

**COMMONWEALTH OF PENNSYLVANIA
OFFICE OF THE SECRETARY OF EDUCATION**

RICHARD MIGLIORE,	:	
	:	
Appellant	:	
	:	
v.	:	Teacher Tenure Appeal No. 03-11
	:	
PHILADELPHIA CITY SCHOOL	:	
DISTRICT,	:	
Appellee	:	

OPINION AND ORDER

Richard Migliore (“Mr. Migliore”) appeals to the Secretary of Education (“Secretary”) from the June 13, 2011 decision of the School Reform Commission (“SRC”), in which it held that Mr. Migliore was not terminated or constructively discharged from the School District of Philadelphia (“District”), but that he retired from his position as an Assistant Principal, effective June 30, 2009.

Findings of Fact

1. Mr. Migliore was employed by the District as an Assistant Principal at Mastbaum Area Vocational Technical School (Mastbaum) beginning in the 2006-2007 school year through the 2008-2009 school year. (Tr., 9/14/10, p. 577).
2. During Mr. Migliore’s time at Mastbaum, the Principal was Mary Sandra Dean (“Ms. Dean”). (Tr., 9/14/10, p. 234).
3. During Mr. Migliore’s time at Mastbaum, Ms. Dean issued a number of disciplinary “write-ups” against Mr. Migliore (referred to as SEH-204s) and held investigatory conferences regarding each SHE-204. (Tr., 9/14/10, p. 247;¹ Exh. SDP A, pp. 1-3).²

¹Tr. refers to the transcript of testimony from the hearings on May 25, 2010, September 14, 2010, September 29, 2010 and January 6, 2011 before Commissioner Dworetzky.

4. On May 29, 2009, Ms. Dean issued a SHE-204 Unsatisfactory Job Performance for Mr. Migliore, followed by a SHE-204 conference summary on June 15, 2009, recommending that Mr. Migliore be demoted from the position of Assistant Principal. (Exh. SDP A, p. 2).

5. In the 2008-2009 school year, James Douglass (“Mr. Douglass”) was the assistant regional superintendent for the north region of the District. (Tr., 9/14/10, p. 256). Disciplinary action against an employee is presented to a regional superintendent for a second level hearing. (Tr., 9/14/10, p. 257).

6. When a request goes to the regional office for a second level hearing, documents are reviewed, a meeting with the teacher and any relevant parties is scheduled, any additional documents or information about extenuating circumstances are requested, and then a determination is made whether to support or not support a principal’s recommendation. (Tr., 9/14/10, pp. 257-58).

7. Mr. Douglass recalled meeting with Mr. Migliore on at least two occasions for secondary hearings based on some of the SHE 204 disciplinary “write-ups” from Ms. Dean. (Tr., 9/14/10, pp. 262-63). Ms. Dean sent her documentation regarding Mr. Migliore and her recommendation that he be demoted from his position as Assistant Principal to Mr. Douglass. (Tr., 9/14/10, p. 241).

8. On June 25, 2009, Mr. Douglass held a secondary conference with Mr. Migliore regarding Ms. Dean’s demotion recommendation. Mr. Douglass issued a SHE-204 Record of Conference on June 29, 2009, recommending that Mr. Migliore be demoted from his position of Assistant Principal. (Tr., p. 271; Exh. SDP A, p.2).

² Exh. refers to exhibits admitted into evidence at the hearings before Commissioner Dworetzky on May 25, 2010, September 14, 2010, September 29, 2010 and January 6, 2011.

9. During the 2008-2009 school year, the Regional Superintendent in the north region was Lucy Feria (“Ms. Feria”). (Tr., 9/14/10, p. 271). Ms. Feria and Mr. Douglass were both second level rating officers and either could make a recommendation regarding discipline of an employee. (Tr., 9/14/10, p. 287).

10. Ms. Feria received summaries of all the documents that had been completed previously about Mr. Migliore, as well as documents about some incidents that had occurred for which Ms. Feria held a second level hearing. (Tr., 9/14/10, p. 276-77).

