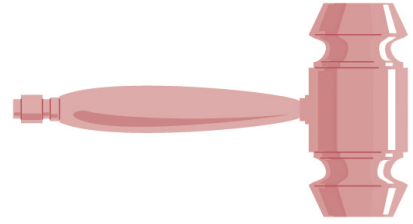


Legal Corner



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

The Current Status of Economic Furloughs in Pennsylvania



As most school administrators are well aware, under the current economic circumstances, federal and state funding limitations and the taxing restrictions of Act 1, school district budgets are tighter than ever. As a result, school districts are often faced with the prospect of furloughing professional staff, including professional administrators. School principals, of course, are impacted by furloughs in several ways.

Furloughs obviously lead to the reduction of your professional and administrative staffing, which increases class sizes, eliminates class offerings and programs and impacts operational management. In addition, and more directly, under some circumstances, principals and assistant principals themselves may also be furloughed. Therefore, it is important for school principals to know the rules pertaining to the furlough of professional employees.

Since the early to mid-1970s, statewide, virtually all school districts have furloughed professional employees at one time or another. For several decades, furloughs (or *suspensions* as used by the legislature) have been covered by Sections 1124 and 1125.1 of the School Code. 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. Until recently, both Section 1124 and Section 1125.1 have remained relatively unchanged. However, in more recent years, the legislature has made several significant changes to both statutes.

Section 1124 sets forth the acceptable reasons for furloughing a professional employee. For years, those reasons were limited to the following:

- substantial decrease in pupil enrollment;
- certain curtailments or alteration of the educational program in the school entity;
- consolidation of schools; and
- the establishment of a new school district.

In fact, the aforementioned reasons stated in Section 1124 were held to be the *exclusive* reasons available to

school districts. *Warwick Bd. of Sch. Directors v. Theros*, 494 Pa. 108, 430 A.2d 268 (1981).

For years, the primary reason cited for furloughs was declining student enrollment. In fact, most suspensions of school district employees were based on a substantial decrease in pupil enrollment. Such furloughs were fairly uncomplicated due to the objective nature of the premise, i.e., a declining enrollment in students leading to a concomitant reduction in staff.

However, in the most recent past decade, school districts increasingly began furloughing professional employees due to the curtailment or alteration of educational programs.

Significantly, under Section 1124, four criteria were required to be met to furlough based upon the curtailment or alteration of programs:

- there must be a recommendation for curtailment or alteration by the superintendent;
- the school board must concur in the recommendation;
- the Secretary of Education must approve the curtailment or alteration; and
- 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.



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In particular, Act 55 modified Section 1124 to add a fifth criterion: *economic reasons that require a reduction in professional employees.*”

As written, a school district could not furlough any employees on the curtailment basis if even only one of the four conditions were not satisfied.

As noted, for years, regardless of the reason, 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 prompted by economic reasons which begot the “operational” or “educational” changes declared by the school district. In a tacit nod to this reality, courts upheld furloughs if one of the enumerated reasons for furlough was present, even if the primary motive was to save money. e.g., *Platko v. Laurel Highlands Sch. Dist.*, 49 Pa.Cmwth. 210, 212, 410 A.2d 960, 962 (1980).

The main obstacle for most school districts furloughing for economic purposes, but using the curtailment or alteration of programs premise, was obtaining approval from the Department of Education. As mentioned above, until 2012, suspensions under section 1124(2) required the approval of the Secretary of Education. However, in the years leading up to 2012, the Secretary was being flooded with requests for approvals. Therefore, in response, by Act 82 of 2012, the General Assembly did away with that step. In addition to deleting certain language from Section 1124(2), the General Assembly added the following language to section 1124 that expressly notes that suspensions under section 1124(2) do not require the approval of the Secretary of Education. Now, Section 1124(b) of the School Code provides as follows:

(b) Notwithstanding an existing or future provision in a collective bargaining agreement or other similar employment contract to the contrary, suspension of a professional employe due to the curtailment or alteration of the educational program as set forth in subsection (a)(2) may be effectuated without the approval of the curtailment or alteration of the educational program by the Department of Education, provided that, where an educational program is altered or curtailed as set forth in subsection (a)(2), the school district shall notify the Department of Education of the actions taken pursuant to subsection (a)(2). The Department of Education shall post all notifications received from a school district pursuant to this subsection on the Department of Education’s publicly accessible Internet website.

