

in his notebook for summer school. These facts, in and of themselves, would justify Mr. Boehm's dismissal. There are additional facts which support the school board's decision.

Mr. Boehm contended in his statement to Mr. Worman that he could not deposit the money in the savings account until he obtained Mr. Ray's permission and that he did not deposit the funds on June 29, 1973 because he had not received that permission. However, Mr. Ray testified that he had never required Mr. Boehm to obtain his permission to deposit funds into the savings account. He also testified that he met with Mr. Boehm sometime in late June, on or before the 29th, at which time Mr. Boehm mentioned he had the funds to be deposited.

We feel that if Mr. Boehm had deposited the funds in the Pittsburgh National Bank, he would have been extremely adamant, when the discrepancy was discovered, that the bank had made a mistake. However, in his conversations with Mr. Worman and Mr. Ray, Mr. Boehm did not blame the bank. He merely indicated he did not know what he had done with the money.

We reject Mr. Boehm's contention that the passbook had been taken from the school vault and used to withdraw the missing funds. In order to accept this contention, we would have to believe that the thief withdrew the exact amount that Mr. Boehm was supposed to have deposited in June, instead of withdrawing all or a substantial part of the \$5,900 in the account.

Accordingly, we make the following:

ORDER

AND NOW, this 20th day of July, 1976, it is hereby Ordered and Decreed that the appeal of Walter A. Boehm be dismissed and that the decision of the Board of Education of the Pittsburgh School District dismissing him as a professional employe be sustained.

* * * *

Appeal of James W. McDonald from a decision of the Board of School Directors of the Bellefonte Area School District, Centre County, Pennsylvania

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

No. 252

OPINION

John C. Pittenger
Secretary of Education

James W. McDonald, Appellant herein, has appealed from a decision of the Bellefonte Area School District terminating his services as an elementary guidance counselor.

FINDINGS OF FACT

1. At the February 19, 1974 board meeting, the board of school directors elected Appellant to the position of elementary guidance counselor.
2. The board resolution stated that Appellant was elected "for the remainder of the 1973-74 school term."
3. In a letter dated February 20, 1974, K. Frederick Mauger, Superintendent of Bellefonte Area Schools, notified Appellant that he was elected as guidance counselor in the Bellefonte Area Elementary Schools for the remainder of the 1973-74 school year.
4. On March 18, 1974, Appellant signed the standard form of contract provided for in Section 1121 of the Public School Code of 1949, P.L. 30, as amended, 24 P.S. Section 11-1121.

5. The professional employe contract contained one significant change from the standard form contract. Below the final sentence in the contract the following language was added: "Prorated on the basis of 202 days for the remainder of the 1973-74 school term."
6. In a conversation in June 1974 with the Superintendent, Appellant was informed that he had signed a contract that expired at the end of the 1973-74 school year.
7. By letter dated June 18, 1974, to the Superintendent of the School District, Appellant expressed his belief that he had signed the standard form contract for a professional employe. However, pursuant to his conversation with the Superintendent, Appellant reapplied for his original position of elementary counselor and also applied for the positions of secondary education counselor, secondary math teacher and elementary teacher.
8. By letter dated July 17, 1974, the Superintendent of the School District informed Appellant that his elementary guidance position in the Bellefonte Elementary Schools would be filled by the senior member of the existing guidance staff. This letter also stated that there were no openings in Appellant's field of certification.
9. By letter dated September 19, 1974, Appellant informed the Superintendent of the Bellefonte School District that his legal counsel had informed him that as a professional employe he was entitled to a hearing and a detailed written statement of the charges before dismissal.
10. By letter dated September 26, 1974, Appellant wrote to the President of the Bellefonte Board of School Directors requesting a hearing on the subject of his dismissal.
11. By letter dated October 11, 1974, the solicitor of the Bellefonte Area School Board advised Appellant that since he was elected for the balance of the 1973-74 school term, there was no necessity for a statement of charges. The letter also informed Appellant that his position had been filled by another person by virtue of a new arrangement of personnel. The board offered to hear Appellant's position.
12. Appellant satisfactorily completed two years of service at Apollo Ridge School District from 1971 to 1973. His attainment of tenure status was recorded by the school board on June 7, 1973. His position as elementary guidance counselor was abolished June 13, 1973, and Appellant was suspended.
13. The elementary guidance position at the Bellefonte Area School District that Appellant filled had been vacant for approximately a year and a half.
14. Appellant's contract was terminated; he is not considered to be a suspended professional employe by the Bellefonte School District.
15. The Appellant's petition of appeal was received in the Office of the Secretary of Education on January 10, 1975. A hearing on appeal was held on February 10, 1975.

DISCUSSION

Appellant was dismissed from his position as elementary guidance counselor without a statement of charges and without a hearing. His rights upon termination are controlled by his teacher classification defined in Section 1101 of the Public School Code of 1949, P.L. 30, as amended, 24 P.S. Section 11-1101. Three classifications are set forth in Section 1101: (1) professional employes, (2) temporary professional employes, and (3) substitutes. Under Section 1127 of the Public School Code, 24 P.S. Section 11-1127, only the classification of "*professional employe*" is entitled to a detailed written statement of the charges upon which his or her proposed dismissal is based and a hearing before the school board. Therefore, the key to resolving whether the school board's action of dismissal violated Appellant's rights under Section 1127 is a determination of Appellant's teacher classification.

A professional employe is defined in Section 1101 of the School Code, which provides in relevant part:

"(1) The term 'professional employe' shall include those who are certificated as teachers,...and school counselors." 24 P.S. Section 11-1101(1)

If the Appellant is to prevail in his contention that he is a professional employe, he must show that he is a teacher or school counselor. See *Rhee v. Allegheny Intermediate Unit No. 3*, 11 Pa. Commonwealth Court 394 (1974); *Appeal of Spano*, 439 Pa. 256, 267 A.2d 848 (1970); *Elias v. Board of School Directors*, 421 Pa. 260, 218 A.2d 738 (1966).

