

(1945); *Appeal of Deane*, 26 Northumberland L.J. 17 (1956). Neglect to teach encompasses more than not providing instruction or a full instructional program. It includes the failure to perform those other duties of a teacher necessary if instruction is to be effective. As is clear from the above, the Appellant has failed to implement the contract system and to work as part of the teaching team. Accordingly, we conclude that the charge of persistent negligence is sustained.

Counsel for the Appellant raises a number of procedural issues that can be disposed of summarily. First, Appellant charges that the Intermediate Unit Board of Directors cannot dismiss him because, having brought the charges, it cannot serve as an impartial judge. The United States Supreme Court in *Withrow v. Larkin*, ___ U.S. ___, 43 L. Ed. 2d 712 (April 16, 1975), clearly rejected this contention. Second, Appellant's counsel contends that the same two-thirds of the school board must attend every hearing in order to be eligible to vote for the dismissal. In *Acitelli v. Westmont Hilltop School District*, 15 Cmwlth. Ct. 214, 325 A.2d 490, it was held if a quorum is present at every hearing and those voting on the dismissal give full consideration to the testimony presented (i.e. by reading the transcript of any meeting he or she may have missed), there is no violation of Appellant's statutory or constitutional due process rights.

Finally, Appellant's counsel contends that irrelevant materials and hearsay testimony were permitted into the record to color the minds of the Board of School Directors so that they could not make an impartial judgment. After careful review of the record, we find this contention to be without merit. The Board had ample factual evidence, including direct testimony involving numerous incident reports on which to base its decision to dismiss the Appellant.

Thus, it is our opinion that the decision of the School Board to dismiss on the charge of incompetency must fail but that the dismissal based on the grounds of persistent negligence is supported by substantial evidence in the record.

Accordingly, we make the following:

ORDER

AND NOW, this 22nd day of December, 1975, it is ordered and decreed that the Appeal of Richard Stholer from the decision of the Board of School Directors of the Berks County Intermediate Unit #14, be and is hereby dismissed, and the action of the said Board dismissing him as a professional employee is hereby sustained on the grounds of persistent negligence.

* * * *

Appeal of Alfred B. Traub, a
Professional Employee, from a
decision of the Board of School Directors of
the Garnet Valley School District.

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

No. 261

OPINION

John C. Pittenger
Secretary of Education

Alfred B. Traub, Appellant herein, has appealed from the decision of the Board of School Directors of Garnet Valley School District dismissing him on the grounds of incompetence and intemperance.

FINDINGS OF FACT

1. The Appellant is a professional employee. He has been employed continuously by the Garnet Valley School District as a mathematics teacher since 1965.

rated unsatisfactory in accordance with procedures approved by the Department of Education. Section 1123 of the School Code, 24 P.S. Section 11-1123, provides that an unsatisfactory rating will not be valid unless approved by the district superintendent or, if applicable, the executive director. The February, 1971 and the May, 1973 ratings do not comply with the first requirement; accordingly, neither rating can be used to support a dismissal for incompetency.

Before a professional employee can be dismissed because of incompetency, there must be two unsatisfactory ratings -- the first serving as a warning that improvement is essential, *Thall v. Sullivan County Joint School Board*, 410 Pa. 222, 189 A.2d 249 (1963). That first unsatisfactory rating can be an annual rating from the preceding school year, or it can be a preliminary rating made within the current school year. An anecdotal record, substantiating the rating, must be sent to the professional employee as soon as possible. The purpose of this rating scheme is designed to formulate concrete standards to judge competence and to improve the general level of teaching by drawing attention to existing deficiencies. (See *Mulhollen Appeal*, 155 Pa. Super. 587, 39 A.2d 283 (1949).

There is only one, valid unsatisfactory rating in the record, which the Appellant received during his last year of employment. Because two unsatisfactory ratings are required, the charge of incompetency must be dismissed.

The school board has also charged the Appellant with persistent negligence. For the following reasons, we uphold this charge: During the period of 1970 to 1975, the Appellant taught at three different schools within the Berks County Intermediate Unit -- the Daniel Boone School, the Twin Valley School, and finally the South Mountain School. At each successive teaching placement, Appellant was given fewer students to teach. The Appellant's supervisors notified him that his work was not satisfactory and gave him suggestions and directives to make his teaching more effective. The Appellant consistently failed to follow these directives.

In particular, the Appellant failed to follow the behavioral modification contract system used at the South Mountain School. Under this system, each student was assigned work to be completed by a specified date. Successful completion would be rewarded by giving the student free time; failure would be penalized by the loss of privilege or by confinement to a certain area. By reinforcing positive attitudes toward learning and discouraging negative attitudes, the contract system is intended to modify the student's behavior so that he or she can be returned to the regular classroom.

