

IN THE OFFICE OF THE SECRETARY OF EDUCATION
COMMONWEALTH OF PENNSYLVANIA

LEE V. McFERREN, :
Appellant :
v. : Teacher Tenure Appeal
: No. 03-08
: FARRELL AREA SCHOOL :
DISTRICT, :
Appellee :

Lee V. McFerren (“Mr. McFerren”), Appellant, appeals the decision of the Board of School Directors (“Board of Directors”) of the Farrell Area School District (“District”), terminating his employment with the District.

Findings of Fact

1. Mr. McFerren was employed as the District’s high school principal from August 2005 until his suspension on February 7, 2008. (N.T., p. 24).¹
2. By letter dated February 7, 2008, the District notified Mr. McFerren that he was suspended without pay pending dismissal proceedings. (N.T., pgs. 23-24; District Exh. 8)².
3. By letter dated March 1, 2008, the District notified Mr. McFerren that allegations had been made against him and that, if true, could constitute persistent negligence in the performance of duties, willful neglect of duties and persistent and willful violation of or failure to comply with school laws of the Commonwealth (including official directives and established policy of the board of directors). (District Exh. 41).

¹ N.T. refers to Notes of Testimony from the hearings before the Board of School Directors.

² Exh. refers to exhibits admitted into evidence before the Board of School Directors.

4. At the hearing before the District's Board of School Directors, the District's counsel stated that the District wanted to amend the statement of charges to include immorality and intemperance. (N.T., pgs. 13-14).

5. In Mr. McFerren's evaluation for the 2005-2006 school year, Mr. Rubano rated Mr. McFerren as needing improvement in the area of "Demonstrates professional ethics and appropriate behavior in relationship with faculty, students, parents, central office, colleagues, and other school personnel." (N.T. pp. 123-24; District Exh. 39).

6. In Mr. McFerren's evaluation for the 2005-2006 school year, Mr. Rubano also made suggestions that Mr. McFerren should listen to the Superintendent's advice on issues and treat people with dignity and respect. (N.T. p. 127; District Exh. 39).

7. At its June 12, 2006 meeting, the Board of Directors approved a modification to Mr. McFerren's title as High School Principal by adding Assistant to the Superintendent to his title. Mr. McFerren did not receive any additional salary and, notwithstanding McFerren Exhibit #7 and Mr. McFerren's testimony, there is no evidence in the record that the Board of Directors ever approved a job description for the position of Assistant to the Superintendent. (N.T. pgs, 191-94, 212, 955-57; District Exh. 48).

8. On August 30, 2006, during a meeting among Mr. Rubano (District Superintendent at that time), Mr. McFerren, Mrs. Latzoo (the high school assistant principal), Ms. Wheaton (a high school secretary), and her attorney, Mr. McFerren became so upset and irate that he left the room and slammed the door. (N.T., pgs. 128-131).

9. Mr. McFerren testified that he became frustrated at the August 30, 2006 meeting because he did not know there would be an attorney representing Mrs. Wheaton. (N.T., pgs. 24-25).

10. Mr. Rubano sent a letter of reprimand to Mr. McFerren regarding his conduct at the August 30, 2006 meeting stating, *inter alia*, that such conduct would not be tolerated and that Mr. McFerren had an anger management problem that needed to be ameliorated as quickly as possible. (N.T., pgs. 27-28; District Exh. 10).

11. The letter of reprimand stated that it would be expunged within six (6) months provided Mr. McFerren made the necessary corrections to his behavior. The letter of reprimand remained in Mr. McFerren's personnel file because he did not make the necessary corrections to his behavior. (N.T. p. 131; District Exh. 10).

12. On November 8, 2006, Mr. McFerren yelled at student Jackson Long and fired him from giving the morning announcements because he was allegedly late for the announcements. (N.T. pgs. 31-32, 34, 687; Exhibit 12).

13. During a meeting in Mr. Rubano's office that included Mr. McFerren and Ms. Powell (a District grant writer), Mr. McFerren became very agitated and rude with Ms. Powell. Mr. Rubano had to interrupt Mr. McFerren and admonish him at least three times to sit down and be quiet. (N.T. pgs. 125-26, 427; District Exh. 46).

14. At Mr. McFerren's request, he was given the responsibility for maintaining the District's website and was paid \$4,000 for doing so. However, Mr. McFerren failed to keep the website updated, did not provide Mr. Rubano with any resolution of the alleged problems with the website and stated that "maybe the job didn't get done, I don't know." (N.T. pgs. 58-61, 149-50; District Exh. 16).

15. In December 2006, Ms. Pawluk asked Mr. McFerren to come to the computer lab so she could show him that the environment was not conducive to learning because there were seventy-five (75) students in the computer lab and it was very hot. Mr. McFerren started yelling

and screaming in front of the students and teachers about there being five teachers in the room and questioning whether they could control the students. (N.T. pgs. 446-49).

16. In March 2007, Mr. McFerren suspended a student, Janeil Savage, for insubordination because Janeil participated with his stomp group at a basketball game after being told he could not participate because of having received a double detention. When Janeil and his father were in Mr. McFerren's office, Mr. McFerren said "just wait until you get out there and the white man kicks you on your ass" or "you know what Janeil, the white man are going to kick your ass." (N.T. pgs. 154-55, 976, 979; District Exh. 18).

