

Under *Narducci and Sakal*, he is not a professional employee. Once Appellant accepted the appointment to the position of administrative assistant for personnel and special services, he voluntarily relinquished his status as a professional employee and all rights pertaining thereto.

Whether or not Appellant's position is "mandated" or "nonmandated" is irrelevant to the issue at hand. Even persons serving in nonmandated positions can be professional employees. *Striebert v. Board of Directors of the School District of the City of York*, 14 A.2d 303 (1940). The Supreme Court of Pennsylvania held in *Striebert* that a person serving as "dean of girls" was a professional employee. The Court emphasized that "dean of girls" was a nonmandated position. Also, in the *Appeal of Spano*, supra, the Court held that the person serving in the nonmandated position of curriculum coordinator was a professional employee within the meaning of the School Code. The Court's concern was with Ms. Spano's job responsibilities, and not with whether or not the position was mandated or nonmandated. The Appellant, in this case, clearly was not a professional employee while serving in the position of administrative assistant for personnel and special services.

The Chichester Area School Board asked that the appeal be quashed because the Appellant failed to file his petition of appeal within the Secretary of Education's Office within the statutorily mandated thirty day period as provided in Section 1131 of the Public School Code, 24 P.S. Section 11-1131. We find that it is unnecessary to rule on the motion since the Secretary of Education does not have jurisdiction over this case.

An employee of a school district who is not a professional employee has the right to challenge his dismissal by recourse to the provisions of the Local Agency Law. (53 P.S. Section 11301 et seq.) The Local Agency Law gives a person the right to a hearing before the school board and an appeal to the Common Pleas Court to have the Board's action reviewed.

As the Appellant is not a professional employee, the Secretary of Education lacks jurisdiction to accept this appeal. Accordingly, we make the following:

ORDER

AND NOW, this 27th day of January, 1976, it is Ordered and Decreed that the Appeal of Anthony E. Fiorenza be dismissed for lack of jurisdiction.

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Appeal of Elizabeth Parsons from a decision of the Board of School Directors of the Avon Grove School District, Chester County, Pennsylvania

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

No. 278

OPINION

John C. Pittenger
Secretary of Education

Elizabeth Parsons, Appellant herein, has appealed the termination of her employment as teacher of perceptual development for the Avon-Grove School District.

FINDINGS OF FACT

1. The Appellant was employed by the Avon-Grove School District in September 1956 as a full-time health and physical education teacher and was issued a temporary professional employee's contract.
2. In January 1958 the Appellant resigned her position to take a maternity leave.

3. The Appellant was re-employed by the Avon-Grove School District in September 1966 as a part-time (2 days per week) physical education teacher.
4. In September 1970, the Appellant was notified by Mr. Engle, the Superintendent of Avon-Grove School District and Mr. Coffman, the elementary school principal, that her assignment was changed to teaching a new program in perceptual development.
5. There is no Department of Education certification required to teach perceptual development.
6. From September 1970 to September 1972, the Appellant taught one day per week in the Kemblesville Elementary School, one day per week in the Avon-Grove Elementary school and spent one day at home to plan her lessons, as she was instructed to do.
7. As a part of this specialized instruction, the Appellant taught small groups of students as well as a full classroom. The Appellant maintained a regular schedule of instruction for each student, and she was expected to plan lessons and evaluate student progress.
8. The Appellant's duties at these schools also included testing children in three areas of potential perceptual difficulty: gross motor, visual and auditory responsiveness.
9. In September 1972, the Appellant was notified by her supervisor that her schedule would be changed. She would spend three days per week (115 school days) solely at the Avon-Grove Elementary school. There would be no planning day at home.
10. This schedule continued until September 1974 when the Appellant returned to a modified two day per week schedule through December 1974. From January 1975 to June 1975, the Appellant's schedule in school varied between three to five days per week at the Avon-Grove Elementary school, although the Appellant spent a total of 115 days at school this year.
11. Though the Appellant was observed by her supervisors she was never rated from September 1970 through June 1975.
12. The perceptual development program was funded by money from the federal government through Title I Elementary and Secondary Education Act grants.
13. The Appellant never received a professional employee contract nor was she paid on the scale of other teachers in the district.
14. On July 21, 1975, the Appellant was notified by letter that her job was terminated.
15. By letter dated July 31, 1975, the Appellant, by her attorney, requested that a school board hearing be set to determine the propriety of terminating the Appellant's employment.
16. By letter dated August 21, 1975, the Avon-Grove School District, by its attorney, offered two dates, September 3, 1975 or October 1, 1975 as possible times for the hearing.
17. By letter dated October 3, 1975, the Avon-Grove School District, by its attorney, reversed its position and decided not to hold a hearing on the Appellant's termination, contending that the Appellant is not a professional employee.
18. On October 31, 1975, the Appellant's Petition of Appeal was filed in the Office of the Secretary of Education.
19. Pursuant to notice, a hearing on the appeal was held on November 25, 1975.