24 P.S. §11-1124(b).

More recently, In November of 2017, Act 55 of 2017 was enacted into law. In relevant part, Act 55 altered Sections 1124 and 1125.1 of the School Code permitting school dis-

tricts to furlough professional staff for “reasons of economy” and effectively eliminating seniority as the primary method for choosing which professional employee(s) to furlough, and greatly reducing bumping rights.

In particular, Act 55 modified Section 1124 to add a fifth criterion: *economic reasons that require a reduction in professional employees*. On its face, this change seems simple enough and in the context of the issue that has been raised for several decades, it would seem that the intent is straightforward enough. However, by adding the additional words “that require a reduction in professional employees,” the legislature has created a layer of uncertainty to what should have been simple. By adding such words – which must be read by future arbitrators and courts as purposeful and given some effect – the legislature has begged the question, which economic reasons *require* a reduction in professional employees and what evidence is necessary to prove that those economic reasons do so? In short, it is not at all clear what constitutes “economic reasons **that require** a reduction in professional employees.”

In adding the economic reason as a criterion for furlough, the legislature also enacted additional requirements in order to assert it. In particular, Act 55 added to Section 1124 that in order to furlough for economic reasons professional employees who provide instruction directly to students, a school district must also furlough at least an equal percentage proportion of administrative staff, subject to certain exceptions and exemptions. In addition, in order to do so, Section 1124 now requires a school district to obtain board approval of such 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. According to the statute, the resolution of intent must include the economic conditions of the school district making the proposed furloughs necessary and how those economic conditions will be alleviated by the proposed furloughs, including: the total cost savings expected to result from the proposed furloughs; a description of other cost-saving actions taken by the board of school directors, if any; the projected expenditures of the school district for the following fiscal year with and without the proposed furloughs; and the projected total revenues of the school district for the following fiscal year. The resolution must also include: the number and percentage of employees to be furloughed who are professional employees assigned to provide instruction directly to students; the number and percentage of employees to be furloughed who are administrative staff; the number and percentage of employees to be furloughed who are professional employees who are not

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assigned to provide instruction directly to students and who are not administrative staff; and the impact of the proposed furloughs on academic programs to be offered to students following the proposed furloughs, as well as the impact on academic programs to be offered to students if the proposed furloughs are not undertaken, compared to the current school year, and the actions, if any, that will be taken to minimize the impact on student achievement.

As stated, in order to furlough professional employees for economic purposes, the district will not only need to develop and provide adequate data to support the furloughs but it will need to do so timely with and as part of the financial planning incumbent to the budget process.

Under Act 55, following the 2021-2022 school year, the Legislative Budget and Finance Committee shall conduct a study of the effectiveness of these provisions including whether these provisions of law are being used effectively by school districts to improve school district efficiency and the impact of these provisions on programs offered to students, as well as the impact on programs that would have been offered to students if these provisions had not been enacted, if such information is available, and shall deliver a written report of its findings to the Governor, the chairperson and minority chairperson of the Education Committee of the Senate and the chairperson and minority chairperson of the Education Committee of the House of Representatives by December 31, 2022.

Act 55 also modified Section 1125.1. 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."¹ Under that scenario, once the number of employees to furlough and the areas in which the furloughs will take place was determined, the school entity would then have to determine which employees to suspend. Until now, 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 posi-

tion. 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.

By enacting Act 55, the legislature did away with that entire scheme. Under the new law, under Section 1125.1, the selection of tenured employees for furlough must now be 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 employ-

ees are currently teaching.

