

IN THE OFFICE OF THE SECRETARY OF EDUCATION

COMMONWEALTH OF PENNSYLVANIA

RITA CHLODNEY,	:	
Appellant	:	
	:	
v.	:	TEACHER TENURE APPEAL No. 23-77
	:	
BOARD OF SCHOOL DIRECTORS OF	:	
NORWIN SCHOOL DISTRICT,	:	
Appellee	:	

OPINION

Rita Chlodney, the Appellant herein, has appealed from the decision of the Board of School Directors of the Norwin School District, demoting her from the position of full-time German teacher to the position of half-time German teacher, which action she contends is an improper demotion in position.

FINDINGS OF FACT

1. The Appellant is a professional employee of the Norwin School District (hereinafter referred to as the district).
2. The Appellant was hired by the district in 1967 as a full-time German teacher and remained as such through the 1975-76 school year.
3. In May, 1976 the Appellant was certified in English as well as German.
4. At the beginning of the 1976-77 school year, the district demoted Appellant from a full-time teacher at full salary to a half-time teacher at half salary.
5. On August 11, 1976, Appellant requested a hearing. The district received but refused to answer this request.

6. By letter dated September 9, 1976, Appellant's attorney filed a Petition of Appeal, Teacher Tenure Appeal No. 310, in the Office of the Secretary of Education.

7. On March 17, 1977, Appellant's Petition of Appeal in Teacher Tenure Appeal No. 310 was sustained by the Secretary of Education. The Board of School Directors of the Norwin School District was ordered to reinstate Appellant as a full-time German teacher without loss of pay within 30 days of receipt of the Secretary's Order.

8. On April 18, 1977, Norwin School District Board of School Directors appealed the Secretary's Order to the Commonwealth Court, No. 17 C.D. 1977.¹

9. On May 4, 1977, Norwin School District held a hearing in response to the August 11, 1976 request by Appellant (see Finding of Fact No. 5 above).

10. At the hearing Appellant argued her right to a hearing pursuant to either Local Agency Law or Section 1151 of the School Code (24 P.S. §11-1151); the School Board still maintained no hearing was necessary.

11. At all times prior to, during and after the School Board hearing, the School Board has refused to release information to Appellant as to the ratings and seniority of other teachers in Appellant's areas of certification.

12. In an August 9, 1977 decision, the Norwin School Board affirmed its initial position that the action taken against Appellant was not a demotion but was rather a proper suspension because of a decrease in pupil enrollment.

¹By Order dated August 22, 1978 the Commonwealth Court affirmed the Secretary's Order reinstating Appellant without loss of pay. The Court also ruled that Appellant had been demoted.

13. On August 24, 1977, Appellant's Petition of Appeal was received in the Office of the Secretary of Education.

14. A hearing was held before the Secretary of Education on September 27, 1977.

DISCUSSION

Appellant contends that the action taken by the School Board constitutes an improper demotion in salary and position. The School Board argues that their action was a proper suspension. The merits of these arguments have already been addressed by the Secretary in Teacher Tenure Appeal No. 310, decided March 17, 1977. As a result of that decision, a hearing was then held by the School Board on May 4, 1977 purportedly to resolve the same substantive issues. The School Board's decision following the hearing on May 4, 1977 is the basis of this appeal. We find it unnecessary to readdress the demotion/suspension distinction in the appeal currently before the Secretary. The Secretary has already decided that the action was a demotion. (See also footnote No. 1.)

Appellant also contends in her Petition of Appeal that the hearing accorded her on May 4, 1977 was violative of due process. We find the main issue in the appeal currently before the Secretary to be the due process question.