17. On March 8, 2007, Mr. Rubano called Mr. McFerren and asked what had transpired between Mr. McFerren and Mr. Turosky. Mr. McFerren responded by saying "Well, you can go ask your boys." Mr. McFerren refused to answer Mr. Rubano until Mr. Rubano reminded him who was in charge. Mr. McFerren then explained that he believed Mr. Turosky was Mr. Rubano's buddy and that Mr. Rubano would not believe Mr. McFerren. (N.T. p. 41-42, 56; District Exh. 19).

18. During the March 8, 2007 conversation, Mr. Rubano noted that Mr. McFerren had failed to attend an administrative meeting. Attending administrative meetings were part of Mr. McFerren's duties. (N.T. p. 156; District Exh. 19). Mr. McFerren replied that he could do whatever he wanted to do and that Mr. Rubano could not do anything to him. Mr. Rubano advised Mr. McFerren that he was defying Mr. Rubano's authority, which constituted insubordination. (District Exh. 19).

19. Carol Borkowski became the District's acting Superintendent in May 2007. (N.T. p. 222).

20. By memorandum dated May 29, 2007, Ms. Borkowski asked Mr. McFerren for a count of the number of students enrolled in classes for the next year and stated that she had already requested this information by email, phone and in person. In addition, the information had also been requested by the Distinguished Educator ("DE") team but to no avail. (N.T. pgs. 229-31; District Exh. 28).

21. Mr. McFerren could not remember if he gave Ms. Borkowski the count for the number of students enrolled in classes for the next year the first time she asked for the count. (N.T. pgs. 66-67).

22. Mr. McFerren demanded grant information from Ms. Powell and left her a voice mail that if she did not call back in one hour with the information he requested he would consider it insubordination. Mr. McFerren tried to discipline Ms. Powell as being insubordinate. (N.T. pgs. 1083-85).

23. During Ms. Borkowski's investigation of Ms. Powell's complaint about Mr. McFerren, Ms. Borkowski listened to the answering machine message Mr. McFerren left for Ms. Powell in which Mr. McFerren used a curt, demeaning and excessively demanding tone. (N.T. pgs. 329-30, 431-34; District Exhs. 21, 46).

24. By letter dated June 7, 2007 Ms. Borkowski told Mr. McFerren to come to her office on June 11, 2007 to answer questions pursuant to a complaint by Ms. Powell relative to his conduct toward her. Mr. McFerren did not meet with Ms. Borkowski in her office but called her on the phone and provided irrelevant and nonresponsive comments to Ms. Borkowski's questions. (N.T. pgs. 226-27; District Exh. 21).

25. Ms. Borkowski informed Mr. McFerren that Ms. Powell worked under the direction of the Superintendent and that she was overriding his conclusion that Ms. Powell acted in an insubordinate manner. (N.T. p. 331; District Exh. 21).

26. Mr. McFerren never met with Ms. Borkowski when she directed or asked him to do so, even when she gave him a specific directive. (N.T. pgs. 337-38).

27. Pursuant to the contract between the District and District Administrators, Administrators were required to obtain approval from the Superintendent before taking vacation. (N.T. p. 120-21; District Exh. 9).

28. It was not common for Administrators to take vacation during the entire month of July because the District was involved with No Child Left Behind, received test data from the Department of Education during July and had much information to review and disseminate to the administrative team and faculty. (N.T. p.121).

29. Mr. McFerren neither informed Ms. Borkowski that he planned to take vacation the entire month of July 2007 nor did he receive Ms. Borkowski's approval to do so. (N.T. pgs. 232, 243-44, 1094, 1100; District Exh. 26).

30. On July 17, 2007, the Department sent the District an email regarding Career Tech Surveys saying that the Secondary Course Enrollments were extremely late because they were due in February. (N.T. pgs. 231-32; District Exh. 28). Getting this information to the Department in a timely manner was Mr. McFerren's responsibility. (N.T. pgs. 232-33; District Exh. 28).

31. On July 17, 2007, Ms. Borkowski sent an email to Mr. McFerren, Ms. Latzoo and Ms. Green telling them to complete the Secondary School Enrollments as requested by the

Department. Ms. Green emailed Ms. Borkowski on July 30, 2007 stating that she and Ms. Retone completed the Secondary School Enrollments. (N.T. pgs. 232-33; District Exh. 28).

32. During an executive session of the Board of Directors, a Board member, Mr. Guerino, asked Mr. McFerren a question. In response, Mr. McFerren turned his back towards Mr. Guerino and would not immediately turn around when told to do so by several Board members. (N.T. pgs. 42-43, 241, 998).

33. Mr. McFerren and some staff had discussions about changing the school day from seven to eight periods but this was never finalized because the Board of Directors had to approve such a change. Although the Board never approved such a change, Mr. McFerren made the change at the beginning of the 2007-2008 school year. (N.T. pgs.162, 186-87, 252-53).

