

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

TARA BUSKE,	:		
	:		
Appellant	:		
	:		
v.	:		Teacher Tenure Appeal
	:		No. 04-11
NESHAMINY SCHOOL DISTRICT	:		
	:		
Appellee	:		

Tara Buske (“Ms. Buske”), Appellant, appeals the decision of the Neshaminy School District (“the District”), terminating her employment with the District as a professional employee.

FINDINGS OF FACT

1. Ms. Buske was hired as a professional employee by the District. (N.T. p. 11).¹
2. On July 8, 2011, Ms. Buske received a Statement of Charges and Notice of Hearing signed by the President of the District’s Board of School Directors (“the Board”). (Exhibit A-1).²
3. The Statement of Charges and Notice of Hearing indicated that it was provided pursuant to Article XI of the Public School Code of 1949, as amended, and more particularly, sections 1122, 1126, 1127, 1128, 1129, 1130, and 1133 thereof. (Exhibit A-1).
4. The Statement of Charges and Notice of Hearing indicated that the Board would meet on July 28, 2011, at 7:00 p.m. to determine whether Ms. Buske should be dismissed from her employment with the District. (Exhibit A-1).

¹ N.T. refers to Notes of Testimony regarding testimony provided at the July 28, 2011 hearing before the Board.

² Exhibit refers to exhibits admitted into evidence at the July 28, 2011 hearing before the Board.

5. The Statement of Charges and Notice of Hearing indicated that Ms. Buske was being charged with immorality based upon Ms. Buske's arrest for retail theft and receiving stolen property, being placed on ARD for retail theft, and the misuse and misreporting of sick leave. (Exhibit A-1).

6. The Statement of Charges and Notice of Hearing indicated that Ms. Buske had the right to hear witnesses and evidence against her and to cross-examine said witnesses and the right to present witnesses and evidence on her own behalf and to testify on her own behalf. (Exhibit A-1).

7. The Statement of Charges and Notice of Hearing indicated that if Ms. Buske or her counsel had any questions, they could contact Mr. Richard B. Galtman, Esq. ("Mr. Galtman"), counsel for the District. (Exhibit A-1).

8. On July 18, 2011, Mr. Marc L. Gelman, Esq. ("Mr. Gelman"), counsel for Ms. Buske, wrote a letter to Mr. Galtman, requesting additional information with regard to the District's allegations. Specifically, Mr. Gelman requested specific dates, times, and explanations of how the District believed Ms. Buske had misused and misreported her sick leave. In the letter, Mr. Gelman referred to the proceeding scheduled for July 28, 2011, as a "pre-disciplinary conference." A copy of the letter was mailed to Mr. Thomas J. Profy, IV, Esq. ("Mr. Profy"), counsel for the Board. (Attachment to District's Answer).³

9. On July 19, 2011, Mr. Galtman responded to Mr. Thomas W. Jennings, Esq. ("Mr. Jennings"), Mr. Gelman's partner, explaining that the correspondence was a Statement of Charges and Notice of Hearing pursuant to the Public School Code, that the hearing was being held to determine whether Ms. Buske should be dismissed from her employment, that the hearing

³ Attachment to District's Answer refers to copies of documents that are attached to the District's Answer to Buske's Petition for Appeal.

was not a “pre-disciplinary conference,” and that Ms. Buske would have the right to hear witnesses and evidence against her at the hearing. (Attachment to District’s Answer).

10. On July 19, 2011, Mr. Jennings replied to Mr. Galtman, renewing their request for additional information. (Attachment to District’s Answer).

11. On July 22, 2011, Mr. Profy emailed the parties’ respective counsel, stating that the documents requested by Mr. Gelman were relevant and should be turned over to Mr. Gelman pursuant to his request. (Attachment to District’s Answer).

12. On July 22, 2011, Mr. Galtman provided Mr. Gelman with the documents he intended to present at the hearing, including criminal records outlining Ms. Buske’s arrest, and absence reports evidencing her misuse of sick leave to attend her criminal matter. (Attachment to District’s Answer).

13. On July 27, 2011, Mr. Profy reminded the parties’ respective counsel that the formal hearing as outlined in the Statement of Charges and Notice of Hearing was being held on July 28, 2011. (Attachment to District’s Answer).

14. On July 27, 2011, Mr. Profy asked the parties’ respective counsel whether there were any outstanding issues in advance of the hearing. (Attachment to District’s Answer).

15. On July 27, 2011, Mr. Gelman responded to Mr. Profy, stating that he did not have any outstanding issues. (Attachment to District’s Answer).

16. A hearing was held on July 28, 2011, commencing on or about 7:10 p.m., before the Board, at the District Office Board Room, 250 Langhorne-Yardley Road, Langhorne, Pennsylvania. (N.T. p. 1).