11. Ms. Feria recalled having at least two second level conferences with Mr. Migliore with the last one being in May or June of 2009, and she recommended that Mr. Migliore be demoted from his position as Assistant Principal. (Tr., 9/14/10, p. 283-84).

12. On July 23, 2009, an email from the District’s Office of Professional Staffing was sent to Mr. Migliore stating that it had been notified of his demotion from Assistant Principal and that he should contact the Office of Professional Staffing to schedule an appointment for him to pick his new school location. (Exh. M-1).

13. Mr. Migliore sent an email to the Office on July 27, 2009, regarding his possible assignments, and asking that the District keep the Kensington position and the reading positions open for him because he wanted to make an informed decision. (Exh. M-3; Tr. pgs. 54-55).

14. An Assignment Introduction sheet was provided for Mr. Migliore stating that he was assigned from “Mastbaum to non-public as an administrative transfer, special assignment.” (Exh. M-4; Tr., 5/25/10, pgs. 55-56).

15. The Executive Director of Employee Relations, Mr. Rosen, testified that Mr. Migliore was being recommended for demotion and so he believed that in offering him different

teaching positions, human resources was acting on the assumption that Mr. Migliore “needed a place to be in September.” (Tr., 9/29/10, p. 612).

16. Although Mr. Migliore investigated certain positions to which he could have been assigned, he sent an email to the Office on July 29, 2009, stating, *inter alia*, that he did not wish to choose a position at that time. Mr. Migliore further stated that he had not yet been demoted and did not expect to be and a demotion cannot become effective until after a hearing before the SRC or an arbitrator. (Exh. M-5; Tr., 5/25/10, pgs. 58-59).

17. A letter dated August 14, 2009, and signed by the Chairman of the SRC, and the District Superintendent, who also had authority as the Secretary of the SRC, stated that they were going to recommend to the SRC that Mr. Migliore be demoted to the position of teacher. The letter identified charges against Mr. Migliore, advised him of his right to request a hearing before the SRC, and advised that if he requested a hearing it would be held on August 25, 2009 at 10:00 a.m. (Exh. SDP A 1-3).

18. By letter dated August 18, 2009, Mr. Migliore advised the District that he was appealing the recommendation that he be demoted to a teaching position, that he elected to have a hearing before the SRC and that he represent himself. (Exh. SDP H 1-2, M-6; Tr., 5/25/10, pgs. 63-64).

19. By letter dated August 21, 2009, Mr. Bielli, Assistant General Counsel for the District, acknowledged receipt of Mr. Migliore’s appeal of the recommended demotion, his request for a hearing before the SRC, and that Mr. Migliore would be representing himself. The hearing initially scheduled for August 25, 2009 was postponed and available dates for the hearing were to be obtained. (Exh. M-7; Tr., 5/25/10, pgs. 64-65).

20. On September 2, 2009, the District's Office of Human Resources received a Notification of Retirement/Resignation form from Mr. Migliore dated August 31, 2009. On this form, Mr. Migliore indicated that he was retiring, his last day of work was June 30, 2009, and his position was Assistant Principal. (SDP B; Tr., 5/25/10, pgs. 85-86).

21. By letter dated September 3, 2009, Mr. Migliore noted that he and Mr. Bielli, Assistant General Counsel for the District, had been negotiating a possible settlement of the matter but that senior District officials had not approved the proposed settlement. (Exh. SDP I 1-2).

22. After June 30, 2009, Mr. Migliore never reported to work with the District as a teacher; Mr. Migliore was paid as an Assistant Principal from August 14, 1999, through his retirement date of June 30, 2009. (Tr., 5/25/10, pgs. 46, 86; Exh. SDP D 1-2).

23. Even though Mr. Migliore had retired, the SRC commenced hearings regarding the recommendation that Mr. Migliore be demoted from his position as an Assistant Principal on May 25, 2010, before SRC Commissioner Dworetzky.