34. The only official documentation Ms. Borkowski had that Mr. McFerren had changed the schedule from seven periods to eight periods is the Board Report of September 2007, which was after the 2007-2008 school year started, prepared by Mr. McFerren for the Board of Directors. (N.T. pgs. 96-97, 252; District Exh. 38).

35. The creation and addition of classes, such as integrated math, integrated reading or cognitive tutoring, would require approval by the Board of Directors. (N.T. p. 163).

36. The math department had talked about integrated math classes at the end of May 2007 but after consulting with other school districts that had used the program it was decided that it was best not to pursue it because other districts that had used it felt it was not of sufficient depth to be successful for all students. In addition, there was no communication with Mr. McFerren all summer and neither the head of the math department nor the math coach were aware of any planning for integrated math. (N.T. 442-44, 453, 488-90, 499).

37. Teachers learned about the integrated math classes during the in-service that was held a few days before school started in the 2007-2008 school year. (N.T. pg. 443, 487-88).

38. Ron Reed, a District literacy coach, did not know anything about an integrated reading course prior to the beginning of the 2007-2008 school year. (N.T. pgs. 725-26).

39. The integrated reading class did not fit with the Getting Results Plan as it did not have the rigor it needed because students were not put in a class according to the guidelines for differentiated instruction. (N.T. pgs. 728-29).

40. When Mr. McFerren decided to change from seven periods to eight periods he did not take into account that the integrated math and integrated reading classes were not aligned with the District's Getting Results Plan and acknowledged that failure to comply with the Plan could result in the District losing funding. (N.T. pgs. 1105-06).

41. When Mr. McFerren changed from seven to eight periods there were nineteen (19) teachers who, for thirty (30) minutes, were not scheduled to teach a class and not scheduled for their own lunch period. Therefore, there were five hundred seventy (570) minutes of lost instructional time during the week because of these teachers not being scheduled. (N.T. pgs. 576-77).

42. The targeted population for the integrated math and integrated reading classes were students who scored basic or below basic on the PSSA tests. (N.T. p. 556; District Exh. 6). However, Mr. McFerren testified that these classes were not just for students who were failing and that teachers could provide enrichment for the students who scored proficient or advanced on the PSSA or who were classified as gifted students. (N.T. 82, 102-03).

43. Placing gifted students or students who scored proficient or advanced on the PSSA tests in the integrated math or integrated reading classes was not in their best interests

because the instructional materials being used were not appropriate for those students. (N.T. pgs. 461-63, 491-92).

44. The teachers' contract requires that any changes to their schedule be announced by June 30 of the prior school year and, to Mr. Reed's knowledge, that did not happen prior to the 2007-2008 school year. (N.T. p. 753).

45. In a letter to Mr. McFerren dated November 5, 2007, Ms. Borkowski directed Mr. McFerren to advise her office any time during the school day that he left the school building, the reason for leaving and when he was expected to return. Mr. McFerren was the only staff member who would not tell Ms. Borkowski when he was leaving the building and the reason for leaving. (N.T. p. 343; District Exh. 5).

46. Mr. McFerren believed the directive to advise Ms. Borkowski's office every time he left the school building was unfair and he did not advise her office every time he left the building for lunch. (N.T. pgs. 51-52).

47. On December 21, 2007, the last day of school before Christmas vacation, Mr. McFerren stated that he allowed teachers to be dismissed at 2:45 p.m., which was 15 minutes prior to the usual teacher dismissal time. (N.T. 1038-39). Mr. McFerren did not notify Ms. Borkowski about the early dismissal of teachers. (District Exh. 42).

48. On December 21, 2007, Willette Hosey, supervisor of the custodial staff, arrived at the school at approximately 1:30. Ms. Hosey testified that at 1:30 there were some staff and some students in the building but that everyone left between 2:00 and 2:15. (N.T., pgs. 857-58).

49. Staff development was to occur through the early dismissal of students, which was approved by the Board of Directors, but Mr. McFerren, without informing Ms. Borkowski, initiated a late start for high school students which caused confusion with parents and cost the

District money because breakfast had been prepared for students but could not be served. (N.T. pgs. 287-88; District Exh. 40).

50. Pursuant to the collective bargaining agreement, there were to be four (4) extended development days for professional staff and as of December 20, 2007, Mr. McFerren had not planned the days so there was a violation of the agreement. (N.T. pgs. 286-87; District Exh. 42).

Discussion

Procedural Issues

In his appeal, Mr. McFerren alleges that the Board of Directors' hearing process was fundamentally unfair. Mr. McFerren alleges that there was improper admission of hearsay statements, disregard for the testimony of Mr. McFerren and his witnesses, complete acceptance of the testimony of the District's witnesses, failure of the Board of Directors to deliberate, and violation of Mr. McFerren's right to due process by the Board of Directors.

The Pennsylvania Supreme Court has held that "in an appeal by an aggrieved professional employee under Section 1131 of the School Code, the Secretary is vested with the authority to conduct *de novo* review whether he takes additional testimony or merely reviews the official record of the proceedings before the board." *Belasco v. Board of Public Education*, 510 A.2d 337, 343 (Pa. 1986). This *de novo* review establishes the Secretary as the ultimate fact finder and authorizes him to determine the credibility of witnesses, the weight of their testimony and the inferences to be drawn therefrom. *Id.* at 342. "[T]he Secretary's *de novo* review of the decision of a school board ensures that the requirements of due process are satisfied." *Katruska v. Bethlehem Center School District*, 767 A.2d 1051, 1056 (Pa. 2001). "Because the Secretary

decides the case anew, events occurring procedurally at an earlier stage of the case are irrelevant.” *Forest Area School District v. Shoup*, 621 A.2d 1121, 1125 (Pa. Cmwlth. 1993).