DISCUSSION

The Appellant contends that her employment with the Avon-Grove School District was improperly terminated. The Appellant claims she is a professional employee and is thus entitled to a hearing under Section 1127 of the School Code which provides, *inter alia*:

"Before any professional employee having attained a status of permanent tenure is dismissed by the board of school directors, such board of school directors shall furnish such professional employee with a detailed written statement of the charges upon which his or her proposed dismissal is based and shall conduct a hearing."
(24 P.S. Section 11-1127)

The first question that must be answered is: Does the Secretary of Education have jurisdiction over this appeal? The Public School Code, 24 P.S. Section 11-1131 permits the Secretary of Education to hear appeals from professional employees (Act of March 10, 1949, P.L. 30, Article XI, Section 1131). No other class of employees may appeal to the Secretary of Education.

A professional employee is defined in Section 1101 of the School Code to include:

".... Those who are certified as teachers, supervisors, principals, assistant principals, vice principals, directors of vocational education, dental hygenists, visiting teachers, home and school visitors, school counselors, child nutrition program specialist, school librarians, school secretaries, the selection of whom is on the basis of merit as determined by eligibility lists and school nurses." (24 P.S. Section 11-1101(1))

If the Appellant is to prevail in her contention that she is a professional employee, she must show that she is within one of these classes. (*Appeal of Spano*, 439 Pa. 256, 267 A.2d 848, 1970; *Rhee v. Allegheny Intermediate Unit No. 3*, 11 Pa. Comwlth. Ct., 394, 1974).

The focal question on this appeal is did the Appellant meet the requirements of "teacher" as defined in Section 11-1141 of the School Code. That section provides, in pertinent part:

"All professional employees and temporary professional employees who devote fifty percentum (50%) of their time, or more, to teaching or other direct educational activities..." (24 P.S. Section 11-1141)

shall be deemed a teacher.

In *Spano*, supra, the Pennsylvania Supreme Court held that one who qualifies as a teacher under Section 1141 automatically qualifies as a professional employee under Section 1101(1).

It was undisputed that the Appellant was a full-time, temporary professional employee from September 1956 to January 1958. For that one and one-half years, the Appellant served as a physical education and health teacher. In order to become a tenured professional employee, one must serve satisfactorily in the same school district for a period of two years in one's area of certification. (See 24 P.S. Section 11-1121). Nowhere in the school laws of the Commonwealth of Pennsylvania does it mandate that this two years of service be consecutive.

The Appellant was rehired by the school district without a contract in September 1966 as a part-time physical education teacher. For the years 1966 to 1970, the Appellant did not devote 50% of her time to teaching or direct educational activities because she spent only two days per week in school. This period of time, then, did not contribute to her satisfactory completion of two years of service to the school district.

In September 1970, the Appellant was informed by her supervisors that her duties would be changed. She would teach two days per week a new federally-funded program in perceptual development. She followed this schedule until September 1972.

For the school years 1972-73, 1973-74 and 1974-75 the Appellant was required to be in the Avon-Grove Elementary school a total of 115 days per year, or three days per week. She filed her schedule with her supervisors and they were on notice as to the Appellant's schedule. Thus, after spending two years of service (1972-73, 1973-74) in the Avon-Grove School District devoting more than 50% of her time in direct educational activities, the Appellant became a professional employee. At this point in time, the school district was obligated to issue a professional employee's contract to the Appellant. The fact that the district did not, however, has no bearing on the Appellant's status as a bona fide professional employee. *Mullen v. Dubois Area School District*, 259 A.2d 877, 436 Pa. 211 (1969). The testimony before the school district reveals that the minutes of the school board since March 20, 1956 (at which time the board hired the Appellant under contract as a temporary professional employee) contain no other references to

the re-hiring of the Appellant. However, *Mullen, supra*, p. 880 addresses this issue quite specifically when it states that the expression of the school board members approval "can be evidenced in other ways than by a formal vote required in the minutes". A new program in perceptual development, though funded by federal money, would be approved by the school board. Pursuant to this acceptance, a staff must be hired to fulfill the program. The Appellant was then hired. It was then obligatory on the part of the superintendent (or other staff personnel) to secure the board's approval. The court stated in *Mullen, supra*, at p. 880:

"Our teachers ought not have the burden of being required to know all the statutes relative to their employment. Neither should they have to carefully examine the minutes of their hiring board in order to ascertain that each and every requirement was complied with. The burden of complying with the statute rests with the school board, should they fail to conduct business as required, the consequences ought to lie at their door, not at the door of their victims."