24. At the hearing on May 25, 2010, Mr. Migliore's counsel stated that he did not object to Commissioner Dworetzky "considering what we are calling the preliminary objection, the issue of whether there was or was not a demotion as a preliminary matter." (Tr., 5/25/10, p. 15). In addition, Commissioner Dworetzky and counsel for the parties discussed the issues in the case and agreed that the issues were:

- (a) whether Mr. Migliore was demoted, and if so, the merits of the demotion; or
- (b) if Mr. Migliore was not demoted, was he constructively discharged. (Tr., 5/25/10, pgs. 27-36).

Further, Commissioner Dworetzky stated that during the May 25, 2010 hearing, he only was going to hear testimony on the factual issue of whether there was a demotion. He explained that if he ruled that there was no demotion, Mr. Migliore could raise as part of the merits argument that there was, nevertheless, a constructive discharge. Mr. Migliore's counsel stated that he understood. (Tr., 5/25/10, pgs. 37-38).

25. At the end of the hearing on May 25, 2010, Commissioner Dworetzky asked that he be provided with documents showing what moneys Mr. Migliore received or was entitled to receive after August 31, 2009, and on what basis that was calculated – as a teacher or as an Assistant Principal. (Tr., 5/25/10, pgs. 117-120).

26. By letter dated July 22, 2010, Adrian Moody, Counsel to the SRC, stated that Commissioner Dworetzky decided after reviewing transcripts, exhibits, and written briefs from the parties, that Mr. Migliore was not “in fact” demoted. It was noted that Mr. Migliore was paid as an Assistant Principal when he received his termination funds. (Exh. SDP N 1-5). In addition, Mr. Moody stated that a hearing needed to be scheduled on the issue of whether Mr. Migliore was constructively discharged. (Ltr. dated July 22, 2010, from Adrian Moody, Esquire).

27. Hearings on the issue of constructive discharge were held on September 14, 2010, September 29, 2010, and January 6, 2011. Commissioner Dworetzky found that Mr. Migliore was not constructively discharged. Thus, Commissioner Dworetzky recommended to the SRC that the SRC dismiss the matter without further hearing because Mr. Migliore had not been demoted prior to his retirement and had not been constructively discharged.

28. By resolution dated June 15, 2011, the SRC resolved that Mr. Migliore retired from the District effective June 30, 2009, and adopted the Findings of Fact and Conclusions of Law submitted by Commissioner Dworetzky.

Standard of Review

Under Section 1131 of the Public School Code of 1949, a professional employee who considers himself or herself to have been aggrieved by the action of the board of school directors can appeal that action to the Secretary. 24 P.S. § 11-1131. The Secretary has the authority to review a teacher tenure appeal *de novo*. *Belasco v. Board of Public Education*, 510 A.2d 337, 343 (Pa. 1986). In such proceedings, the Secretary is the neutral fact-finder and may “conduct *de novo* review whether [s]he takes additional testimony or merely reviews the official record of the proceedings before the board.” *Id.* at 343. The Secretary has the authority to determine the credibility of the witnesses, the weight of the evidence, and the inferences to be drawn therefrom. *Id.* at 342; *Forest Area School Dist. v. Shoup*, 621 A.2d 1121, 1124 (Pa. Cmwlth. 1993). After hearing and argument and reviewing all the testimony filed or taken before the Secretary, the Secretary shall enter an order affirming or reversing the action of the board of school directors.

Discussion

The Public School Code provides that a professional employee may not be demoted in salary or in type of position unless the employee consents to the demotion. If the employee does not consent to the demotion, then the employee has the right to a hearing before the board of school directors and an appeal in the same manner as provided in the case of the dismissal of a professional employee. See 24 P.S. § 11-1151. The board of school directors must provide the professional employee with a written notice signed by the president and attested to by the secretary, setting forth the time and place of the hearing and a detailed statement of the charges. See 24 P.S. § 11-1127. A demotion cannot become effective until after a hearing has taken place. *Ahern v. Chester-Upland School District*, 582 A.2d 741 (Pa. Cmwlth. 1990), *appeal denied*, 598 A.2d 285.