Therefore, Mr. McFerren’s allegations of procedural improprieties and denial of due process are not relevant in a *de novo* review. The Secretary has reviewed the record from below, made his own findings of fact, determined the credibility of witnesses, the weight of their testimony and any inferences to be drawn therefrom. Thus, the Secretary’s *de novo* review of the Board of Directors’ decision ensures that the requirements of due process have been satisfied. In addition, any exhibits that Mr. McFerren’s counsel objected to admitting into evidence based on hearsay have not been used by the Secretary as a basis for his findings unless the information in the exhibit was corroborated by the testimony of Mr. McFerren or other witnesses.

In addition, at the hearing before the Board of Directors, the District’s counsel stated that he wanted to amend the statement of charges to include immorality and intemperance. This request for amendment was not to change or amend the factual assertions set forth in the notice of charges. (N.T. pgs. 13-14). Mr. McFerren’s counsel objected stating that it was late notice and that the charges contained no indication that immorality or intemperance would be alleged. (N.T. p. 14).

However, Commonwealth Court has held that “[a]s long as the substance of the charges furnished the professional employee refers to one of the valid causes for dismissal under Section 1122, statutory and constitutional procedural requirements are satisfied.” *Lucciola v. Secretary of Education*, 360 A.2d 310, 312 (Pa. Cmwlth. 1976). In *Lucciola*, the statement of charges only indicated that the professional employee called in sick for two days and used personal days to go skiing for an entire week. The charges did not state specifically that the professional employee was being charged for persistent and willful violation of the school laws. However,

Commonwealth Court held the charges were sufficient to inform the employee that his proposed dismissal was based on persistent and willful violation of school laws. *Id.* at 312-13.

In *Dohanic v. Pennsylvania Department of Education*, 533 A.2d 812 (Pa. Cmwlth. 1987), *appeal denied*, 541 A.2d 1392 (Pa. 1988), Commonwealth Court again held that even though the charge of immorality was not specifically stated in the statement of charges, immorality was sufficiently averred in the statement of charges. Thus, the failure to specify immorality in the statement of charges did not change the substance of the charges. *Id.* “Charges only need inform a teacher of the basis for a proposed dismissal so as to enable him to present a proper defense.” *Id.* at 815. The alleged causes for dismissal were sufficiently averred in the statement of charges, which informed Mr. McFerren of the basis for a proposed dismissal and enabled him to present a proper defense.

Substantive Issues

Mr. McFerren’s dismissal by the District was pursuant to Section 1122 of the Public School Code, *as amended*, 24 P.S. §11-1122, 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 . . .

A tenured professional employee, such as Mr. McFerren, 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). In order to uphold Mr. McFerren’s dismissal, only one of

these charges must be established. *Horton v. Jefferson County-DuBois Area Vocational Technical School*, 630 A.2d 481, 483 (Pa. Cmwlth. 1993).

After hearing, and a thorough review of the record, the Secretary finds that there is sufficient competent evidence to sustain the District's dismissal of Mr. McFerren.

Persistent and Willful Violation of or Failure to Comply with School Laws Including Official Directives and Established Policy of the Board of Directors and 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*, 630 A.2d at 484. A violation of school laws includes a violation of a school district's rules and orders. *Sertik v. School District of Pittsburgh*, 136 Pa. Cmwlth. 594, 584 A.2d 390 (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 incidences or as one incident carried on for a substantial period of time. *Strinich v. Clairton School District*, 431 A.2d 267, 271 (Pa. 1981).³

³ 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).

The record evidences numerous occasions when Mr. McFerren violated or failed to comply with school laws, including official directives, the District's rules and orders and established policy of the Board of Directors. In addition, many of these occasions also evidence that Mr. McFerren was persistently negligent in the performance of his duties.

On March 8, 2007, Mr. Rubano, who was then Mr. McFerren's supervisor, called and asked Mr. McFerren what had transpired between Mr. McFerren and Mr. Turosky. Mr. McFerren initially refused to answer Mr. Rubano's question because he thought Mr. Rubano was biased against him and told Mr. Rubano that "you can go ask your boys." Mr. McFerren repeatedly refused to answer Mr. Rubano and only when Mr. Rubano reminded Mr. McFerren who was in charge did Mr. McFerren respond to the question. Mr. McFerren stated that he thought Mr. Turosky was Mr. Rubano's buddy and that Mr. Rubano would not believe Mr. McFerren. (N.T. pgs. 41-42, 156; District Exh. 19).