The position of elementary guidance clearly falls within the class of "school counselors." In addition, the Department of Education, which has the responsibility for "designation of professional titles for personnel" under 22 Pa. Code Section 49.13(b)(2), has designated the title "elementary school guidance counselor" to fall within the category of "school counselor." See *Policies, Procedures and Standards for Certification of Professional School Personnel*. Pennsylvania Department of Education (1970). The Department's authority to designate a professional title and establish standards for certification of that designation is determinative of whether the position is accorded professional status under Section 1101(1) of the School Code. *Charleroi Area School District v. Commonwealth, Secretary of Education*, 18 Pa. Commonwealth Court 121, 334 A.2d 785 (1975). Therefore, the position of elementary guidance counselor has professional employe status.

Since the position is one in which an individual is a professional employe, Appellant must be classified as either a "substitute" or "temporary professional employe" if he is to be denied the rights of a professional employe. Appellant was not a substitute as defined in Section 1101(2) of the School Code, 24 P.S. Section 1101(2). That section mandates that a substitute is employed to perform the duties of a professional or temporary professional during the period of time when that individual is absent. Appellant was not filling a vacancy that resulted from the absence of another employe. The position he occupied had been vacant for approximately a year and a half; no one was returning to the vacancy. A vacancy in this sense is not occupied by a substitute. *Love v. School District of Redstone Township*, 375 Pa. 200, 100 A.2d 55 (1953).

The argument is finally reduced to whether Appellant was a "temporary professional employe." The school district contends that because Appellant was employed to perform for a limited period of time, he is a temporary professional employe according to the language of Section 1101(3) of the School Code:

"The term 'temporary professional employe' shall mean any individual who has been employed to perform, for a limited period of time, the duties of a newly created position or of a regular professional employe whose services have been terminated by death, resignation, suspension, or removal." 24 P.S. Section 11-1101(3)

The Appellee school district has ignored Section 1108 of the Public School Code, which further defines the term "temporary professional employe." Section 1108(b) provides in relevant part:

"No professional employe who has attained tenure status in *any* school district of this Commonwealth shall thereafter be required to serve as a temporary professional employe before being tendered such a contract when employed by *any other part* of the public school system of the Commonwealth." 24 P.S. Section 11-1108(b).

Once a teacher has earned professional employe status, he is a professional employe for ever after, even though he interrupts his teaching position in one Pennsylvania school district and moves to another Pennsylvania school district.

Appellee school district does not contest that Appellant satisfactorily completed two years of service as elementary school guidance counselor and acquired tenure status at Apollo Ridge

School District. Because Appellant has attained tenure status, the school board may not require him to serve as a "temporary professional employe."

The situation in this case is analogous to the facts in *Sakal v. The School District of Sto-Rox*, Pa. Commonwealth Court _____, 339 A.2d 896 (1975). The Appellant in *Sakal* had acquired tenure status prior to being elected to the untenured position of Superintendent. When he was not reelected to the superintendency, he was elected to the professional employe position of principal. The Board resolution electing him as principal labeled his position as assistant elementary principal for a limited period of one year. However, he signed the standard form professional employe contract set forth in Section 1121 of the School Code, 24 P.S. Section 11-1121. The Commonwealth Court concluded that if the resolution prevailed, "...all that every school board needs to do to emasculate tenure is to pass a resolution hiring a professional employe for only one year and then execute the standard form of contract." *Sakal v. The School District of Sto-Rox*, Pa. Commonwealth Court _____ 339 A.2d 896, 898 (1975).

In the instant case the board resolution stated that Appellant was elected "for the remainder of the 1973-74 school term." In addition, the standard form contract of Section 1121 was altered by including a final sentence: "Prorated on the basis of 202 days for the remainder of the 1973-74 school term." Following the logic of the *Sakal* decision, a school board cannot emasculate tenure by passing a resolution and altering the standard form contract to hire the professional employe for a limited duration.

Appellee school district has attempted to create a fourth classification of teacher, i.e., professional employe hired for a limited period of time to fill the position vacated by a professional employe. If this new classification were permitted, the Appellant would waive his rights under Section 1127 of the School Code, 24 P.S. Section 11-1127, in exchange for a contract of limited duration. Such a waiver violates Section 1121 of the School Code, which provides:

"This contract is subject to the provisions of the 'Public School Code of 1949' and the amendments thereto.

"AND IT IS FURTHER AGREED by the parties hereto that none of the provisions of this act may be waived either orally or in writing,...." 24 P.S. Section 11-1121.

Thus, the board action including the "remainder provision" in Appellant's contract was inconsistent with the above mandate in Section 1121. Such an action may not be used to deny Appellant his rights under the professional employe contract that he signed. See *Sakal v. The School District of Sto-Rox*, Pa. Commonwealth Court _____, 339 A.2d 896 (1975); *Mullen v. DuBois Area School District*, 436 Pa. 211, 259 A.2d 877 (1969).

Appellant's contract rights include the right to a hearing and statement of charges preceding dismissal. These procedures required by Section 1127 of the School Code were not complied with; therefore, the Appellant must be reinstated, *In Re Swink*, 200 A. 200, 132 Pa. Superior 107 (1938).

ORDER

AND NOW, to wit, this 14th day of July, 1976, it is Ordered and Decreed that the Appeal of James W. McDonald be and is hereby sustained and the Bellefonte Area School District is hereby directed to reinstate James W. McDonald as a professional employe, without loss of pay.