

for our review.

Our conclusion that the Board of School Directors of the Oxford Area School District and its superintendent violated the Appellant's due process rights should not be regarded as censure of either the school board or its superintendent. We find that the procedural violations, though serious, occurred as the result of inadvertence, not deliberate and wilful intent to violate the provisions of the School Code or the Appellant's due process rights. Actually, we are impressed with their efforts to be fair in what, in our opinion, is a difficult case to decide. Unlike most school districts, the Oxford Area School District had different attorneys to present the evidence and to advise the board; a practice that should receive serious consideration in light of *Horn v. Township of Hilltown*, op. cit.

Because of the incident, the Appellant requested a sabbatical leave for health. Section 1166 of the School Code provides that a professional employee who satisfies the requirements is *entitled* to a sabbatical leave for certain reasons; health is one of those reasons. Based on the evidence present in the record, we are satisfied that the Appellant substantiated her need for a sabbatical leave for health purposes. Therefore, it is our decision that the Appellant's status for the 1974-75 school year be that of a professional employee on a sabbatical leave of absence for health.

Accordingly, we make the following

### ORDER

AND NOW, this 11th day of July, 1975, it is hereby Ordered and Decreed that the Appeal of Ruth Lesley be sustained, that she be given a sabbatical leave of absence for health for the 1974-75 school year, and that she be reinstated as a professional employee without loss of pay, as determined in accordance with Section 1169 of the School Code.

\* \* \* \*

Appeal of Alvin J. Hoffman, a Professional Employee, from a decision of the Board of School Directors of the Northampton Area School District, Northampton County, Pennsylvania

In the Office of the Secretary of Education, Commonwealth of Pennsylvania, at Harrisburg, Pennsylvania

No. 249

### OPINION

John C. Pittenger  
*Secretary of Education*

Alvin J. Hoffman, Appellant herein, has appealed from the decision of the Board of School Directors of the Northampton Area School District dismissing him as a professional employee on the grounds of immorality.

### FINDINGS OF FACT

1. The Appellant is a professional employee. He has been a full-time employee of the Northampton Area School District from 1961 until the Spring of 1972 when he took a leave of absence because of the incident upon which the charges against him are based. The Appellant taught mathematics, economics and typing in the junior high school and was an assistant wrestling coach.
2. On the evening of April 8, 1972, the Appellant drove up to Miller's Diner and asked a person whom we shall refer to as "David" to give him a hand. David, aged 17, was an eleventh grade student in the Northampton Area School District. He had been one of the Appellant's students when in the ninth grade and was a member of the Junior Fire Squad which was supervised by the Appellant. Believing the Appellant was referring to work to be done at the firehall, David

got into the Appellant's car. Instead of going to the firehall, the Appellant drove around. The Appellant asked David if he had a girlfriend, if he had ever had a "trip around the world", and if he wanted a good "blow job". The Appellant put his hand on David's leg, then attempted to grab David in the crotch area. David told the Appellant to stop. The Appellant stopped his advances, but continued to ask obscene questions. David wanted to get out of the car, but it was moving too fast. The Appellant drove into the country, pulled the car over to the side of the road and made another attempt to grab David in the crotch area. He stopped momentarily when a car drove by and the Appellant decided to go to a more secluded location. The Appellant drove to a deadend road in the country. He grabbed David by the neck and made another advance against him. David freed himself from the Appellant's grasp and got out of the car. He had previously refrained from leaving the car in the hope that the Appellant would return to Northampton. David ran across fields back to Northampton. The Appellant drove around calling for him, but David would hide when the Appellant came near. When David approached the town, he was picked up and given a ride by one of his friends. At his request, David was taken to the police station where he reported the incident.

3. Because of the incident, David brought criminal charges against the Appellant on assault and solicitation to commit sodomy and corrupting morals of a minor. By letter dated April 25, 1972, the Appellant, through his counsel, agreed to take a leave of absence with pay until the preliminary hearing on the criminal charges was completed.