Also during the conversation on March 8, 2007 between Mr. Rubano and Mr. McFerren, Mr. Rubano noted that Mr. McFerren had been absent from an administrative meeting without informing Mr. Rubano that he would be absent. Attending administrative meetings was part of Mr. McFerren's duties. (N.T. p. 156; District Exh. 19). Mr. McFerren replied that he could do whatever he wanted to do. When Mr. Rubano stated that perhaps he should suspend Mr. McFerren, Mr. McFerren replied that Mr. Rubano could not do anything to him. Mr. Rubano answered that Mr. McFerren was defying Mr. Rubano's authority and that it constituted insubordination. (District Exh. 19).

When Mr. McFerren was hired by the District, he asked to be given the responsibility for the District's website. At some point, information on the website became outdated and Mr. Rubano asked Mr. McFerren to update the website and contact him when it was completed. Mr.

McFerren advised him that there were some “bugs” to be worked out. However, Mr. McFerren never told Mr. Rubano whether there was an ultimate resolution of the issues Mr. Rubano had raised or if the “bugs” had been worked out. (N.T. pgs. 58-61, 149-50; District Exh. 16). At the hearing before the Board of Directors Mr. McFerren stated that “maybe the job didn’t get done, I don’t know.” (N.T. pg. 61).

On May 29, 2007, Ms. Borkowski, Mr. McFerren’s supervisor at that time, asked Mr. McFerren for a count of the number of students enrolled in classes for the next year. Ms. Borkowski indicated that she had already asked for this information by email, phone and in person, and that the Distinguished Educators had also requested the information. (N.T. pgs. 229-31; District Exh. 28). Mr. McFerren did not remember if he gave Ms. Borkowski the information the first time she asked for it but stated that, to the best of his knowledge, he gave her the information before May 29, 2007. When asked if he had any documents to support his statement that he had given the information before May 29, 2007, Mr. McFerren stated that he thought a witness would be able to come forward to supply that information. (N.T. pgs. 66-70). No witness provided any information or documentation to support Mr. McFerren’s statement.

Ms. Powell was the Community Outreach Specialist whose job duties included being a grant writer. (N.T. p. 425). In May 2007, Mr. McFerren asked Ms. Powell for information about grants related to the employment of Ms. Blue. (N.T. pgs. 431-33). Mr. McFerren left Ms. Powell a threatening message on her answering machine that was curt, demeaning and in an excessively demanding tone and said if Ms. Powell did not call him back in an hour with the information he requested he would consider it insubordination. (N.T. pgs. 329-30, 431-34, 1083-85; District Exhs. 21, 46). By letter dated June 7, 2007, Ms. Borkowski told Mr. McFerren to come to her office on June 11 to answer relevant questions about the complaint by Ms. Powell

relative to his conduct toward her. Although specifically directed to do so, Mr. McFerren did not go to Ms. Borkowski's office but called her on the phone and provided irrelevant and nonresponsive comments to her questions. (N.T. pgs. 226-27; District Exh. 21). Mr. McFerren acknowledged that he probably called Ms. Borkowski rather than going to her office. (N.T. p. 999, 1091). Ms. Borkowski informed Mr. McFerren that Ms. Powell worked under the direction of the Superintendent and that she was overriding his conclusion that Ms. Powell acted in an insubordinate manner. (N.T. p. 331; District Exh. 21). Not only did Mr. McFerren refuse to meet with Ms. Borkowski regarding Ms. Powell's complaint, Mr. McFerren never met with Ms. Borkowski when he was specifically directed or asked to do so. (N.T. pgs. 337-38). Mr. McFerren stated that he would sometimes go to her office and sometimes not. (N.T. p. 999).

Pursuant to the contract between the District and District Administrators, Administrators were required to obtain approval from the Superintendent before taking vacation. (N.T. p. 120-21; District Exh. 9). It was not common for Administrators to take vacation during the entire month of July because the District was involved with No Child Left Behind, received test data from the Department of Education during July and had much information to review and disseminate to the administrative team and faculty. (N.T. p.121). Mr. McFerren neither informed Ms. Borkowski that he planned to take vacation the entire month of July 2007 nor did he receive Ms. Borkowski's approval to do so. (N.T. pgs. 232, 243-44, 1094, 1100; District Exh. 26). Mr. McFerren testified that he told Ms. Borkowski in front of Mr. Stockdale, Ms. Latzoo and Ms. Green that he was taking vacation the month of July 2007. (N.T. p. 73). However, neither Mr. Stockdale nor Ms. Latzoo testified at the hearing before the Board of Directors and Ms. Green stated that she was not present when Mr. McFerren allegedly told Ms. Borkowski he

was taking vacation the month of July 2007. (N.T. pgs. 549-50). Thus, there is no testimony in the record to corroborate Mr. McFerren's testimony.

During the 2006-2007 school year there had been discussions between Mr. McFerren and some staff about changing the school day from seven to eight periods. However, this was never finalized because the Board of Directors had to approve such a change and this did not happen. Nevertheless, Mr. McFerren made the change from seven to eight periods at the beginning of the 2007-2008 school year. (N.T. pgs. 162, 186-87, 252-53). The only official documentation Ms. Borkowski had that Mr. McFerren had changed the schedule from seven to eight periods was a report prepared by Mr. McFerren for the Board of Directors in September 2007, after the school year began. (N.T. pgs. 96-97, 252; District Exh. 38).