17. Ms. Buske appeared at the hearing on July 28, 2011. Mr. Gelman represented Ms. Buske throughout the hearing. (N.T. p. 2).

18. Mr. Profy convened the hearing by stating it was the Board's understanding that the hearing was a formal hearing based upon a request for same by Ms. Buske in response to the Statement of Charges and Notice of Hearing. (N.T. p. 4).

19. Neither Ms. Buske nor Mr. Gelman contested Mr. Profy's characterization of the proceeding. (N.T. p. 4).

20. The only legal issue Mr. Gelman raised before the Board at the onset of the hearing was that the specification of charges, particularly the misuse and misreporting of sick leave, was insufficient for Ms. Buske to be made aware of the allegations against her. (N.T. pp. 5-6).

21. Dr. Louis T. Muenker, D.Ed. ("Dr. Muenker"), the District Superintendent, testified on behalf of the District. (N.T. p. 9). Mr. Gelman cross-examined Dr. Muenker. (N.T. p. 47).

22. Ms. Buske did not testify and did not present any witnesses. (N.T. p. 101).

23. At the close of the hearing, Mr. Profy requested that the parties' respective counsel submit proposed findings of fact and conclusions of law. (N.T. p. 102).

24. Neither Ms. Buske nor Mr. Gelman contested Mr. Profy's request for proposed findings of fact and conclusions of law. (N.T. pp. 102-105).

25. Neither Ms. Buske nor Mr. Gelman raised any other legal or procedural issues to the Board before the hearing was officially closed. (N.T. pp. 102-105).

26. On August 4, 2011, Mr. Gelman sent a letter to Mr. Profy and Mr. Galtman, asserting Ms. Buske's position that the July 28th hearing was not governed by Section 1127, and therefore, Ms. Buske did not waive her right to grieve her dismissal pursuant to Section 1133. To the extent the Board disagreed, Mr. Gelman requested that all further activity in connection to

the July 28th hearing immediately cease, rendering the process void. (Exhibit 2 attached to Buske's Petition for Appeal).⁴

27. On August 4, 2011, Mr. Galtman replied to Mr. Gelman's letter, explaining the District's position that the July 28th hearing was governed by Section 1127; thus, Ms. Buske waived her right to grieve her dismissal pursuant to Section 1133. (Exhibit 3 attached to Buske's Petition for Appeal).

28. On August 5, 2011, Mr. Gelman sent an email to Mr. Profy and Mr. Galtman, raising the issue of the Statement of Charges and Notice of Hearing being insufficient. Specifically, he asserted that it was never made apparent, by the language of the Statement of Charges and Notice of Hearing or by the conduct at the hearing, that Ms. Buske was waiving her right to grieve her dismissal by requesting and attending the July 28th hearing. Mr. Gelman requested that no further activity occur until the issue was resolved. (Exhibit 4 attached to Buske's Petition for Appeal).

29. On August 9, 2011, Mr. Profy asked the parties' respective counsel to brief the issue that Mr. Gelman raised on August 4, 2011, and to submit the briefs on that issue at the same time they submitted their proposed findings of fact and conclusions of law. (Exhibit 5 attached to Buske's Petition for Appeal).

30. On August 9, 2011, Mr. Gelman requested that Mr. Profy clearly establish the nature of the proceeding and its status before going forward in the process. (Exhibit 6 attached to Buske's Petition for Appeal).

31. On August 10, 2011, Mr. Profy denied Mr. Gelman's request in the interest of expediency. (Exhibit 7 attached to Buske's Petition for Appeal).

⁴ Exhibit to Buske's Petition for Appeal refers to documents attached to the Petition for Appeal that are identified by exhibit numbers.

32. On August 11, 2011, Mr. Gelman asked Mr. Profy to reconsider his position due to the lack of clarity as to the nature of the July 28th hearing and the failure to confirm that Ms. Buske's participation did not serve as a waiver of her right to grieve her dismissal. (Exhibit 8 attached to Buske's Petition for Appeal).

33. On August 16, 2011, Mr. Profy denied Mr. Gelman's request for reconsideration. (Exhibit 9 attached to Buske's Petition for Appeal).

34. On August 19, 2011, Mr. Gelman submitted his brief, addressing the issue of insufficient notice, but did not submit proposed findings of fact or proposed conclusions of law. (Exhibit 10 attached to Buske's Petition for Appeal).

35. On August 19, 2011, Mr. Galtman submitted his proposed findings of fact, proposed conclusions of law, and a brief addressing the issue of insufficient notice. (Exhibit 11 attached to Buske's Petition for Appeal).

36. By resolution of August 23, 2011, the Board:

(a) Found that the District had proven the charges set forth in the Statement of Charges and Notice of Hearing;

(b) Approved, adopted, authorized and ratified the findings of fact and conclusions of law prepared by Mr. Profy; and

(c) Voted to dismiss Ms. Buske from employment with the District.