4. On May 15, 1972, the district justice found that there was a prima facie case established on both charges against the defendant and ordered that he be bound over to the next session of criminal court in Northampton county.

5. By letter dated May 22, 1972, the Appellant agreed with the school district that he would continue his present capacity until that school year ended. If the criminal case were still pending against him next school year, he agreed to take a leave of absence without pay until the case was concluded. The Appellant was subsequently indicted for maliciously soliciting and enticing another person to commit sodomy and for corrupting the morals of a minor. He was later convicted for the crime of *assault* and solicitation to commit sodomy and for corrupting the morals of a minor, as charged by the trial judge.

6. In December, 1973, the school district informed the Appellant through his counsel that it wished to terminate its relationship with him because of his conviction. This was followed with a letter dated January 14, 1974 from the district solicitor inquiring if the Appellant was appealing his conviction. The Appellant did take such an appeal.

7. By letter dated March 21, 1974, to Mr. Albert Lerch, Acting Superintendent of the Northampton Area School District, the Appellant requested reinstatement as a teacher. By return letter Mr. Lerch promised the Appellant that his request would be conveyed to the school board at a special committee meeting.

8. A notice of charges dated July 17, 1974, signed by Mr. Ralph McCandless, Jr., Chairman of the Northampton Area School Board, attested to by the Secretary, was sent to the Appellant and received by him on July 18, 1974. The notice of charges stated that a hearing would be held on August 7, 1974 at which time the school board would determine whether or not there exists a valid cause for termination of the Appellant's contract as a professional employee on the basis of immorality. The charge of immorality was based on the incident of April 8, 1972 involving David.

9. The hearing scheduled for August 7th was continued until September 4, 1974. Only seven school board directors were present for the hearing. Findings of fact and conclusions were prepared after the hearing was completed and the transcript had been prepared. At its October 25, 1974 meeting, the Board of School Directors of the Northampton Area School District voted 7-2 to terminate the professional employee contract of the Appellant on the grounds of immorality and to adopt the findings of fact and conclusions of law as part of the resolution of dismissal. The two directors who were not present at the hearing voted in favor of the Appellant's dismissal. The minutes of the board meeting note that these directors were asked prior to the vote by the solicitor if they had received the stenographic record of the proceedings of the hearing and that both answered in the affirmative. The Appellant received written notification of the board's

decision on October 31, 1974.

10. On November 25, 1974, the Appellant's petition of appeal was received in the Office of the Secretary of Education. A hearing was scheduled for December 20, 1974. However, at the request of both parties, it was agreed that instead of a hearing, each party would submit a brief.

11. On December 11, 1974 the Superior Court of Pennsylvania reversed the Appellant's conviction and ordered that a new trial be granted on all charges. The Superior Court reversed the Appellant's conviction because he was indicted for "*maliciously soliciting and enticing another person to commit sodomy*" but in the trial judge's charge to the jury at the conclusion of the trial, the judge charged on the crime of "*assault and solicitation to commit sodomy*". The Appellant was then convicted of the crime as charged by the judge and later sentenced for it. The Superior Court expressed its concern that a person could be indicted for one offense and then be convicted of an entirely different offense. The Appellant's re-trial is scheduled for some time in the Fall of 1975.

### DISCUSSION

In his petition of appeal, the Appellant claims that although the vote to dismiss him was 7-2, the school board failed to come up with the necessary two-thirds majority in favor of dismissal required by Section 1129 of the School Code, 24 P.S. §11-1129. The Appellant contends that two of the votes for dismissal should be disallowed because the school board directors casting those votes did not attend the hearing. Thus, according to the Appellant, the vote against him should be 5-2, which is one less than the necessary two-thirds required to sustain the dismissal.