As stated above, in the hearings before Commissioner Dworetzky, the issues were whether Mr. Migliore was demoted, and if so, the merits of the demotion; or if he was not demoted, had he voluntarily retired or had he been constructively discharged. Commissioner Dworetzky stated in his recommended opinion to the SRC that Mr. Migliore had not been demoted and had not been constructively discharged. Further, Commissioner Dworetzky stated that Mr. Migliore had retired as an Assistant Principal; thus, there was no need to consider whether a demotion would have been authorized by the SRC had he not retired. On June 15, 2011, the SRC resolved that Mr. Migliore had retired from the District, effective June 30, 2009, and adopted the Findings of Fact and Conclusions of Law recommended by Commissioner Dworetzky.

For the reasons below, I find that Mr. Migliore was not demoted and was not constructively discharged; but that Mr. Migliore voluntarily retired from his employment with the District, effective June 30, 2009. Therefore, I affirm the decision of the SRC and deny Mr. Migliore's appeal.

Demotion

In approximately June 2009, District administrators recommended that Mr. Migliore be demoted from his position as an Assistant Principal to a classroom teacher. Mr. Migliore received documents from the Office of Professional Staffing regarding his alleged demotion and asked that he make an appointment to pick his new school location. (Exh. M-1). The Executive Director of Employee Relations, Mr. Rosen, testified that Mr. Migliore was being recommended for demotion and so he believed that in offering him different teaching positions, human resources was acting on the assumption that Mr. Migliore "needed a place to be in September." (Tr., 9/29/10, p. 612). Mr. Migliore investigated certain positions but on July 29, 2009, advised

that he was not choosing a position at that time, that he had not been demoted and did not expect to be demoted. (Exh. M-5; Tr., 5/25/10, pgs. 58-59).

Mr. Migliore received a letter dated August 14, 2009, signed by the Chairman of the SRC, and the District Superintendent, who also had authority as the Secretary of the SRC, stating that they were going to recommend to the SRC that Mr. Migliore be demoted to a teaching position. (Exh. SDP A 1-3). The letter identified charges against Mr. Migliore, advised him of his right to request a hearing before the SRC, and advised that if he requested a hearing it would be held on August 25, 2009. By letter dated August 18, 2009, Mr. Migliore advised the District that he was appealing the recommendation that he be demoted to a teaching position, he was electing to have a hearing before the SRC, and he was going to defend himself. (Exh. SDP H 1-2, M-6; Tr., 5/25/10, pgs. 63-64).

By letter dated August 21, 2009, Mr. Bielli, Assistant General Counsel for the District, acknowledged receipt of Mr. Migliore's appeal of the recommended demotion, his request for a hearing before the SRC, and that Mr. Migliore would be representing himself. The hearing initially scheduled for August 25, 2009 was postponed and available dates for the hearing were to be obtained. (Exh. M-7; Tr., 5/25/10, pgs. 64-65). By letter dated September 3, 2009, Mr. Migliore stated that he and Mr. Bielli, had been negotiating a possible settlement of the matter but that senior District officials had not approved the proposed settlement. (Exh. SDP I 1-2).

On September 2, 2009, prior to any hearing before the SRC regarding the recommended demotion, the District's Department of Human Resources received from Mr. Migliore, a Notification of Retirement/Resignation form dated August 31, 2009. (Exh. SDP B). On this form, Mr. Migliore indicated that he was retiring, his last day of work was June 30, 2009, and his position was Assistant Principal. After June 30, 2009, Mr. Migliore never reported to work with

the District as a teacher. Mr. Migliore was paid as an Assistant Principal continuously from August 14, 1999 through his retirement date of June 30, 2009. (Tr., 5/25/10, pgs. 46, 86; Exh. SDP D 1-2).

Mr. Migliore argues that he was illegally demoted because a demotion cannot become effective until after a hearing before the SRC. Mr. Migliore stated during the hearing before Commissioner Dworetzky that when he signed his resignation letter he had in mind that he was not legally demoted. (Tr., 5/25/10, p. 87). Thus, even though Mr. Migliore had been asked to pick a new school location for the 2009-2010 school year and learned that his Assistant Principal position at Mastbaum had been advertised as an open position, Mr. Migliore knew that any demotion would not be effective until after a hearing before the SRC. Mr. Migliore testified that he never received any notification of demotion from the SRC. (Tr. 5/25/10, p. 95).