In addition, the math department had talked about integrated math classes at the end of May 2007 but after consulting with other school districts that had used the program it was decided that it was best not to pursue it because other districts that had used it felt it was not of sufficient depth to be successful for all students. There was no communication with Mr. McFerren all summer and neither the head of the math department nor the math coach were aware of any planning for integrated math. (N.T. 442-44, 453, 488-90, 499). Nevertheless, Mr. McFerren added integrated math and integrated reading classes to the 2007-2008 schedule. Teachers learned about the integrated math classes during the in-service that was held a few days before school started in the 2007-2008 school year. (N.T. pg. 443, 487-88).

Ron Reed, a District literacy coach, did not know anything about an integrated reading course prior to the beginning of the 2007-2008 school year. (N.T. pgs. 725-26). The integrated reading class did not fit with the Getting Results Plan as it did not have the rigor it needed because students were not put in a class according to the guidelines for differentiated instruction.

(N.T. pgs. 728-29). When Mr. McFerren decided to change from seven to eight period days he did not take into account that the integrated math and integrated reading classes were not aligned with the District's Getting Results Plan and acknowledged that failure to comply with the Plan could result in the District losing funding. (N.T. pgs. 1105-06). In addition, the teachers' contract requires that any changes to their schedule be announced by June 30 of the prior school year and, to Mr. Reed's knowledge, that did not happen prior to the 2007-2008 school year. (N.T. p. 753).

When Mr. McFerren changed from seven to eight periods, there were nineteen (19) teachers who, for thirty (30) minutes, were not scheduled to teach a class and were not scheduled for their own lunch period. Therefore, there were five hundred seventy (570) minutes of lost instructional time during the week because of these teachers not being scheduled. (N.T. pgs. 576-77). These lost minutes of instructional time were noticed once the students began attending classes but there were no modifications made to the schedule. (N.T. pgs. 605-06).

The targeted population for the integrated math and integrated reading classes were students who scored basic or below basic on the PSSA tests. (N.T. p. 556; District Exh. 6). However, Mr. McFerren testified that these classes were not just for students who were failing and that teachers could provide enrichment for the students who scored proficient or advanced on the PSSA or who were classified as gifted students. (N.T. 82, 102-03). Both the Math Coach and the head of the Math Department testified that placing gifted students or students who scored proficient or advanced on the PSSA tests was not in their best interests because the instructional materials being used were not appropriate for those students. (N.T. pgs. 461-63, 491-92). Although scheduling students might be a difficult task, the evidence shows that Mr. McFerren

added the integrated math and reading classes without proper preparation, which caused many of the problems surrounding these classes.

In a letter to Mr. McFerren dated November 5, 2007, Ms. Borkowski directed Mr. McFerren to advise her office any time during the school day that he left the school building, the reason for leaving and when he was expected to return. Mr. McFerren believed this directive was unfair and he did not advise her office every time he left the building for lunch. (N.T. pgs. 51-52). Mr. McFerren was the only staff member who would not tell Ms. Borkowski when he was leaving the building and the reason for leaving. (N.T. p. 343; District Exh. 5).

On December 21, 2007, the last day of school before Christmas vacation, Mr. McFerren stated that he allowed teachers to be dismissed at 2:45 p.m., which was 15 minutes prior to the usual teacher dismissal time. (N.T. 1038-39). Mr. McFerren did not notify Ms. Borkowski about the early dismissal of teachers. (District Exh. 42). In addition, Willette Hosey, supervisor of the custodial staff, arrived at the school on December 21, 2007 at approximately 1:30. Ms. Hosey testified that at 1:30 there were some staff and some students in the building but that everyone left between 2:00 and 2:15. (N.T. pgs. 857-58).

Staff development was to occur through the early dismissal of students, which was approved by the Board of Directors, but Mr. McFerren, without informing Ms. Borkowski, initiated a late start for high school students which caused confusion with parents and cost the District money because breakfast had been prepared for students but could not be served. (N.T. pgs. 287-88; District Exh. 40). In addition, pursuant to the collective bargaining agreement, there were to be four (4) extended development days for professional staff and as of December 20, 2007, Mr. McFerren had not planned the days so there was a violation of the agreement. (N.T. pgs. 286-87; District Exh. 42).

During an executive session of the Board of Directors, a Board member, Mr. Guerino, asked Mr. McFerren a question. In response, Mr. McFerren turned his back towards Mr. Guerino and, in direct contravention of a specific directive, would not immediately turn around when told to do so by several Board members. (N.T. pgs. 42-43, 241, 998).

The many incidents described above, especially when viewed collectively, provide sufficient evidence that Mr. McFerren persistently and willfully violated or failed to comply with school laws including official directives, the District's rules and orders and established policy of the Board of Directors. These incidents also evidence Mr. McFerren's persistent negligence in the performance of his duties.

Intemperance

Loss of self-control is the main element of intemperance. *Belasco*, 486 A.2d at 541-42, *aff'd*, 510 A.2d 337 (1986). Intemperance is also defined as "a loss of self-control or self-restraint, which may result from excessive conduct." 22 Pa. Code §237.5.