The procedural posture of this case is so convoluted as to require comment. Appellant is currently appealing from a hearing which the School Board finally granted her nine months after her initial request for a hearing and two months after the Secretary's first order in this matter. Appellant was originally before the Secretary in September, 1976 because the School Board refused to respond to her request for a

hearing. In Teacher Tenure Appeal No. 310, the Secretary ordered a hearing and reinstatement of Appellant until a hearing could be held. The School Board appealed the decision to Commonwealth Court but granted Appellant a hearing. The decision by the School Board, rendered August 9, 1977, after the Secretary's first decision, was adverse to Appellant and she has appealed for a second time to the Secretary.

In addition to the substantive issues addressed in the first appeal, Appellant claims that the hearing violated due process because the solicitor for the School Board acted in a dual capacity as prosecutor for the School District and advisor to the School Board. We find Appellant's contention to be supported by substantial evidence on the record. Having initially refused to grant Appellant a hearing, the School Board has now given her a hearing that we are forced to describe as clearly prejudicial.

The law in Pennsylvania is well settled on the issue of dual representation by a school district solicitor in a due process hearing. See Horn v. Township of Hilltown, 461 Pa. 745, 337 A.2d 858 (1975); Pennsylvania Human Relations Commission v. Feeser, 469 Pa. 173, 364 A.2d 1324 (1976); Appeal of Feldman, 21 Pa. Commw. Ct. 451, 346 A.2d 895 (1975); English v. North East Bd. of Education, 22 Pa. Commw. Ct. 240, 348 A.2d 494 (1975). The Supreme Court addressed the issue of the commingling of functions by a solicitor in an administrative hearing and found it to be improper, stating:

"In the case at bar, . . . we are presented with a governmental body charged with certain decision-making functions that must avoid the appearance of possible prejudice, be it from its members or from those who advise it or represent parties before it. In the instant case, the same solicitor represented both the zoning hearing board and the township, which was opposing appellant's application for

zoning variance. While no prejudice has been shown by this conflict of interest it is our opinion that such a procedure is susceptible to prejudice and therefore, must be prohibited." Horn, 461 Pa. at 337 A.2d at 860.

It is clear that the concern of the Court was not only actual prejudice but even the appearance of possible prejudice. The Court reiterated this position when deciding Appeal of Feldman which specifically involved a school district solicitor who tried a case before a school board, after which he either prepared or assisted in the preparation of the board's adjudication. The Court also noted in Feldman that a statement by the school board, at the hearing, that the board was not being represented by the solicitor presenting the school district's case is not sufficient to avoid the prohibited appearance of possible prejudice. Feldman, 21 Pa. Commw. Ct. at 452, 346 A.2d at 896.

In the case before us, the solicitor for the School District appeared before the Board on behalf of the District to argue that the action taken with respect to Ms. Chlodney was not a demotion. It is also apparent, from our review of the record, that the Solicitor gave advice to the School Board during the hearing. The Board also relied on his performing an advisory function; in the words of one Board member: "You want us to make a decision without his advice? That is what we pay him for." (N.T.5). Appellant's attorney addressed the dual role of the solicitor on the record: "The school solicitor and the person conducting the hearing are conversing and deciding what to do" (N.T. 8); "the solicitor is constantly talking in a voice that is not loud enough for me to hear, to the hearing examiner determining what is going to be done in this hearing." (N.T. 23). The solicitor himself stated: "This is myself leading the School Board." (N.T. 23) Statements such as the above go far beyond creating "an appearance of possible prejudice."

The activities that occurred in the instant case must be compared with English v. North East Board of Education, supra. In English, the solicitor acted in the dual role of judge and prosecutor. He presided at the hearing, made several evidentiary rulings, and at the same time, presented the case against the teacher. The Commonwealth Court held there was a denial of due process.

The facts in the instant case are not as clear as in English. The acts of the solicitor are not as overt as in English. However, the record clearly shows the School Board's reliance on the District's solicitor for advice and the solicitor's acceptance of that advisory role in spite of his conflicting role as presenter for the School District. We find that this is precisely the type of commingling of functions which Pennsylvania's courts have declared to be violative of due process rights.