Although the administration had recommended that Mr. Migliore be demoted, Mr. Migliore retired before a demotion was effectuated. The SRC had not voted on a demotion prior to Mr. Migliore's retirement and Mr. Migliore had not received any notification from the SRC of a demotion. Mr. Migliore knew that a hearing was to be scheduled with the SRC regarding the recommended demotion. However, before the hearing was scheduled, Mr. Migliore retired.³ Thus, Mr. Migliore was not demoted prior to his voluntary retirement.

³ Mr. Migliore argues that the SRC did not hold a hearing within fifteen (15) days of its notice of charges, as required by section 1127 of the Public School Code. 24 P.S. § 11-1127. However, the notice was dated August 14, 2009, and stated that a hearing, if requested, would be held on August 25, 2009. After Mr. Migliore requested a hearing, the hearing was postponed and available dates were to be determined. However, as evidenced by correspondence from Mr. Migliore to Mr. Bielli, and from statements of Mr. Migliore's attorney during the May 25, 2010 hearing, they had been negotiating a possible settlement of the matter. (Exh. SDP I 1-2; Tr., 5/25/09, p. 13). Thus, postponement of the hearing was not unreasonable as settlement negotiations were occurring.

Mr. Migliore testified that he knew he had a choice to teach or retire. (Tr., 9/29/10, p. 584). He also testified that he knew he could contest the demotion if he took a job as a teacher and that he had not been asked to release his right to contest the demotion. (Tr., 9/29/10, p. 532-33).

Prior to June 22, 2009, Mr. Migliore also had told Ms. Dean that he was going to sit down with his family at the end of the year and decide whether to retire. (Tr., 9/29/10, p. 525). Nobody at the District instructed him to retire. (Tr., 9/29/10, p. 517). Prior to retirement, Mr. Migliore met with Mr. Lerner, President of the Teamster Local 502, Commonwealth Association of School Administrators, and discussed his rights and alternatives. Mr. Migliore also talked to the union's lawyer. Mr. Migliore was told that it would take approximately one year to go through the grievance and arbitration procedure. (Tr., 9/29/10, pgs. 509, 512-13). However, Mr. Migliore decided he did not want to teach one year and then retire in case he received an adverse ruling. (Tr., 9/29/10, p. 513). Mr. Migliore knew what his rights were when he decided to retire. (Tr., 9/29/10, pgs. 515-16).

Mr. Migliore also testified that family considerations contributed to his decision to retire. (Tr., 9/29/10, p. 565). In addition to family considerations, one of the reasons he retired was that he wanted to defend himself, and he initially decided to defend himself for financial reasons. (Tr., 9/29/10, p. 546). However, after he retired, Mr. Migliore hired counsel to provide his defense.

Mr. Migliore testified that if he retired by August 31, 2009, his retirement would revert back to June 30, 2009. (Tr., 5/25/10, p. 85). Mr. Migliore testified that he submitted his retirement papers as an Assistant Principal because that was the position he held on June 30, 2009, and he would have lost money had he retired as a teacher. (Tr., 5/25/10, p. 97). According

to Mr. Migliore, he wanted to mitigate damages by retiring at the Assistant Principal level rather than at the teacher level because he would get paid at a higher rate for unused personal days and sick leave if he retired as an Assistant Principal. (Tr., 5/25/10, pgs. 96-97; Tr., 9/29/10, p. 576). Mr. Migliore was paid as an Assistant Principal continuously from August 14, 1999, through his retirement date of June 30, 2009. (Exh. SDP D 1-2; Tr., 5/25/10, p. 46). After June 30, 2009, Mr. Migliore never reported to work with the District as a teacher. (Tr., 5/25/10, p. 86). Mr. Migliore began receiving his retirement pay in May 2010 and there is no evidence in the record that the retirement pay was not based on his position as an Assistant Principal (Tr., 5/25/10, p. 97).