On August 30, 2006, during a meeting among Mr. Rubano, Mr. McFerren, Mrs. Latzoo (the high school assistant principal), Ms. Wheaton (a high school secretary), and her attorney, Mr. McFerren became so upset and irate that he left the room and slammed the door. (N.T., pgs. 128-131). Mr. McFerren testified that he became frustrated at the August 30, 2006 meeting because he did not know there would be an attorney representing Mrs. Wheaton. (N.T., pgs. 24-25). Based on Mr. McFerren's conduct, Mr. Rubano sent him a letter stating, *inter alia*, that such conduct would not be tolerated and that Mr. McFerren had an anger management problem that needed to be ameliorated as quickly as possible. (N.T., pgs. 27-28; District Exh. 10). The letter of reprimand stated that it would be expunged within six (6) months provided Mr. McFerren made the necessary corrections to his behavior. The letter of reprimand remained in

Mr. McFerren's personnel file because he did not make the necessary corrections to his behavior. (N.T. p. 131; District Exh. 10).

On November 8, 2006, Mr. McFerren yelled at student Jackson Long and fired him from giving the morning announcements because he was allegedly late. (N.T. pgs. 31-32, 34, 687; Exhibit 12). Mr. Andrzejewski heard Mr. McFerren yell at Jackson Long from approximately fifty (50) to seventy-five (75) feet away. (N.T. pgs. 686-88).

During a meeting in Mr. Rubano's office that included Mr. McFerren and Ms. Powell, Mr. McFerren became very agitated and rude with Ms. Powell. Mr. Rubano had to interrupt Mr. McFerren and admonish him at least three times to sit down and be quiet. (N.T. pgs. 125-26, 427; District Exh. 46).

In December 2006, Ms. Pawluk asked Mr. McFerren to come to the computer lab so she could show him that the environment was not conducive to learning because there were seventy-five (75) students in the computer lab and it was very hot. Ms. Pawluk was not blaming Mr. McFerren but just wanted him to see that something needed to be done to address the environment. Mr. McFerren started yelling and screaming in front of the students and teachers about there being five teachers in the room and questioning whether they could control the students. (N.T. pgs. 446-49).

The above incidents evidence Mr. McFerren's lack of self-control or self-restraint. Thus, Mr. McFerren's actions constitute intemperance.

Wilful Neglect of Duties

Wilful neglect is not defined in the Public School Code and there are few cases that have provided a definition. *See, Williams v. Clearfield County Vocational-Technical School*, TTA No. 4-99. "Wilfulness requires the presence of intention and at least some power of

choice.” *Horton*, 630 A.2d at 484. Neglect is defined 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*. Neglect may also mean an omission to do or perform some work, duty or act. *Black’s Law Dictionary, (Sixth Ed. 1990)*.

On July 17, 2007, the Department of Education sent the District an email regarding Career Tech Surveys stating that the Secondary Course Enrollments were extremely late because they were due in February. (N.T. pgs. 231-32; District Exh. 28). Getting this information to the Department in a timely manner was Mr. McFerren’s responsibility. (N.T. pgs. 232-33; District Exh. 28). Ms. Borkowski emailed Mr. McFerren, Ms. Latzoo and Ms Green telling them to complete the Secondary School Enrollments as requested by the Department. After receiving Ms. Borkowski’s email, Ms. Green and Ms. Retone completed the Secondary School Enrollments. (N.T. pgs. 232-33; District Exh. 28).

Mr. McFerren’s failure to provide this information to the Department in February when it was due evidences his choice to ignore or disregard his duty to provide this information, his failure to carry out his duty, as through oversight or carelessness, and his omission to do or perform his work. This constitutes wilfull neglect of duties.

In addition, other incidents previously identified in this decision are also evidence of Mr. McFerren’s wilfull neglect of duties. This includes: (1) Mr. McFerren’s failure to obtain approval by the Board of Directors for the change from seven to eight periods per day; (2) Mr. McFerren’s failure to obtain approval from the Board of Directors for adding new integrated math and reading classes; and, (3) Mr. McFerren’s failure to keep the website updated, to correct the problems with the website and to report any resolution of the problems to Mr. Rubano.

Incompetency

The Pennsylvania Supreme Court has held that incompetency as a cause for dismissal is to be given broad meaning. *Board of Public Education, School District of Philadelphia v. Soler*, 176 A.2d 653, 655 (Pa. 1961), *cert. denied* 370 U.S. 919 (1962). In *Horosko v. Mount Pleasant Township School District*, 6 A.2d 866, 869-70 (Pa. 1939), *cert. denied* 308 U.S. 553 (1939), the Pennsylvania Supreme Court provided the following definition of incompetency:

The term incompetency has a common and approved usage. The context does not limit the meaning of the word to lack of substantive knowledge of the subjects to be taught. Common and approved usage give a much wider meaning. For example, in 31 C.J., with reference to a number of supporting decisions, it is defined: 'A relative term without technical meaning. It may be employed as meaning disqualification; inability; incapacity; lack of ability, legal qualifications, or fitness to discharge the required duty.' In Black's Law Dictionary, 3rd edition, page 945, and in 1 Bouv. Law Dict., Rawle's Third Revision, p. 1528, it is defined as 'Lack of ability or fitness to discharge the required duty.' . . . Webster's New International Dictionary defines it as a 'want of physical, intellectual, or moral ability; insufficiency; inadequacy; specif., want of legal qualifications or fitness.' Funk & Wagnalls Standard Dictionary defines it as 'General lack of capacity of fitness, or lack of the special qualities required for a particular purpose.'