(Exhibit 3 attached to the District's October 7, 2011 letter to the Secretary in response to the Secretary's October 7, 2011 letter appointing a hearing officer and requesting certain documents).

37. On September 6, 2011, Mr. Profy sent a letter to Mr. Gelman, stating that his request to non-suit the hearing and transfer the matter to arbitration was denied because the

request was made after the close of all evidence and, pursuant to Section 1133, a professional employee is not entitled to both a school board hearing and arbitration. (Exhibit 14 attached to Buske's Petition for Appeal).

38. On September 22, 2011, Ms. Buske filed an appeal of her dismissal with the Secretary.

39. On October 26, 2011, a hearing was held before the hearing officer appointed by the Secretary and the parties' counsel presented oral arguments supporting their respective positions.

DISCUSSION

Ms. Buske received a Statement of Charges and Notice of Hearing setting forth charges against her and stating that the Board would hold a hearing on July 28, 2011, to determine whether Ms. Buske should be dismissed from her employment with the District. The hearing was held and Ms. Buske was represented by counsel. On August 23, 2011, the Board held that the District had proven the charges set forth in the Statement of Charges and Notice of Hearing; thus, the Board voted to dismiss Ms. Buske from employment with the District.

Ms. Buske filed an appeal with the Secretary of Education (Secretary) pursuant to section 1131 of the Public School Code, as amended. 24 P.S. § 11-1131. On October 26, 2011, a hearing was held before a hearing officer appointed by the Secretary and counsel for the parties presented oral arguments supporting their respective positions.

In her appeal, Ms. Buske alleges that the Statement of Charges and Notice of Hearing was insufficient; thus, violating her due process rights. First, Ms. Buske alleges that the Statement of Charges and Notice of Hearing did not provide her with the choice to waive a

Section 1127 hearing in order to alternatively grieve and arbitrate her dismissal.⁵ Ms. Buske alleges that the hearing that took place on July 28, 2011, was not a hearing pursuant to Section 1127; thus, she did not waive her right to grieve and arbitrate her dismissal pursuant to Section 1133. Moreover, Ms. Buske requests that the July 28th hearing be rendered void.

A Statement of Charges and Notice of Hearing was provided to Ms. Buske pursuant to Section 1127 of the Public School Code, as amended. 24 P.S. § 11-1127. Section 1127 is entitled “Procedure on dismissals; charges; notice; hearing” and provides in pertinent part:

Before any professional employe having attained a status of permanent tenure is dismissed by the board of school directors, such board of school directors shall furnish such professional employe with a detailed written statement of the charges upon which his or her proposed dismissal is based and shall conduct a hearing. *A written notice signed by the president and attested by the secretary of the board of school directors shall be forwarded by registered mail to the professional employe setting forth the time and place when and where such professional employe will be given an opportunity to be heard either in person or by counsel, or both, before the board of school directors and setting forth a detailed statement of the charges.* (Emphasis added).

By its express terms, section 1127 only requires that before dismissing a professional employee, the board of school directors must provide the employee with a written notice stating the time and place of the hearing and a detailed statement of the charges against the employee. Therefore, an explanation of the effect that requesting a hearing pursuant to sections 1121 through 1132 has on the professional employee’s right to file a grievance under a collective bargaining agreement is not required to be explained in the written notice provided pursuant to section 1127.

⁵ Ms. Buske claims that the wording of the Statement of Charges and Notice of Hearing caused her to not understand the nature of the July 28th hearing. More specifically, Ms. Buske claims she understood the Statement of Charges and Notice of Hearing to mean that she would be precluded from grieving and arbitrating her dismissal if she did not request a hearing. Ms. Buske claims she attended the July 28th hearing solely as a means of preserving her right to grieve and arbitrate her dismissal.

The effect of requesting a hearing is explained in Section 1133 of the Public School Code, as amended. 24 P.S. § 11-1133. Section 1133 provides:

Nothing contained in sections 1121 through 1132 shall be construed to supersede or preempt a provision of a collective bargaining agreement . . . [that] provides for the right of an exclusive representative to grieve and arbitrate the validity of a professional employe's termination for just cause or for causes set forth in section 1122 of this act;

...
However, if within ten (10) days after receipt of the detailed written statement and notice required by section 1127, the professional employe chooses to exercise his or her right to a hearing, any provision of the collective bargaining agreement relative to the right of the exclusive representative to grieve or arbitrate the termination of such professional employe shall be void. Professional employees shall have the right to file a grievance under the collective bargaining agreement or request a hearing pursuant to section 1121 through 1132, but not both.