Mr. Migliore argues that he was improperly demoted by administrative staff and cites to the case of *Board of School Directors of Abington School District v. Pittenger*, 305 A.2d 382 (Pa. Cmwlth. 1973), for support of his position. In *Pittenger*, the professional employee was an assistant principal at a district high school when he was advised by the superintendent that his assignment at the high school would terminate on July 9 and that he would be reassigned to a teaching position for the next school year. On July 7, the professional employee was handed a letter setting forth the understanding of the administrators as to the employee's status as of July 9. On July 14, the employee sent a letter to the superintendent, stating that he considered the new assignment to be a demotion to which he did not give his consent and demanded a hearing. *Id.* at 383.

After receipt of the employee's letter, the principal of the high school prepared a list of 24 charges as support for the transfer and the superintendent signed the list of charges on September 29. Notice of a hearing before the board of school directors was signed by the president and secretary; however, counsel for the school board testified that the board did not see

the charges until the first hearing on October 11. Hearings held before the board concluded on November 18. The board met December 2 and issued a resolution or adjudication approving the transfer-demotion of the employee. *Id.* at 384.

The school board argued in *Pittenger* that because it was performing a quasi-judicial function, it would not be proper for it to pass upon the demotion before hearing the facts of the case; therefore, it was not necessary for the board to have passed a resolution on the demotion prior to granting the employee a hearing. However, all of the proceedings before September 29, which was the date of the letter signed by the president and secretary of the board granting a hearing, were performed by the administrative staff. Thus, the administrative staff had already accomplished the demotion before the board had notice of it. The Court found neither a specific nor an implied provision in the School Code that would allow board ratification of a demotion directed by administrative staff. *Id.* at 386. The Court held that the action of the board violated the employee's rights under the teacher tenure provisions of the School Code and was void. Therefore, the school district was ordered to reinstate the professional employee to the position of assistant high school principal. *Id.* at 387.

However, in *Pittenger*, the Court also explained that the board could have cured the procedural defect. "The Board only needed to have passed a resolution that it had sufficient evidence to support its belief, to demote Albrecht by some given date, and therein direct the Secretary and President of the Board to serve notice upon Albrecht of this fact and to advise him of his right to a hearing." *Id.* at 387; see also, *Patchel v. Wilkinsburg School District*, 400 A.2d 229 (Pa. Cmwlth. 1979) (the board of school directors followed the procedure in *Pittenger* to cure the defective administrative demotion).

Thus, even if Mr. Migliore was improperly demoted by administrative staff, the District received notice of Mr. Migliore's retirement on September 2, 2009 - within fifteen (15) days of requesting a hearing before the SRC regarding the recommended demotion. Mr. Migliore's retirement from the District prevented the SRC from taking any action to cure the alleged administrative demotion about which Mr. Migliore complains.

In addition, Mr. Migliore had the opportunity to remain employed by the District and proceed to a hearing before the SRC regarding the recommended demotion. Mr. Migliore knew that if there was a decision that he had been improperly demoted or that the demotion was arbitrary, discriminatory or based on improper considerations, the remedy would have been to return him to the position of Assistant Principal, with back pay.

However, Mr. Migliore was trying to "hedge his bets" and decided to short-circuit the process by retiring. Although Mr. Migliore asked for a hearing before the SRC to determine whether he was to be demoted, he then decided to try to "mitigate his damages" by retiring to avoid losing money in the event there was an adverse ruling against him. In other words, Mr. Migliore only wanted to be bound by the decision of the SRC on his recommended demotion if the decision was in his favor. Mr. Migliore, by retiring, did not want to have to live with the consequences of less retirement money if the decision about the recommended demotion was not decided in his favor.

Once Mr. Migliore removed himself from employment with the District by retiring, he was no longer a professional employee of the District. It would be unreasonable to allow a professional employee to request a hearing before the board of school directors regarding the employee's recommended demotion, then retire from the school district, and still require the school district to hold a hearing regarding the recommended demotion. Once the professional

employee retires or resigns from the school district, the school district should not be required to proceed with a hearing regarding the recommended demotion of someone who is no longer an employee of the school district.