The Court has also interpreted incompetence to include insubordination and lack of frankness, candor and intellectual honesty. *Brownsville Area School District v. Alberts*, 260 A.2d 765 (Pa. 1970), citing, *Soler*, 176 A.2d at 657.

There are at least four incidents discussed previously in this decision that constitute insubordination: (1) when Mr. McFerren turned his back on the Board of Directors when he was being spoken to; (2) when Mr. McFerren refused to tell Ms. Borkowski when he left the building; (3) when Mr. McFerren refused to meet with Ms. Borkowski when he was directed to do so; and, (4) when Mr. McFerren failed to attend an administrative meeting and told Mr. Rubano that Mr. Rubano could not do anything to him. Because these incidents constitute insubordination they fall within the definition of incompetency.

Immorality

Immorality is defined as “a course of conduct as offends the morals of a community and is a bad example to the youth whose ideals a professional educator is supposed to foster and elevate.” *Horosko*, 6 A.2d at 868. The District bears the burden of proving that: (1) the underlying acts that it claims constitute immorality actually occurred; (2) such conduct offends the morals of the community; and, (3) the conduct is a bad example to the youth whose ideals the educator is supposed to foster and elevate. *Palmer v. Wilson Area School District*, TTA No. 5-94.

The District introduced two letters written by Janeil Savage regarding two related incidents with Mr. McFerren in February/March 2007. (District Exh. 18). The first incident occurred at a basketball game and the second occurred in the assistant principal’s office. Mr. McFerren’s testimony confirms that the incidents occurred. During a basketball game in February 2007, Mr. McFerren stopped a music tape from being played during half-time because Janeil Savage was not permitted to “stomp” because of a double detention he had received. When Janeil Savage and his father came to speak to Mr. McFerren a few days later, Mr. McFerren said to Janeil either “just wait until you get out there and the white man kicks you on the ass” or “you know what Janeil, the white man are going to kick your ass.” (N.T. pgs. 154-55, 976, 979; District Exh. 18). The District concluded that Mr. McFerren’s statement constituted immorality. The District proved that the underlying act that it claims constitutes immorality actually occurred.

Deciding whether conduct offends the morals of a community is a legal determination. The general rule requires that the District present direct evidence or evidence from which the Secretary can infer that Mr. McFerren’s conduct offended the morals of the community. *Palmer*

v. Wilson Area School District, TTA No. 5-94. If there are insufficient facts from which the Secretary can determine or infer whether the conduct offends the morals of the community, no legal determination can be made on the issues of immorality. *Id.*

However, there are limited exceptions to this general rule. There is some conduct that is so egregious that its immoral nature transcends geographic or community boundaries. *Id.* Even in the absence of evidence of community standards, courts have expressed a willingness to review legal precedent to determine whether similar conduct has been adjudicated to be immorality.

“The policy of the courts, and indeed, of our nation as a whole, ever since *Brown v. the Board of Education of Topeka*, 347 U.S. 483, 724 S.Ct. 686, 98 L.Ed. 873 (1954), has been that school students are entitled to be taught by teachers who treat all the races equally and without bias or prejudice. To fail to do so is immoral, in that it is wrong.” *West Chester Area School Bd. v. West Chester Area Educ. Ass’n.*, 9 Pa. D. & C.4th 125, 132 (Pa.Com.Pl. 1991). In *West Chester*, a white teacher gave a copy of questions and answers that were highly offensive and demeaning to African Americans to three of his white colleagues. Even though he did not distribute these documents to any students or any African Americans, his conduct constituted immorality.

In Mr. McFerren’s case, the District did not provide any evidence that his statement to Janeil Savage violated the morals of the community. However, I find that such a statement is highly offensive, demeaning and racist, and so egregious that its immoral nature transcends geographic or community boundaries. In addition, the conduct is a bad example to the youth whose ideals Mr. McFerren was supposed to foster and elevate. Thus, Mr. McFerren’s conduct constitutes immorality.

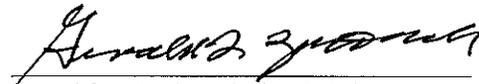
Based on all of the above, the District has provided sufficient evidence in the record to support Mr. McFerren's dismissal. Accordingly, the following Order is entered:

IN THE OFFICE OF THE SECRETARY OF EDUCATION
COMMONWEALTH OF PENNSYLVANIA

LEE V. McFERRIN, :
Appellant :
v. : Teacher Tenure Appeal
: No. 03-08
: FARRELL AREA SCHOOL :
DISTRICT, :
Appellee :

ORDER

AND NOW, this 23rd day of January, 2009, it is hereby ordered and decreed that the appeal of Lee V. McFerren is denied and the decision of the Farrell Area School District to dismiss Lee V. McFerren from employment with the Farrell Area School District is affirmed.


Gerald L. Zahorchak, D.Ed.
Secretary of Education

Date Mailed: 1/23/2009