This system requires close monitoring by the teacher. Work assignments must be within the student's capabilities, or else the student will be faced with failure regardless of how hard he tries to complete his assignments. Discipline must be maintained, or else penalties and rewards will have little, if any, impact on changing the student's behavior.

The record shows that the Appellant was unwilling to make the effort necessary for the contract system to work. His lesson plans were incomplete and poorly planned, frequently requiring students to work beyond, not within their capabilities. He did not maintain discipline, students would wander in and out of his class or refuse to attend, but would not be punished. On one occasion, a student emptied an ashtray on the Appellant's desk; although present, the Appellant did nothing to punish the student.

The Berks County Intermediate Unit uses the team teaching concept. The team or the administration would often schedule team meetings after the students were excused for the day. The Appellant usually did not attend these meetings, contending that he did not have to work after classes were dismissed. Teachers who had a free period were required to offer their assistance to other teachers on the team. The Appellant would not do this; instead, he would read newspapers or books. He failed to help with other team chores, such as issuing report cards or setting up the movie projector.

Each teacher is expected to utilize the educational resources of the school to provide each student with a stimulating learning environment. The Appellant failed to utilize much of the scientific equipment and demonstration materials the school made available for his science students. By acting in this manner, the Appellant did not teach his students a full science program.

The failure or neglect to teach constitutes grounds for dismissal under the charge of persistent negligence, *West Mahanoy Township School District v. Kelly*, 41 A.2d 244, 156 Pa. Super. 601

2. In the Spring of 1966, the Appellant kicked a chair out from under Gregory Rowe, a student in his math class, thereby knocking him to the floor. He then struck Gregory on the arms with either his fists or feet. This action occurred without any forewarning to the student.

3. In geometry class on October 18, 1973, Walter Bell was complaining to Appellant about a question that had been marked incorrect on an examination, which had just been returned. The Appellant's attempts to explain the correct answer did not silence Walter's complaints; he accused Appellant of not teaching the material. Without a verbal warning, Appellant shoved the desk into Walter with his foot. The thrust of the desk forced Walter backwards, whereupon Appellant grabbed him by the throat in a choking manner and pinned him to the wall.

4. On October 18, 1973 during the incident with Walter Bell, Mr. Joseph Bruton was teaching in the room next to Appellant's geometry class. The doors to both classrooms were open. Mr. Bruton left his classroom to summon Appellant from his geometry class because after hearing Appellant's voice he believed that Appellant was angry. Mr. Bruton felt that by removing Appellant from the classroom situation in which he was involved, Appellant might have an opportunity to consider the situation more rationally.

5. Mrs. Mary Bell, Walter's mother, wrote a letter of complaint regarding the incident to Mr. Hoffman, the Superintendent of Schools, to the President of the School Board and to the President of the Garnet Valley Education Association, the teachers' professional organization. The school board requested that Mr. Udovich conduct an investigation of the incident.

6. Walter J. Udovich, the Principal of Garnet Valley High School, investigated the incident and prepared a memorandum, dated December 27, 1973, that outlined the events involving the incident. In that memorandum, the Principal stated that Appellant admitted to pushing Walter's desk into him and to handling him physically. The memorandum also stated that Appellant was warned that if another such incident occurred, Mr. Udovich would take appropriate action against him in keeping with school laws of Pennsylvania. Mr. Traub signed this memorandum. Mr. Udovich reported his findings to the school board. The board members requested that any repetition of a similar incident be reported to them.

7. In spite of this incident, in June 1974, the Principal rated Appellant's performance for the school year 1973-74 satisfactory. Appellant was rated satisfactory as to "personality", "emotional stability", "professional relationships", and "judgment". After June 1974, Appellant was not evaluated. No evaluation form was prepared after the December 4, 1974 incident. Consequently, Appellant's evaluation forms from 1965 to 1974 are uniformly satisfactory.

8. On December 4, 1974, Paul Carbutt and Edward Firth, ninth grade students of average size, were engaged in horseplay when they were leaving a study hall held the last period of the day. Paul shoved Eddie forward into a loose panel in the front of the auditorium. Seeing their actions, Appellant said something like, "Let me try some techniques on you," grabbed the boys around their necks in a headlock, and forced both students to a concrete floor. Appellant contends that the weight of his body on top of the students carried the boys and himself to the ground. At that point he held them pinned to the floor for a while.

9. Mr. Udovich transmitted a report of the Carbutt-Firth incident to the board. Based on facts presented to the school board, the directors at the meeting held on April 14, 1975 resolved to hold a hearing on April 30, 1975 to determine whether the contract of the Appellant should be terminated.

10. By letter dated April 15, 1975, from the President of the school board, attested to by the Secretary of the board, the Appellant was notified that a hearing to determine whether his contract was to be terminated would be conducted. The letter charged Appellant with incompetence, intemperance, and persistent negligence.

11. A hearing was held before the school board on April 30, 1975.

12. A private meeting of the school board was held on May 5, 1975, prior to a public meeting on the budget. At that meeting the board members questioned Mr. Surrick, the school solicitor, concerning substantive and procedural matters connected with the evidence presented. At the hearing before the Secretary of Education on July 18, 1975, Mr. Surrick testified that he did not remember the specific questions that had been posed or the answers given. Mr. Surrick did

remember that he had offered no opinions concerning the weight and strength of the evidence. At this meeting Mr. Surrick summarized a discussion between Appellant's counsel and himself discussing alternatives less than termination and more severe than exoneration of the Appellant's actions.

13. Prior to the public meeting on May 8, 1975, at which the vote for dismissal was held, there was a short private session. Mr. Surrick informed the board that Appellant, through his attorney, had refused alternatives other than termination or exoneration. At the public meeting on May 8, 1975, the school board voted to dismiss Appellant on the grounds of intemperance and incompetency. The vote was six in favor of termination and two against.

14. By letter dated May 9, 1975, the Appellant was informed of the board's decision.

15. The Appellant's petition of appeal was received in the Office of the Secretary of Education on May 30, 1975. A hearing on appeal was scheduled for June 30, 1975, but at the request of counsel was continued and was held on July 17, 1975.

DISCUSSION

The contract of the Appellant was terminated on two grounds, incompetence and intemperance. These charges were stated in the motion read and passed by the board at the meeting of May 8, 1975. Because the school board eliminated the charge of persistent negligence in its final motion, Appellant's contentions related to that charge are irrelevant.

Appellant contends the charge of incompetency is not sufficiently supported by the evidence. The Appellant received a satisfactory rating on form DEBE-333 for the school year 1973-74, which included the Walter Bell incident. There was no evaluation prepared after the December 4, 1974 incident with Carbutt and Firth. In his teaching career from 1965 to 1974, the Appellant's evaluation forms are uniformly satisfactory.

As is clear from Section 1123 of the Public School Code of 1949, Act of March 10, 1949, P.L. 30, as amended, 24 P.S. Section 11-1123, a professional employee cannot be dismissed for incompetency unless rated unsatisfactory in accordance with procedures approved by the Department of Education. Two unsatisfactory ratings are required before a professional employee can be dismissed for incompetency, *Appeal of Sullivan County Joint School Board*, 410 Pa. 222, 189 A.2d 249 (1963). The Appellant never received an unsatisfactory rating; therefore, the charge of incompetence cannot stand.

The rating of a teacher on the prescribed forms should not be a perfunctory task. The school district's failure to rate the Appellant's performance unsatisfactory following any of the cited incidents is in violation of the spirit and the letter of Section 1123. Although the Appellant received notice in a memorandum, dated December 27, 1973, that legal action would be taken against him following a repetition of the Walter Bell incident, his rating for the school year 1973-74 was satisfactory. This rating was totally inconsistent with the board's prior warning and would seem to indicate a withdrawal from the principal's previous position. The rating either evidences a disregard for the seriousness of the standards, regulations and forms prepared by the Department of Education or a reevaluation that the Appellant was a competent teacher. Either alternative leads to the conclusion that there is insufficient evidence to support the charge of incompetency.

Appellant complains that his due process rights have been violated by the dual role played by the solicitor in prosecuting the case and advising the school board. Section 1129 of the Public School Code states the procedures that the school board must follow after the hearing on the charges brought against a professional employee is concluded. The section provides in relevant 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 such charges or complaints have been sustained and whether the evidence substantiates such charges and complaints, and if so determined shall discharge such professional employee." 24 P.S. Section 11-1129 (Emphasis added).

At issue in the instant case is the solicitor's role following the public hearing on the Appellant's dismissal. At a private session preceding the public hearing held to vote on the subject of dismissal, the solicitor gave advice in three separate areas: (1) as to procedural questions related to dismissal, (2) as to the substance of evidence that had been offered, (3) as to an alternative remedy in the case short of dismissal but more severe than exoneration. Concerning the second area, it is important to note that Mr. Surrick refused to answer questions specifically addressed to the weight or strength of the evidence in an attempt not to advise the board as to its final determination.

In a series of recent decisions, the Pennsylvania Supreme Court and the Commonwealth Court have addressed themselves to the due process considerations involved when the same attorney functions in both an adversarial and adjudicative role. In *Horn v. Township of Hilltown*, ___ Pa. ___, 337 A.2d 858 (1975), the Pennsylvania Supreme Court held a denial of due process because of the possibility of prejudice inherent in a proceeding when the solicitor for the township represented the township before the Zoning Hearing Board, which he advised. Critical to the instant case was the court's conclusion concerning actual prejudice:

"In our opinion there need not be a showing of harm in the instant case to sustain a finding of denial of due process.

* * *

"...a governmental body charged with certain decision making functions... must avoid the appearance of possible prejudice, be it from its members or from those who advise it or represent parties before it."

The standard for the appearance of possible prejudice was further refined by the Commonwealth Court in the *Appeal of Feldman*, ___ Pa. Commonwealth Ct. ___, 346 A.2d 895 (1975). In that case, the school district's solicitor tried the case in support of the proposed action of dismissal; the Board was not advised by the solicitor at the hearing. The determinative fact of the *Feldman* case was that the attorney assisted in the board's adjudication of dismissal. This assistance was sufficient to establish the "appearance of possible prejudice" first articulated in *Horn*.

The procedural and fairness problems associated with teacher dismissals was articulated in *Brentwood Borough School District Appeal*, 439 Pa. 256, 267 A.2d 848, (1970):

"At the hearing the board plays a dual role. It acts both as prosecutor and a judge, and because of this it can never be totally unbiased."

Because of this hazard and *Feldman*, the solicitor must proceed carefully to avoid any appearance of bias.

Mr. Surrick during the hearing was cautious to avoid the taint of any prejudice. He did not advise the school board during the hearing. However, appropriate procedural safeguards were absent from the private meeting of May 5, 1975. A closed hearing where the prosecutor for the board's case advises the board concerning certain substantive and procedural evidentiary matters has the appearance of procedural unfairness. During this hearing Mr. Surrick assumed the role of advisor to the board assisting the directors in reaching a decision. In effect, the hearing had

been extended to a private session, where the defendant or his counsel could not challenge the procedural decisions that are being made.

The courts have held in a line of cases dealing with the situation where the solicitor acts in a dual role, thus creating the appearance of possible prejudice, that the appropriate remedy is to remand for further proceedings. *Horn v. Township of Hilltown*, ___ Pa. ___, 337 A.2d 858 (2975); *Pennsylvania Human Relations Commission v. Feeser*, ___ Pa. Commonwealth Ct. ___, 341 A.2d 584 (1975); *Appeal of Feldman*, ___ Pa. Commonwealth Ct. ___, 348 A.2d 895 (1975). Accordingly, the decision of the school board is reversed and we remand the case for proceedings consistent with this opinion as to the charge of intemperance.

Accordingly, we make the following:

ORDER

AND NOW, this 9th day of April, 1976, it is hereby Ordered that the decision of the Board of School Directors of the Garnet Valley School District dismissing Alfred B. Traub be reversed, and that the case be remanded to the Board for a rehearing on the charge of intemperance.

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ANTHONY J. BOVINO, Appellant

v.

The Board of School Directors of the Indiana
Area School District

Teacher Tenure Appeal No. 262

OPINION

John C. Pittenger
Secretary of Education

Anthony J. Bovino, Appellant herein, has appealed from the decision of the board of school directors of the Indiana Area School District dismissing him as a professional employe on the grounds of immorality and cruelty.

FINDINGS OF FACT

1. Anthony J. Bovino is a professional employe. Upon graduation from Indiana University of Pennsylvania in May 1970, he was hired by the Indiana Area School District as a teacher of foreign languages. He taught foreign languages at the secondary level continuously until February, 1975.
2. In late May, 1974, Dr. Robert P. Martin, superintendent of schools, asked Mr. Bovino to submit his resignation. Dr. Martin made this request because of a number of complaints he had received concerning Mr. Bovino, in particular, a complaint that Mr. Bovino was harassing a student by referring to her as "dog" or "bow wow", and using dog-like sounds when he spoke to her. Mr. Bovino refused to resign. Dr. Martin pointed out that if he had the evidence, he would seek Mr. Bovino's discharge.
3. In the middle of January, 1975, Mr. Bovino called one of his ninth grade French students a "slut". Mr. Bovino had allowed his French class, which was having a study period, to observe the chorus practice. As his class was returning to the classroom, he approached a 14 year old female student, who shall hereinafter be referred to as "Kelly", and said essentially the following: "Kelly, I could call you a word, a four-letter word that starts with an 's'". Kelly exclaimed, "What?" The Appellant responded, "Slut". This exchange was witnessed by one other student, a friend of Kelly's. Kelly, an "A" student in French, was very embarrassed by this incident.