Although there are not cases strictly on point regarding this issue, there are two cases that are instructive. *Appeal of Wesenberg*, 31 A.2d 151 (Pa. 1943) and *Arnold v. Pittsburgh Board of Public Education*, 415 A.2d 985 (Pa. Cmwlth. 1980). In *Arnold*, a temporary professional employee received two unsatisfactory performance ratings and was advised that she had the option of resigning or being discharged. Ms. Arnold chose to resign. She continued working in the district as a substitute teacher for the next three (3) years and continually asked to be reinstated as a temporary professional employee. Because the district refused to reinstate her as a professional employee, she filed a complaint in mandamus to compel the school board to grant her a hearing under the Local Agency Law so she could contest her unsatisfactory ratings. The court dismissed her complaint because she had voluntarily resigned and so was not entitled to a hearing. The court found that she voluntarily resigned to avoid the adverse consequences of being discharged.

Although Mr. Migliore was a professional employee (tenured) rather than a temporary professional employee (not tenured), he voluntarily retired from employment with the District. In addition, as exemplified by Mr. Migliore's own testimony, one of the main reasons he retired was to avoid the adverse financial consequences of being demoted. The *Arnold* case supports the position that Mr. Migliore could not retire and still require the SRC to hold a hearing about his recommended demotion; particularly since he retired to avoid possible adverse financial consequences while still trying to reserve the right to return to the District as an Assistant Principal if a decision about the recommended demotion was in his favor.

In *Wesenberg*, a high school principal was reassigned to be the principal of a proposed new junior high school. The principal declined to accept the assignment because he believed it was a demotion. The school board notified the principal that his failure to assume the new assignment would be regarded as insubordination and persistent neglect of his duties. Charges were filed against the principal and he was dismissed. The Secretary of Education affirmed the action of the board, which was also upheld by the Pennsylvania Supreme Court. 31 A.2d at 152.

In reviewing the matter, the Supreme Court stated:

Appellee did not invoke that remedy and ask for a hearing on the question of demotion. If he had done so and at the same time assumed the new assignment until final disposition of the question, he could have safeguarded his rights under the statute and avoided the risk of dismissal. He chose to refuse to assume any duties as principal of the new high school, although holding himself ready, willing, and able to act as principal of the Liberty High School. (emphasis added).

346 Pa. at 441, 31 A.2d at 153.

Although Mr. Migliore asked for a hearing and one was to be scheduled, he failed to “assume the new assignment until final disposition of the question.” Therefore, Mr. Migliore did not safeguard his rights under the statute. Mr. Migliore even stated in his brief that had he failed to report as a teacher for the 2009-2010 school year (if he had not retired) that would have constituted insubordination. Based on *Wesenberg*, such insubordination could have resulted in Mr. Migliore’s dismissal.

Therefore, when Mr. Migliore retired, the SRC was no longer required to proceed with a hearing to determine whether Mr. Migliore should be demoted. Even if Mr. Migliore had been improperly demoted by administrative action, Mr. Migliore’s retirement prevented the SRC from curing the alleged administrative demotion.

Mr. Migliore knew that if he reported to work for the 2009-2010 school year as a teacher, he was still entitled to have a hearing regarding the alleged demotion. In addition, if it was

determined that he had been improperly demoted, the remedy would have been reinstatement to an Assistant Principal position with back pay. However, Mr. Migliore was concerned that if he reported as a teacher and then the proposed demotion was found to have been valid, he would have lost money when he later retired. Thus, as stated previously, Mr. Migliore wanted to retire to save himself money in the event that a ruling about the recommended demotion was not in his favor.⁴

Mr. Migliore never worked in a teaching position at the District after June 30, 2009, the effective date of his retirement, and was paid as an Assistant Principal to the date of his retirement. Therefore, I hold that Mr. Migliore was not demoted but voluntarily retired from his employment with the District, effective June 30, 2009. Mr. Migliore's retirement prevented the SRC from curing what Mr. Migliore argues was an illegal administrative demotion; therefore, after his voluntary retirement, the SRC was not required to provide Mr. Migliore a hearing regarding the recommended demotion.