The issue raised by the Appellant is important. In previous teacher tenure appeals we have ruled that a director may only vote if he or she has attended substantially all of the hearing, or hearings, held in the dismissal action. This is the first time we have been asked to determine the legitimacy of the vote of a director who missed the hearing but reviewed the transcript. A recent decision by Commonwealth Court indicates that such a vote is valid. In the Case of *Acitelli v. Westmont Hilltop School District*, 325 A. 2d 490 (1974), a temporary professional employee was terminated after his second school year of service because of an unsatisfactory rating. The employee requested a hearing under the Local Agency Law and Section 508 of the School Code. After two hearing sessions, the school board voted 6-0 to uphold the termination of the employee's employment. Only three of the six voting members of the board actually attended both hearing sessions. One member did not attend either session. In upholding the school board's action, Commonwealth Court held as follows:

"Moreover, Acitelli took full opportunity to testify, to present witnesses and to cross-examine opposing witnesses, the transcript was made available for all parties to review after the hearings were concluded. Neither due process nor the applicable statutes impel those who finally vote on the status of a teacher to have had direct aural reception of all the evidence. *Foley Brothers v. Commonwealth*, 400 Pa. 584, 163 A. 2d 80 (1960). Absent evidence to the contrary, the recording of the board members' votes indicate that they gave full consideration to the testimony presented. *Foley Brothers v. Commonwealth*, supra. And, there being no evidence to the contrary here, it must be presumed that six board members, who voted on the appellant's dismissal, did consider the evidence presented whether or not all were present at all of the sessions held. And, of course, it did constitute both quorum and a majority. We are satisfied, therefore, that no violation of appellant's statutory or constitutional rights resulted because of the composition of the Board at the time of the final adjudication." *Acitelli v. Westmont Hilltop School District*, 325 A. 2d 490, 494-95.

In *Foley Brothers v. Commonwealth*, 400 Pa. 584, 163 A. 2d 80 (1960) the Pennsylvania Supreme Court reviewed the decision of the Commonwealth's Board of Arbitration of Claims in a case where twenty-one hearing sessions were held. After the first eleven sessions were completed, one of the three board members died; his replacement was present at the last six hearings and participated in the decision. In upholding the Board's action, the Supreme Court ruled as follows:

"Finally, the record shows a quorum of at least two arbitrators present at all sessions, and the signatures of all three of the decision of the award. The board's power was 'to hear and determine' After giving 'consideration' to the evidence presented. *We do not believe that this requires physical aural reception of every word spoken. . . .* It is obviously advisable, when the legislative command is to hear and determine, that those who decide should hear substantially all of the testimony, except where the delegation of the hearing power to a master or auditor is proper. *But the important thing is that they who decide must consider all of the evidence. . . .*" *Foley Brothers, Inc. v. Commonwealth*, 163 A. 2d 80 at 84-85. (Emphasis added).

The Court further held in *Foley* that the signatures of all three arbitrators to the board's decision is a guarantee, absent evidence to the contrary, that they gave full consideration to the case, *Foley Brothers v. Commonwealth*, supra, 163 A. 2d 80, 85.

Section 1127 of the School Code states the procedures that are to be followed *before* and during the hearing; it says nothing about how many board members must be present. Section 1129 of the School Code specifies the procedures to be followed *after* the hearing. That provision provides in part:

"After fully hearing the charges or complaints and hearing all witnesses produced by the board and the person against whom the charges are pending and after full, impartial and unbiased consideration thereof, the board of school directors shall by a two-thirds vote of all the members thereof, to be recorded by roll call, determine whether the evidence substantiates such charges and complaints, and if so determined shall discharge such professional employe. If less than two-thirds of all of the members of the board vote in favor of discharge, the professional employe shall be retained and the complaint shall be dismissed." 24 P.S. § 11-1129.

