been interpreted to mean only discharge (termination). Hence, the finding that Section 514 does not refer to, or cover, reassignments, even those that result in demotions.[4] Noteworthy, a recent Commonwealth Court decision issued in March of this year held that the similar language found in School Code Section 1089 applicable to business managers is likewise inapplicable to reassignments resulting in demotion and thus precludes hearing rights under that statute as well.

Based upon the foregoing, school administrators who are deemed professional employees under the School Code, facing impending furloughs or demotions based upon "restructuring" and/or "economic" reasons, certainly enjoy due process rights as enumerated in the School Code. However, although those processes provide a procedural basis for such challenges, given the minimal standards established by the legislature and the courts – especially in terms of demotions – in reality they provide only a limited substantive basis for successfully challenging furloughs and/or demotions.

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End Notes

[1] Under the School Code, two essential criteria establish "professional employee" status: employment classification and certification. An individual must occupy a position for which Pennsylvania Department of Education ("PDE") requires certification issued by PDE (*Duerr v. Mars Area School Dist.*, TTA 1-86, 23 SLIE 87 (1986), and the individual must be properly certificated to fill that position (*Gorman v. East Allegheny School District*, TTA 4-96, 34 SLIE 52 (1997)). To be considered a "professional employee," an individual must meet both conditions. Said another way, "professional" positions are ones for which the holder is required to possess an applicable certificate issued by PDE. By statute, possession of a certificate is fundamental to classification as a professional employee. *Occhipinti v. Board of School Directors of Old Forge School District*, 76 Pa. Cmwlth. 516, 464 A.2d 631, 632 (1983).

[2] The regulations at 22 Pa. Code §49.13 authorize PDE to issue administrative agency interpretive policies and directives relating to professional certification and staffing in the schools as may be necessary to carry out the intent of the regulations. PDE issues written policy and guideline statements, known as "Professional Personnel Certification and Staffing Policies and Guidelines" (commonly referred to as "CSPGs") to clarify PDE's position and give advice on certification and staffing issues. The CSPGs are found on the PDE website. (https://www.education.pa.gov/Educators/Certification/Staffing%20Guidelines/Pages/default.aspx) There are more than 100 CSPGs, addressing the numerous appropriate certifications required for Pennsylvania schools. In addition, the PDE website lists the numerous types and codes applicable to the certificates issued by PDE.

[3] Section 514, in relevant part, states:

> Removal of Officers, Employes, etc.– The board of school directors in any school district, except as herein otherwise provided, shall after due notice, giving the reasons therefor, and after hearing if demanded, have the right at any time to remove any of its officers, employes, or appointees for incompetency, intemperance, neglect of duty, violation of any of the school laws of this Commonwealth, or other improper conduct…

24 P.S. §5-514.

[4] See *Organtini v. Methacton School District* 2008 WL 324022 (U.S.D.C E.D. Pa.) ("From the plain language of Section 514, it is clear that a hearing is not available in cases of transfer or demotion; the hearing right is triggered only by removal.") *Id.*[4], citing *Moriarta v. State College Area School District,* 144 Pa. Cmwlth. 359, 601 A.2d 872,873 (Pa. Cmwlth. 1992) ("[t]he word 'removal' means discharge or dismissal…") and *Miller v. Quakertown Community School District*, 18 Pa. D. & C. 3d 416, 419-420 (Bucks County CCP 1981) (Section 514 "refers to the removal (dismissal) of a nonprofessional employee and not to the demotion of such an employee"). Additionally, the *Organtini* court expressly held that "Pennsylvania's Local Agency Law does not provide the statutory basis for requiring a hearing upon demotion of a classified government employee." *Id.*, at *6.

Submit an Article for The Pennsylvania Administrator: Winter 2023 Edition

The Pennsylvania Principals Association is seeking articles for its **Winter 2023 edition** of ***The Pennsylvania Administrator*** **magazine.** *This issue does not have a theme, so any education-related articles will be considered for publication by the Editorial Review Board.*

Submissions that are sent to us as scholarly papers (dissertations) will be returned for a rewrite before being reviewed by the Editorial Review Board. In addition, articles that are determined to require extensive editing, or are not in APA style, will also be returned for revisions before being considered for publication. For additional article criteria and specifications, visit: www.paprincipals.org/publications/the-pennsylvania-administrator/how-to-submit-an-article/

To submit an article, please send to Sheri Thompson at sherit@paprincipals.org by December 16, 2022.

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