Constructive Discharge

In his brief, Mr. Migliore cited to a number of cases regarding constructive discharge and stated that the Pennsylvania Supreme Court adopted the doctrine of constructive discharge based on the reasonable person standard. Mr. Migliore argues that the SRC used the wrong standard in determining that he was not constructively discharged. However, in Commissioner Dworetzky's recommended opinion, he clearly states that the standard is whether a reasonable person in Mr.

⁴ Mr. Migliore cannot ask that his rights against a contested demotion be protected by seeking a hearing and then decide to retire so that he will not lose any money in retirement if the matter is decided against him, but still reserve the right to return to work as an Assistant Principal if the matter is decided in his favor.

Migliore's position would have concluded that the circumstances were so adverse that he had no choice but to resign.

"A constructive discharge occurs only where the employer makes working conditions so intolerable that the employee is forced to resign." *Pennsylvania Labor Relations Board v. Sand's Restaurant Corporation*, 240 A.2d 801, 803 (Pa. 1968). "[T]o establish 'constructive discharge,' the plaintiff must . . . show that the abusive working environment became so intolerable that her resignation qualified as a fitting response." *Pennsylvania State Police v. Suders*, 542 U.S. 129, 134 (2004). "The inquiry is objective: Did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?" *Id.* at 141.

Based on the documents and testimony provided in this case, a reasonable person in Mr. Migliore's situation would not have felt compelled to resign. Any stress Mr. Migliore felt working at Mastbaum would not have been present in the 2009-2010 school year if he had accepted a teaching position because it would not have been at Mastbaum. Mr. Migliore apparently believed that if he accepted a teaching position it would have amounted to an acceptance that Ms. Dean's charges against him were valid; thus, in Mr. Migliore's mind accepting a teaching position was intolerable. However, I do not accept that argument because Mr. Migliore clearly knew that even if he accepted a teaching position he was still entitled to have a hearing regarding the recommended demotion; thus, there is no basis for his position that accepting a teaching position would have meant that he agreed that Ms. Dean's charges against him were valid. Mr. Migliore knew that he could have reported to work in a teaching position for the 2009-2010 school year and that if a decision regarding the recommended demotion was in his favor he would have been reinstated to an Assistant Principal position with back pay.

Although Mr. Migliore requested a leave with pay so he could properly prepare for his defense, the District was under no obligation to grant his request. Mr. Migliore was not required to defend himself; he made that choice. In addition, after Mr. Migliore retired, he hired counsel to provide his defense. Mr. Migliore's decision to retire was his voluntary decision. Mr. Migliore testified that family considerations contributed to his retirement. In addition, Mr. Migliore repeatedly testified that he retired to avoid the loss of retirement funds in the event a ruling about the recommended demotion was not in his favor. In other words, Mr. Migliore wanted to challenge the recommended demotion by seeking a hearing before the SRC; but he only wanted to be bound by the decision of the SRC on his recommended demotion if the decision was in his favor. Mr. Migliore, by retiring, did not want to have to live with the consequences of less retirement money if the decision about the recommended demotion was not decided in his favor.

Nothing in the record evidences that the District made conditions of Mr. Migliore's employment so intolerable that a reasonable person would have felt compelled to resign. Therefore, I hold that Mr. Migliore was not constructively discharged.

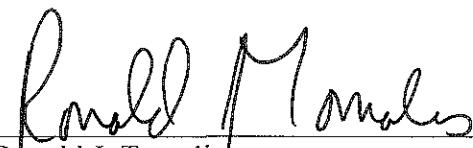
Accordingly the following Order is entered:

**COMMONWEALTH OF PENNSYLVANIA
OFFICE OF THE SECRETARY OF EDUCATION**

RICHARD MIGLIORE, :
Appellant :
:
v. : **Teacher Tenure Appeal No. 03-11**
:
PHILADELPHIA CITY SCHOOL :
DISTRICT, :
Appellee :

ORDER

AND NOW, this 3rd day of August 2012, it is hereby ordered and decreed that Mr. Migliore was not demoted and was not constructively discharged by the Philadelphia City School District; but he voluntarily retired. Therefore, Mr. Migliore's appeal is denied.



Ronald J. Tomalis
Secretary of Education

Date Mailed: August 3, 2012