Section 1129 of the School Code is in substantially the same form as it originally appeared when adopted as part of the Teacher Tenure Act of 1937. The purpose of the Teacher Tenure Act has been explained by our courts on many occasions. In the case of *Swick v. School District of Borough of Tarentum*, 14 A. 2d 898, the Pennsylvania Superior Court stated:

"Our courts fully recognized that the purpose of the Teacher Tenure Act of 1937 was to insure a competent and efficient school system by preventing dismissal of capable and competent professional employees without just cause, and to insure them continuous employment whenever reasonably possible, and that the purpose of the procedure described by the Act for the dismissal of a professional employee is to prevent arbitrary action by the board, to afford a fair hearing to the professional employee before dismissal, *and to provide for full, impartial, and unbiased consideration by the board of testimony produced.* See Teacher Tenure Act cases, supra, 329 Pa. 213, 231, 197 A. 344, 355; *Stribert v. School District of the City of York*, Pa. Sup., 14 A. 2d 303; *Swink Case*, 132

Pa. Super. 107, 13, 200 A. 200." *Swick v. School District of Borough of Tarantum*, 14 A. 2d 898, 900. (Emphasis added).

The Superior Court further stated:

"It is true that the Teacher Tenure Act of 1937 places emphatic limitations on the removal of professional employees of school districts, but it is not to be construed so as to constitute merely an obstruction to the consideration of charges and the removal of professional employees for proper cause. The Act discloses no such legislative intent." *Swick*, supra, 14 A. 2d 898, 902.

We note that there is nothing in Section 1129 limiting those voting to those who were present at the hearing. The only requirement an individual school board director must meet to be eligible to vote is to give "full, impartial and unbiased consideration" to the evidence presented at the hearing. Obviously, if the vote is taken before the transcript is prepared, those voting must be limited to those present at the hearing because the others could not give consideration to evidence they had no opportunity to review. It is our understanding of Section 1129 that a school board director who reviews the transcript and exhibits of a hearing which he or she missed can vote on whether or not to dismiss a professional employee. The best procedure is to be present at the hearing; however, as *Acitelli*, *Foley Brothers*, and other cases point out, direct aural reception of the evidence is merely one approved way to consider the testimony, reviewing the transcript is another, *Fleming v. Commonwealth of Pennsylvania, State Civil Service Commission*, 319 A. 2d 185 (1974); *Seigle v. Commonwealth of Pennsylvania, State Civil Service Commission*, 305 A. 2d 736, 9 Pa. Comm. 256 (1973); and *Smith v. Commonwealth State Horse Racing Commission*, 333 A. 2d 798 (1975)<sup>1</sup>

We do not believe that the Appellant was denied a "fair hearing" because two of the nine school board directors who voted on the charges were not present at the hearing. At that hearing the Appellant had the opportunity to cross-examine all witnesses that appeared against him and to testify and present any evidence on his behalf. The record in this case clearly indicates that the two directors who did not attend the hearing reviewed the transcript of the proceedings.

We find that the board's decision to dismiss the Appellant on the grounds of immorality is supported by substantial evidence present on the record. The student testified about the incident between the Appellant and himself. Persons who saw the student immediately after the incident were also present to testify as to his demeanor and behavior. In their testimony they noted that he was extremely upset and that he wanted to go straight to the police and bring charges against the Appellant. The Appellant presented a different version of the events that occurred on the night of May 8, 1972. However, in its conclusions, the board stated it chose to believe the student's testimony, not the Appellant's. We find that there was substantial evidence present on the record to support the board's conclusion.

The Appellant further contends that he did not receive a fair hearing because the board was made aware during the hearing of his conviction on criminal charges arising out of the same incident. We find that the Appellant's objections on this point are without merit. The criminal conviction was raised by the Appellant during the examination of one of the school board's witnesses. The Board already had knowledge of the criminal matter because the Appellant has requested a leave of absence because of the criminal proceedings. It is clear from the record that the board's decision was not based on the Appellant's conviction on criminal charges; it was based on the evidence presented at the hearing.

Accordingly, we make the following

#### ORDER

AND NOW, this 11th day of July, 1975, it is hereby Ordered and Decreed that the Appeal of Alvin Hoffman be and hereby is dismissed.