For a period of nine months the School Board refused to grant Appellant's request for a hearing. During that nine months one hearing was held before the Secretary of Education with a finding in favor of Appellant. Although the School Board appealed the first decision of the Secretary it also attempted to remedy its original inaction by granting Appellant a hearing. The hearing, however, was a hearing in name only. The Solicitor for the School District voiced what appears from the record to be the position of the Board during the so-called hearing: "I do say this, that an employee is at their peril if they want to demand a hearing." (N.T. 2) Section 1151 of the Public School Code, Act of March 10, 1949, P.L. 30, as amended, 24 P.S. §11-1151, mandates a hearing when a professional employee is demoted. The hearing that is required must fulfill due process requirements. Based upon our review of the record, we find that due process requirements, other than the improper

commingling of the solicitor's functions, were also not met in the hearing granted to Appellant.

Appellant has been attempting for a period of approximately two years to secure her rights. The Pennsylvania Supreme Court, in Smith v. Darby, 388 Pa. 301, 130 A.2d 661 (1957) stated that when a professional employee claims she has been demoted she must be given a hearing on the question of demotion. In a demotion hearing it is the School District which has the initial burden of proof. It must state the reason(s) for the demotion. The burden then passes to the professional employee to demonstrate arbitrariness, capriciousness, or discrimination in the school district's action. Smith v. Darby, supra; Tassone v. School District of Redstone, 408 Pa. Commw. Ct. 290, 183 A.2d 536 (1962) The School District, herein, having finally responded to Appellant's request for a hearing, then flatly refused, through its solicitor, to state the reasons for the demotion. The school board gave the following "justification" for its refusal: "The School Board does not have the burden of proof....If you want to go back to the Department of Education on this, we will be glad to go back up" (N.T. 6).

Although the School District finally did agree to give some testimony on the reasons for what it termed "the suspension" of Appellant, it gave only partial evidence and again flatly refused to give Appellant all the information on ratings and seniority of similarly certified professionals. The School District argued Appellant had no right to the information because Appellant was claiming demotion and the requested information is relevant only to suspension. However, the School District itself was arguing that the action was a suspension. Section 1125 of the School Code, 24 P.S. §11-1125, requires the District to suspend on the basis of

seniority and rating information. It must give that information to Appellant in explaining or defending the District' action. This the District refused to do. When asked the reasoning for such refusal, the District's solicitor replied: "Like good old privacy." (N.T. 4) The Board's President stated: "Until such time as the Board is ordered to provide information on other teachers in this District we refuse to do so." (N.T. 5).

The School District has frustrated Appellant in her attempts to present her case under either the demotion or suspension theory. When Appellant argued demotion, the District refused to respond on the basis that the action taken was a suspension. When Appellant attempted to question the basis for the suspension she was denied evidence vital to her case. The record shows a continuing refusal on the part of the School Board and School District Solicitor to grant Appellant a proper hearing.

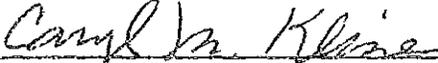
Finally, in the hearing before the Secretary's designated Hearing Officer on this Appeal, the Solicitor for the School District continued his pattern of frustration of any attempt to argue the issues of this case. The solicitor admitted receiving a letter from the hearing officer setting forth the issues to be addressed at the hearing. However, at the hearing the solicitor claimed to be surprised to learn what issues were to be argued and indicated he was not prepared to argue such issues.

We cannot allow this conduct by the School District and its solicitor and the continuous disregard of due process requirements to pass without censure. Appellant's due process right to a hearing on the issue of demotion pursuant to 24 P.S. §11-1157 has yet to be granted.

Accordingly, we make the following:

ORDER

AND NOW, this _____ 1st _____ day of November 1978,
the Appeal of Rita Chlodney is remanded to the Norwin School District.
The Board of School Directors is ordered to reinstate Appellant without
loss of back pay and to hold a proper due process hearing under Section
1151 of the School Code at the earliest possible date.



Caryl M. Kline
Secretary of Education

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