The Appellant is a professional employee and is entitled to all the rights and benefits arising from that position. Thus, the Appellant is entitled to a hearing before the school board prior to her termination.

The school district alleges that the Appellant did not complete two years of satisfactory service under her temporary professional contract because her maternity leave severed her contract. It is true that Appellant's contract did end when she submitted her resignation due to her pregnancy.

However, the school district also alleges that the Appellant worked solely on a part-time basis and devoted less than half a normal work week to teaching or direct educational activities. This contention is without merit. While we support the school district in their position that Appellant worked only part-time from 1966-1970 and in fact from 1970-1972, there is ample evidence to support the Appellant's contention that during the school years 1972-73, 1973-74 and 1974-75, the Appellant spent a total of 115 days out of 180 days in the classroom. In the Appeal of Jo Ellen Lipperini, cited in the Appeal of Carol Bittner, Teacher Tenure Appeal 234 (1975), the Secretary said:

"In this case, the Appellant did work on a regular basis as a reading teacher for more than half of a normal work week and, in addition, took substitute and homebound teaching assignments."
(Bittner, at pp. 6-7)

The Appellant kept her personal schedule of her days at school and also filed a copy of this schedule with the principal. She spent three days per week in school and was thus entitled to professional employee status.

The school district also alleges that the Appellant was not functioning as a professional employee while teaching perceptual development. We find this contention to be without merit. There is no Department of Education certificate for the teaching of this speciality. The Appellant is certified to teach health, recreation and physical education. The new program was designed to foster the growth of learning and reading readiness through gross motor, auditory and visual patterning. The Appellant had to set up a teaching program not only for individual students with problems, but was involved in teaching a full classroom of students. In the classroom, the Appellant was totally in charge of the program - the regular teacher was merely an observer and assistant. It seems strange that the school district thought in 1970 that the Appellant was qualified to teach this program and now determines that she is unqualified to teach it and should be considered a part-time aide. Again, we feel this contention unsupported by the evidence.

Finally, the school district contends that the Appellant's appeal should be barred by laches because (1) she failed to request a standard professional employee contract in 1968 or any time after that; (2) she failed to request a part-time contract; (3) she accepted a lower salary scale of those generally deemed professional employees, and (4) she failed to demand a professional listing by the District Superintendent.

There was ample evidence in the record that the Appellant was concerned about her salary scale and had indeed tried to be paid on schedule. She was refused in this request out of hand. Further, the school district's own witness, Harry B. Gorton, Superintendent of the District, testified that he had been receiving calls (and knew of others) from the Department of Education asking why the Appellant was not in the list of professional employees submitted to the Department. Accordingly, we feel that the Appellant made consistent and timely efforts to ascertain and improve her professional status. Her appeal, then, is not barred by laches.

Therefore, it is our opinion that the decision of the school board to terminate the Appellant's position without a hearing is in contravention to Section 1127 of the School Laws of Pennsylvania and violated the Appellant's rights as a professional employee.

Accordingly, we make the following:

ORDER

AND NOW, this 16th day of March, 1976, it is hereby Ordered and Decreed that the Appeal of Elizabeth Parsons from the decision of the Board of School Directors of the Avon-Grove School District be and is hereby sustained and that the school district is hereby ordered to forthwith reinstate the Appellant without loss of pay.

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Appeal of Richard C. Baker, a
Professional Employee, from a
Decision of the Board of School Directors of
the School District of the City of Allentown,
Lehigh County, Pennsylvania

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

No. 279

OPINION

John C. Pittenger
Secretary of Education

Richard C. Baker, Appellant herein, has appealed from the decision of the Board of Directors of the School District of the City of Allentown, terminating his contract and dismissing him as a professional employee on the grounds of incompetency and immorality.

FINDINGS OF FACT

1. The Appellant is a professional employee. He began his employment in the School District of the City of Allentown in September of 1961 as a teacher. During approximately ten years of Appellant's employment with the school district, he also served as head wrestling coach but was not so engaged at the time of his termination. During the year immediately prior to Appellant's termination, he was a teacher of health and physical education. Appellant held his position of teacher until his contract was terminated in October, 1975.
2. During the autumn of 1974, Appellant was indicted for violation of Title 18 U.S. Code, Section 1955 and Section 2 and Title 18 P.S. Section 4607. The indictment stated as follows: