

IN THE OFFICE OF THE SECRETARY OF EDUCATION
COMMONWEALTH OF PENNSYLVANIA

GWENDOLYN DAMIANO :
Appellant :
v : TTA No. 02-13
SCRANTON SCHOOL DISTRICT :
Appellee :

OPINION AND ORDER

Gwendolyn Damiano (“Appellant”) appeals to the Secretary of Education from the decision of the Scranton School District (the “District”) dismissing her from the position of Principal at the Robert Morris Elementary School (“RMES”).

Findings of Fact

1. Appellant was the Principal at RMES from August 2009 until April 2013. (N.T. (11/18/13) at 20-21, 27-29; Joint Exhibit 1).
2. On April 30, 2013, District administrators held a meeting with Appellant to discuss concerns they had with Appellant’s performance as Principal of RMES. (Joint Exhibit 1).
3. After the April 30th meeting, Appellant was informed to notify the RMES staff and parents that she would be leaving and to report to Isaac Tripp Elementary School the following day. (N.T. (11/18/13) at 29).
4. On May 2, 2013, Appellant was informed that she was to report to the Neil Armstrong Elementary School. (N.T. (11/18/13) at 30).
5. By letter dated May 10, 2013, District Superintendent, William King (“Superintendent King”) provided a summary of the April 30, 2013 meeting, where the following was discussed:

- a. Appellant's removal of the special education student from school grounds with the intent of deescalating him and doing so without the knowledge or permission of the parents and Appellant's supervisors;
- b. Appellant's failure to report for a scheduled administrator's meeting on April 18, 2013 or to notify her supervisors of her inability to attend the meeting following Appellant's recent one-day suspension for failing to follow PSSA Exam Security Guidelines; and
- c. Appellant's failure to be professionally prepared for a staff meeting held on April 26, 2013.

(Joint Exhibit 1).

6. The May 10, 2013 letter provided Appellant with a required "contract for continued employment" that referenced an improvement plan that was required to be successfully completed by the end of the school year. (Joint Exhibit 1).

7. The contract for continued employment was required to be signed and returned no later than May 15, 2013. (Joint Exhibit 1).

8. By letters dated June 3 and June 11, 2013, the District formally advised Appellant of pending misconduct charges. (Joint Exhibit 2, 3).

9. By letter dated July 3, 2013, the District sent Appellant a Statement of Charges and Notice of Hearing containing a list of ten charges against her and advising her that the District's Board of School Directors (the "Board") would conduct a hearing for the purpose of determining whether she should be dismissed from employment. The charges included:

- a. Deficient content and quality of required reports;
- b. Failure to submit reports;

- c. Carelessness with confidential student records;
- d. Failure to follow directives;
- e. Failure to comply with testing and record keeping directives;
- f. Inability to respond appropriately to situations;
- g. Improper release of student from class;
- h. Failure to attend meetings
- i. Repeated lateness; and
- j. Refusal to comply with Superiors' Directives.

(Joint Exhibit 4).

10. The Board held hearings regarding the Appellant's proposed dismissal from employment on August 27, 2013, September 16, 2013, September 18, 2013, November 18, 2013, and November 19, 2013.

11. Professional employes are required by statute to be rated at least annually and temporary professional employes at least twice annually. See 24 P.S. §11-1123(h)(2).

12. If a professional employe is to be dismissed based on unsatisfactory ratings the statute requires those ratings to be not less than four months apart. See 24 P.S. §11-1122.

13. Evaluating employees was among the responsibilities listed in District policy for management team members. (Exhibit Q).

14. Appellant performed annual evaluations for RMES teachers. As sources of evidence for the evaluations, Appellant used classroom observations and informal classroom visits. (N.T. (11/18/13) at 31-34, 111-112; Exhibits 1-4).

15. The 2012-2013 Pennsylvania System of School Assessment ("PSSA") Handbook for Assessment Coordinators states in pertinent part: "[a]ll paper answer and test booklets and

test tickets for online assessments must be kept in a predetermined, locked, secure storage area at both the district and school levels. Secure materials must never be left unattended or in open areas.” See *2012-2013 PSSA Handbook for Assessment Coordinators*, at 19-20.¹

16. Appellant kept the 2012-2013 PSSA material organized in her office. (N.T. (11/18/13) at 59-63).

17. Appellant and her secretary, Sarah Williams (“Williams”), had access to Appellant’s office during the school day.² Whenever they were not in the office, the door was closed and set to automatically lock. (N.T. (11/18/13) at 59, 188).

18. Appellant kept PSSA testing material in her office for the first two days of the 2013 PSSA testing. After being informed of best practices by a Pennsylvania Department of Education (“Department”) official, the PSSA testing material was relocated to a locked closet. (N.T. (11/18/13) at 59-63).

19. On or about April 25, 2013, Kevin Pail (“Pail”), RMES Emotional Support Teacher, required Appellant’s assistance with a special education student. (N.T. (9/18/13) at 46-47).

20. Appellant took the special education student for a “decompression” walk around the school property as indicated by the student’s Individualized Education Program (“IEP”). (N.T. (11/18/12) at 43, 45-47).

¹ Pursuant to section 35.173 of the General Rules of Administrative Practice and Procedure, official Notice is hereby taken of the above-referenced PSSA Handbook published by the Pennsylvania Department of Education which is attached and incorporated by reference herein. 1 Pa. Code § 35.173; *Gleeson v. State Bd. of Med.*, 900 A.2d 430, 440 (Pa.Cmwlt. 2006).

² In addition to Appellant and Ms. Williams, the RMES maintenance person had a key to Appellant’s office.

21. The student's IEP was developed at a different District school and included a provision for a quiet walk around the school.³ (Exhibit I; N.T. (11/18/13) at 42).

22. Appellant understood the student's IEP to mean that the student could walk with a teacher around the area of the school. (N.T. (11/18/13) at 45).

23. This was not the first time Appellant allowed a student's decompression walk to be off school property. District administrators were aware of this practice. (N.T. (11/18/13) at 132-133).

Discussion

Appellant's dismissal was pursuant to Section 1122 of the Public School Code, as amended, which provides in pertinent part:

[the] only valid causes for termination of a contract heretofore or hereafter entered into with a professional employee shall be immorality; incompetency; . . . intemperance; cruelty; persistent negligence in the performance of duties; willful neglect of duties; . . . persistent and willful violation of or failure to comply with school laws of this Commonwealth (including official directives and established policy of the board of directors); on the part of the professional employe.

24 P.S. §11-1122.

A tenured professional employee, such as Appellant, may only be dismissed for the reasons set forth in Section 1122 of the Public School Code. *Foderaro v. School District of Philadelphia*, 531 A.2d 570, 571 (Pa. Cmwlth. 1987), *appeal denied*, 542 A.2d 1372 (Pa. 1988). "It is thus apparent that the legislature intended to protect tenure except for the serious charges listed." *Lauer v. Millville Area School District*, 657 A.2d 119, 121 (Pa. Cmwlth. 1995), *appeal denied* 675 A.2d 1253 (Pa. 1996).

³ The IEP does not define what is meant by around the school. The behavioral support plan associated with the IEP allows a "10 minute decompression walk outside of the school with the teacher or principal." (Exhibit J).

Following a thorough review of the record, I find that there is insufficient evidence to sustain the District's dismissal of Appellant.

I. **Persistent and Willful Violation of or Failure to Comply with School Laws Including Official Directives and Established Policy of the Board of Directors; Persistent Negligence in the Performance of Duties**

The following three elements must be met to determine that a persistent and willful violation of school laws has occurred: persistency, willfulness and a violation of school law. Persistency occurs either as a series of individual incidents or one incident carried on for a substantial period of time. *Gobla v. Board of School Directors of Crestwood School District*, 414 A.2d 772 (Pa. Cmwlth. 1980). Willfulness requires the presence of intention and some power of choice. *Horton v. Jefferson County-DuBois Area Vocational Technical School*, 630 A.2d 481, 484 (Pa. Cmwlth. 1993). A violation of school laws includes a violation of a school district's rules and orders. *Sertik v. School District of Pittsburgh*, 584 A.2d 390 (Pa. Cmwlth. 1990), *appeal denied* 593 A.2d 428 (Pa. 1991).

Persistent negligence in the performance of duties is not defined in the Public School Code. However, negligence is defined "as the failure to exercise that care a reasonable person would exercise under the circumstances." *Lauer*, 657 A.2d at 121. Persistent is defined as continuing or constant, thus, "there must be sufficient continuity and repetition of negligent acts to support a charge of persistent negligence." *Id.* This can occur either as a series of individual incidents or as one incident carried on for a substantial period of time. *Strinich v. Clairton School District*, 431 A.2d 267, 271 (Pa. 1981).⁴

⁴ Part of *Strinich*, which is not relevant here, was overruled by *Belasco v. Board of Public Education of the School District of Pittsburgh*, 510 Pa. 504, 510 A.2d 337 (1986).

A. Alleged Deficient Content and Quality of Reports

On April 3, 2012, District Superintendent, William King (“Superintendent King”), issued a memorandum titled “Administrator Responsibilities/Expectations” which expressed his understanding of the duties and responsibilities of district administrators. (Exhibit A). Rating teachers was clearly required of Appellant as part of her job description. (N.T. (11/18/13) at 31; Exhibit P). The District argued that, as an administrator, Appellant was required to perform two formal observations for tenured teachers and four formal observations for non-tenured teachers. However, the record does not contain any District policy regarding exactly how these “formal observations” were to be conducted.⁵ At the hearing, Superintendent King testified that it was his expectation, as stated in his memorandum, for administrators to “[o]bserve and evaluate all teachers daily.” He agreed that the information in his memorandum “Instructional I 4 x per year and Instructional II teachers 2 x per year” was not “worded the best.” (N.T. (8/27/13) at 35-36; Exhibit P). Furthermore, the testimony of the RMES teachers on the topic of evaluations was vague and unreliable. While some teachers who testified at the hearing may have believed that formal teacher observations were required by district policy, witnesses could not identify the particular policy that expressed these requirements, and no official policy regarding such a requirement was produced or entered into the record at the hearings.

Jessica Leitzel (“Leitzel”), District Director of Elementary Education, testified that at a mid-year review with Appellant, they “had a lengthy discussion . . . regarding the quality of the teacher observations that were submitted.” (N.T. (9/16/13) at 25). Leitzel further testified that she “informed [Appellant] that this quality of work would not be acceptable in the Scranton

⁵ Witnesses testified that the District practice was to observe tenured teachers two times annually and non-tenured teachers four times annually, but there is insufficient evidence to show that the District provided clear guidance regarding how such observations were to be conducted.

School District and that in the future all observations needed to be typewritten, free of grammatical errors, the length of observations; that's what we talked about." (*Id.*).

Leitzel's vague and ironically ungrammatical oral testimony regarding her advice and direction to Appellant does not establish that Appellant was made aware of the specifics of what the District now attempts to claim was a persistent and willful violation of or failure to comply with school laws, official directives or established policy of the Board. No clear and specific forewarning was ever given to the Appellant that the manner in which she was rating teachers could lead to her dismissal. The evidence reveals no clear policy regarding observations and insufficient evidence that the Appellant's observations were in violation of policy or that deficiencies Leitzel identified continued. Further, the District failed to provide sufficient evidence to support a charge of persistent and willful violation of or failure to comply with school law, including official directives and established policy of the Board of Directors, or persistent negligence in the performance of her duties.

B. Alleged Carelessness With Confidential Student Records, Failure to Follow Directives and Failure to Comply With Testing and Record-Keeping Directives

The 2012-2013 PSSA Handbook required testing material be kept in a locked, secure storage area and never left unattended. The District argued that the procedure of keeping the PSSA testing material in Appellant's office was a failure to properly secure the testing material. Additionally, the District argued that Appellant failed to have RMES teachers sign for PSSA materials when they were picked up and when they were returned each day. However, the policy requiring proctors to sign for their testing materials was never produced or entered into the record at the hearings. There is insufficient evidence in the record to establish a requirement that test materials specifically be kept in a cabinet or closet and that a sign out/in sheet was required when test proctors removed and returned their testing material from the secure storage area.

Even assuming such policies did exist, Appellant was previously disciplined for the exact conduct the District is now trying to use as justification for her dismissal.⁶ (Exhibit T). In addition, after being advised by a Department official regarding storage of testing material, the PSSA testing material was moved to a locked closet. (N.T. (11/18/13) at 59-63). Therefore, the District failed to provide sufficient evidence to support a charge of persistent and willful violation of or failure to comply with school law, including official directives and established policy of the Board of Directors, or persistent negligence in the performance of her duties.

C. Alleged Improprieties with Regard to a Special Education Student

The District argued that Appellant took a special education student off school grounds on April 24, 2013 without parental and supervisor permission and in violation of the student's IEP. The District also accused the Appellant of later attempting to improperly revise the student's IEP. Special education IEPs are developed with parental input and permission. In interpreting this particular student's IEP, which was developed at a different District school, Appellant understood the decompression walk around the school to mean in RMES' vicinity, not just on school property. (N.T. (9/18/13) at 12; N.T. (11/18/13) at 45).

Gina Colarossi ("Colarossi"), District Director of Special Education, testified that Appellant "provides a great deal of support to her students in the building" and that the two had a conversation about this particular incident. (N.T. (9/18/13) at 12). After discussing the incident, Colarossi advised Appellant to contact the parents to inform them of the situation and do a revision of the IEP to provide for additional behavioral support. (*Id.*) On or about April 30, 2013, Appellant asked Pail to change the special education student's plan to permit a "walk within a 3 block radius around the school." (Exhibit L). After being informed that Appellant had

⁶ The conduct resulted in a one day suspension without pay, which was served on April 16, 2013.

spoken with Colarossi and the student's parents, Pail altered the plan but did not finalize it because he did not feel comfortable and the yearly IEP review for this student was due in a few weeks. (N.T. (9/18/13) at 48).

Accordingly, there is insufficient evidence in the record to establish that Appellant failed to follow proper protocols with regard to the involved special education student or violated the student's IEP.⁷ Therefore, the District failed to provide sufficient evidence to support a charge of persistent and willful violation of or failure to comply with school laws, including official directives and established policy of the Board of Directors, or persistent negligence in the performance of her duties.

D. Alleged Repeated Lateness

The District argued that Appellant repeatedly arrived late to school. An additional expectation identified in Superintendent King's April 3, 2012 memorandum was that administrators "[b]e at work a minimum of 30 minutes before the start of school and stay a minimum of 30 minutes after school." (Exhibit A). On April 11, 2012, Appellant emailed Superintendent King and Lou Paris, former District Director of Elementary Education, to inform them that, due to her own children's school schedule, she would not be able to be at school by 7:50 am every day. (Exhibit 6; N.T. (11/18/13) at 64-66). The record contains no evidence to support that the District ever objected to this arrangement or warned Appellant that her position/explanation based upon her personal family needs was not acceptable.

Witnesses testified that they did not always see Appellant in the mornings, in the lunchroom, on the playground, or at the end of the day. However, there is conflicting testimony

⁷ There is no District policy in the record pertaining to taking a student off school grounds. The proper procedure was followed to adjust the student's IEP on May 7, 2013. (Exhibit K; N.T. (9/18/13) at 61-62).

as to when Appellant arrived and departed RMES, and witnesses acknowledged that they did not keep track of Appellant's movement throughout RMES during the day. The testimony and exhibits provided by the District do not credibly establish that Appellant was persistently late. There is insufficient evidence in the record to establish that Appellant was violating her morning arrival arrangement, leaving work early, or not supervising the lunch room and playground. Therefore, the District failed to provide sufficient evidence to support a charge of persistent and willful violation of or failure to comply with school laws, including official directives and established policy of the Board of Directors, or persistent negligence in the performance of her duties.

E. Miscellaneous Charges Lodged Against Appellant

The District also brought charges related to Appellant's alleged failure to: submit observation reports; submit all PSSA materials at the end of testing; complete an online PSSA tutorial; and attend an administrator's meeting. After Appellant's mid-year review with Leitzel, during which Appellant was notified of six missing observation forms, there is no evidence in the record to show that Appellant failed to submit observation forms. (N.T. (9/16/13) at 26). With regard to the alleged failure to submit PSSA materials, there is insufficient evidence in the record to establish that Appellant acted as alleged by the District. Appellant credibly testified that she was unable to attend the PSSA meeting and attempted three times to access and complete the online tutorial but was unable to do so. (N.T. (11/18/13) at 123-124). Afterwards, she notified District administrators of her inability to access the online tutorial. (N.T. (11/18/13) at 124-25). Finally, Appellant admitted that she did not attend the one Administrator's meeting on April 18, 2013. (N.T. (11/18/13) at 98-99).

The record reflects that the Appellant engaged in some minor acts of misconduct, some of which she admitted. However, the evidence does not support a conclusion that her miscues were persistent or willful and rose to a level that warrants Appellant losing her livelihood. Accordingly, I find that the District failed to prove that the Appellant was persistently negligent in the performance of her duties or that her conduct evidenced persistent and willful violation of any laws, rules, or policies.

II. Willful Neglect of Duties

Willful neglect is not defined in the Public School Code, and there are few cases that have provided a definition. *Williams v. Clearfield County Vocational-Technical School*, TTA No. 4-99. “Willfulness requires the presence of intention and at least some power of choice.” *Horton*, 630 A.2d at 483. Webster’s Dictionary defines neglect as “ignoring, disregarding, failing to care for or give proper attention to something, or failing to do or carry out, as through oversight or carelessness.” *Webster’s II New College Dictionary*, 1995. Additionally, Black’s Law Dictionary defines neglect as “an omission to do or perform some work, duty or act.” *Black’s Law Dictionary*, (Sixth Ed. 1990). I find insufficient evidence of willful neglect in the present matter.

Finally, after Appellant was stripped of her duties as RMES principal following a meeting with her superiors on April 30, 2013. (N.T. (11/18/13) at 29; Joint Exhibit 1), Appellant was directed to report to two different schools in a manner of days, (N.T. (11/18/13) at 29-31), and on May 10, 2013, was provided with a purported “improvement” plan. The record gives no

indication that Appellant was ever given a meaningful opportunity to improve before being recommended for termination in July.⁸

Based on all of the above, I find there is insufficient evidence in the record to support Appellant's dismissal. Accordingly, the following Order is entered:

⁸ The improvement plan was not entered into evidence at the hearing.

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GWENDOLYN DAMIANO

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SCRANTON SCHOOL DISTRICT

Appellee

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: TTA No. 02-13
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:

ORDER

AND NOW, this 10th day of July 2014, the Scranton School District's dismissal of Ms. Damiano is hereby reversed. Gwendolyn Damiano shall be reinstated to her position as Principal and made whole for all losses occasioned by her dismissal.


James M. Sheehan
Special Deputy for Adjudicatory Matters

Date Mailed: July 10, 2014