In particular, Act 55 modifies Section 1125.1 to add the following required priority:

- The first group of employees to be furloughed are those professional employees whose two most recent annual evaluations are considered unsatisfactory pursuant to section 1123 shall be suspended first.
- After furloughing professional employees under the first group, the second group of employees who face furlough are those professional employees who have one satisfactory and one unsatisfactory.
- After suspending professional employees under the first two groups, the third group to be furloughed are those employees who have two satisfactory ratings, and which are either consecutive ratings of "proficient" or a combination of one rating of "proficient" or "distinguished" and one rating of "needs improvement" pursuant to section 1123.
- The final group that is subject to furlough are those professional employees who received consecutive ratings of "distinguished" or a combination of one rating of "proficient" and one rating of "distinguished."

24 P.S. §1125.1.

On its face, the most significant of the changes to Section 1125.1 appears to be the legislature's determination that the selection of who is to be furloughed shall be determined by evaluation ratings rather than by seniority. However, given the fact that for a number of reasons most professional employees (over 75%) end up rated satisfactory (proficient), in reality, seniority shall still be the predominate criteria upon which employees shall be selected for furlough. The actual *significant* change in the legislation is that the comparison of seniority will now be 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:

(a) 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)

Thus, under this new scheme, no realignment rights or bumping rights across areas of certification exist anymore.

In addition, Act 55 also modified Section 1125.1 in terms of recall rights. Under Section 1125.1, all suspended professional employees have a right of recall, subject to certain limitations and conditions set forth in Section 1125.1. Essentially, as modified, reinstatement now follows along the reverse order of the furlough groups, starting with those furloughed from group 4 to group 3 to group 2 to group 1.

Act 55 also amended both Sections 1124 and 1125.1 to add language prohibiting collective bargaining agreements or other agreements from contradicting the terms of the statutes as modified by Act 55. While the statutes do not mention whether this language applies to other agreements such as administrative compensation plans under Act 93, it is unlikely that the terms and conditions contained in Act 93 agreements can supersede the provisions contained in Act 55. It is our opinion that they cannot. First administrative compensation plans are supposed to contain provisions dealing solely with salary and benefits. See 24 P.S. 11-1164. They are not supposed to contain any job protection provisions. In addition, it is fundamental law in Pennsylvania that public employers, like school districts, have no power or authority to grant job protection greater than allowed by the General Assembly. *Mitchell v. Chester Housing Authority*, 389 Pa. 314, 321, 328, 132 A.2d 873, 880 (1957); *Moore v. Luzerne County*, 262 Pa. 216, 105 A. 94 (1918). Therefore, it is questionable whether job protection provisions in an administrative compensation plan would have any legal effect.

As noted above, furloughs impact school principals indirectly in the reduction of professional staff and directly in terms of their own furloughs. In terms of the latter, the new provisions of Sections 1124 and 1125.1 make furloughs of school administrators more likely and more easily accomplished. However, conversely, the new laws eliminate the "bumping" and realignment issues incumbent to such decisions. However, given that most school principals will have received satisfactory evaluation ratings, most instances of

furlough among school principals will be based upon relative seniority. To refresh, seniority is calculated according to several well-established rules. They are as follows:

- Seniority is to be calculated only with respect to the school entity of current employment. 24 P.S. §11-1125.1(a).
- Seniority rights do not commence until the employee has acquired temporary professional status and proper certification. Substitutes do not accrue seniority.
- 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.
- Time spent on approved leaves must be counted for seniority purposes.
- 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.
- School entities can select a reasonable method of determining the relative seniority of those employees who were hired at the same time.
- Years spent in the military must be added to years served.
- School entities may use the date of hire rather than the first day of work for purposes of calculating seniority.
- 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.