24 P.S. § 11-1133.

Ms. Buske had the choice to request a hearing or file a grievance under the collective bargaining agreement. The Statement of Charges and Notice of Hearing referenced sections 1122, 1126, 1127, 1130 and 1133, and noted that the hearing before the Board would be to determine whether Ms. Buske should be dismissed. Prior to the hearing, Mr. Gelman, Ms. Buske's attorney, was advised by the District's attorney that the hearing was to determine whether Ms. Buske should be dismissed and was not a "pre-disciplinary conference."

At the hearing, Mr. Gelman advised that he did not have any outstanding issues. Mr. Gelman did not contest the hearing officer's characterization of the hearing as a formal hearing based upon a request for such in response to the Statement of Charges and Notice of Hearing. Mr. Gelman did not object to the hearing officer's request, at the end of the hearing, that the parties submit proposed findings of fact and conclusions of law. It was not until August 4, 2011, a week after the hearing had concluded, that Mr. Gelman asserted the position that the July 28, 2011 hearing was not governed by section 1127 and that Ms. Buske had not waived her right to grieve her dismissal.

Ms. Buske requested a hearing before the Board and a hearing was held. The nature of the hearing was made clear prior to the hearing by District counsel and during the hearing by the hearing officer. The Statement of Charges and Notice of Hearing identified relevant statutory provisions, including section 1133. Ms. Buske was represented by counsel before and during the hearing. Ms. Buske never claimed prior to or during the hearing that she misunderstood the nature of the hearing. Therefore, the July 28, 2011 hearing was proper.

Second, Ms. Buske alleges that the Statement of Charges and Notice of Hearing did not contain a detailed written statement of the charges upon which her proposed dismissal was based, specifically referencing the misuse and misreporting of sick leave.

The 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 the entire week. *Id.* at 311. The charges did not state specifically that the professional employee was being charged for persistent and willful violation of the school laws. *Id.* However, the 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), the 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 need only inform a teacher of the basis for a proposed dismissal so as to enable him to present a proper defense.” *Id.* at 815.

The Statement of Charges and Notice of Hearing did more than inform Ms. Buske of the basis for her potential dismissal. Specifically, the Statement of Charges and Notice of Hearing stated that Ms. Buske was being charged with immorality due to her arrest for retail theft and receiving stolen property, being placed on ARD for retail theft, and her misuse and misreporting of sick leave. Thus, the causes for dismissal were sufficiently averred in the Statement of Charges and Notice of Hearing to enable Ms. Buske to present a proper defense.

Furthermore, Ms. Buske did not allege any harm to her interest resulting from the allegedly insufficient statement of charges. In *Kinniry v. Abington School District*, 673 A.2d 429 (Pa. Cmwlth. 1996), the Commonwealth Court affirmed the rule of law that “a petitioner seeking to establish that his or her due process rights have been violated bears the burden of proving that some harm or prejudice to his or her interests was caused by the [procedural defect].” *Id.* at 438. However, in *Graack v. Board of Supervisors of Lower Nazareth Township*, 330 A.2d 578 (Pa. Cmwlth. 1975), the Commonwealth Court indicated that a showing of prejudice is refuted when the petitioner had an opportunity to protect his or her interest. *Id.* at 580.

After receiving the Statement of Charges and Notice of Hearing, Mr. Gelman requested information about how the District believed Ms. Buske misused and misreported sick leave. Pursuant to Mr. Gelman’s request, Mr. Galtman provided Mr. Gelman with the documents he intended to present at the hearing, which were Ms. Buske’s criminal records and absence reports. Mr. Galtman specifically referred to these documents as “[outlining] Ms. Buske’s arrest as well as her misuse of sick leave for the purpose of attending her criminal matter.” (Appellee

Attachment 1 p. 12). Thus, by obtaining additional information about the District's allegations against her, Ms. Buske had the opportunity to protect her interest. There is no basis to find a due process violation since the Statement of Charges and Notice of Hearing was sufficiently specific. In addition, Mr. Galtman provided Mr. Gelman with Ms. Buske's criminal records and absence reports before the July 28th hearing, which further enabled Ms. Buske to present a proper defense. Based on all of the above, Ms. Buske's due process rights were not violated.

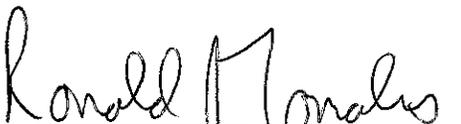
Accordingly the following Order is entered:

IN THE OFFICE OF THE SECRETARY OF EDUCATION
COMMONWEALTH OF PENNSYLVANIA

TARA BUSKE, :
Appellant :
v. : **Teacher Tenure Appeal**
NESHAMINY SCHOOL DISTRICT : **No. 04-11**
Appellee :

ORDER

AND NOW, this 6th day of September 2012, it is hereby ordered and decreed that the appeal of Tara Buske is denied and the decision of the Neshaminy School District to dismiss Tara Buske from employment with the Neshaminy School District is affirmed.



Ronald J. Tomalis
Secretary of Education

Date Mailed: 9/6/12