In addition to furloughs, both Sections 1124 and 1125.1 tacitly apply to demotions undertaken for the reasons articulated in Section 1124. There has always been some confusion about demotions and how demotions fit into the downsizing of administrative staffs. The confusion surrounding demotions may be increased in light of the new rules above and given the less than perfect evaluation processes. However, with some exception, the rules are simple and straight forward. Where there is a "pure" demotion (i.e., not for any of the reasons stated in Section 1124), any bumping rules do not apply. *Compare, Shestack vs. General Braddock Area School District*, 63 Pa.Cmwlt. 204, 437 A.2d 1059 (1981), with *Filoon vs. Middle Bucks Area Vocational-Technical School*, 160 Pa. Cmwlt. 124, 634 A.2d 726 (1993), *Hritz vs. Laurel Highlands School District*, 167 Pa.Cmwlt. 353, 648 A.2d 108 (1994). Further, pure demotions may occur where the school district has 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. Where, however, the demotion is part of an overall reorganization

where sections 1124 and 1125.1 are implicated, the reinstatement requirements of Section 1125.1 may come into play.

One final thing that has not changed is the fact that Section 1125.1 still 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.

Due to the new provisions and unsettled issues in the law, school districts should proceed cautiously when deciding to furlough professional employees, especially for reasons of economy.

End Note

¹ Straight line realignment applies seniority to a particular department(s), while checkerboard realignment enumerates the seniority of the entire professional staff within certification areas.

A Collaborative Approach to Resource Evaluation

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districts with 6,900 students, is nationally recognized for academic achievements and known for its variety of educational opportunities and cultural diversity in Centre County. Bald Eagle Area School District, also in Centre County and serves 1,760 students, is known for being a community school that offers a quality education and innovative programs. Moshannon Valley School District in rural Clearfield County is the smallest district with just over 900 students and has a growing economically challenged population with more than 60% of students receiving free or reduced lunch. Moshannon Valley has been making academic strides, and now more than 37% of juniors and seniors enroll in at least one Advanced Placement course before graduation. This unique collaborative opportunity helped foster mutual respect and create a collaborative environment. Through an embracement of our differences, we were able to help in selecting the best instructional resources for teachers and students.

We plan to continue our professional collaboration because we believe in a collective responsibility for all students, in and out of our own districts. We will continue to

use our shared wisdom to grow professionally and address challenges that we face each school year. As stated in a report titled "How the World's Most Improved School Systems Keep Getting Better" (Mourshed, Chijioke & Barber, 2010):

The power of collective capacity is that it enables ordinary people to accomplish extraordinary things – for two reasons. One is that knowledge about effective practice becomes more widely available and accessible on a daily basis. The second reason is more powerful still – working together generates commitment (p. 84).

Our team is committed to our ongoing work and cannot wait to see what this powerful collaboration can accomplish in the years to come.

For more information, please contact the authors at: jmm58@scasd.org, jzesiger@movalley.org or tracy.boone@beasd.net. **Please join us for the first Ask the Author Zoom Webinar on Thursday, October 25 at 4 p.m. (See page 1 for details.)**

WOW! That's Why I Became a Principal



Pursuing a career in school administration may not be as appealing these days as it once seemed, if you believe all the negative images or controversy over issues related to our public schools. Many influences such as changing demographics, the economy and limited resources, accountability demands and the

constant change of politically-driven initiatives impact not only public perception, but the daily operations of our schools. Yet, despite constant changes and public scrutiny of our educational system, educators rise to the

challenge of providing all children a quality program for learning and personal growth.

We are seeking short, humorous or uplifting stories that relate to some telling aspect of a school administrator's work life for our feature, "Wow! That's Why I Became a Principal."

Articles should be no more than 350-400 words (less if you include a photo and a brief caption). Please include a high-resolution photo (300 dpi) to accompany your article. Articles and photos should be sent to Sheri Thompson at sherit@papprincipals.org.

The deadline for submitting an article for the Winter 2019 issue is Dec. 7, 2018.