

Education to enter such an order as to him appears just and proper. The law clearly intends that a professional employe shall have the right to a hearing to challenge an alleged demotion. While the Appellant's failure to attend hearings offered by the school board might affect any future remedies she may seek, under the circumstances of this case, we do not find that she has lost her right to a hearing.

In view of the foregoing, we make the following

ORDER

AND NOW, to wit, this 29th day of June, 1973, the Appeal of Mary Olive Katter from the action of the Greater Johnstown School Board is sustained in part, and the said School Board is hereby ordered to set a date for a hearing before it on the claimed demotion of Mary Olive Katter.

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Appeal of Donald B. Irwin, a Professional
Employe, from a decision of the Board of
School Directors of the Greater Johnstown
School District, Cambria County,
Pennsylvania

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

No. 222

OPINION

John C. Pittenger
Secretary of Education

Donald B. Irwin, Appellant herein, has appealed from the action of the Board of School Directors of the Greater Johnstown School District, removing him from his position as Principal of Johnstown Central High School and assigning him to the position of Principal of Garfield Junior High School.

FINDINGS OF FACT

1. Donald B. Irwin is a professional employe currently employed by the Greater Johnstown School District as Principal of Garfield Junior High School.
2. On December 4, 1972, a petition of appeal was filed with the Secretary of Education requesting a hearing. The petition contained allegations that Mr. Irwin has been Principal at Johnstown Central High School up to June 19, 1972; that on that date the school board arbitrarily and capriciously assigned him to be Principal at Garfield Junior High School; which action he alleged constituted a demotion in income, benefits and type of position without his consent. Mr. Irwin further alleged that he demanded a hearing before the school board, but none was provided; and that the board, though requested, has failed, neglected, and refused to provide a hearing as required by law.
3. By letter dated August 10, 1972 Appellant requested a hearing before the Greater Johnstown School Board.
4. By letter dated August 22, 1972, received August 23, 1972, Mr. Irwin was informed by Fred W. Darr, secretary to the board, that a hearing would be held at the board's regular monthly meeting, August 28, 1972.
5. By letter dated August 23, 1972, the Appellant, through his counsel, informed the board that the letter of August 22, 1972 did not meet the statutory requirements and that the scheduled hearing was therefore not legally called or instituted.
6. By letter dated September 8, 1972 the board provided the notice requested by the Appellant, denied that a demotion had taken place, and set September 20, 1972 as the date for a hearing.

7. The hearing was not held on September 20, 1972. A clear explanation has not been provided. However, counsel for both the school board and the Appellant believe that one of them had a conflict and requested a continuance.
8. By letter dated November 10, 1972, Appellant through his counsel informed the school board that an appeal was being taken to the Secretary of Education.
9. A hearing before the Secretary of Education was scheduled for January 4, 1973.
10. On January 3, 1973 counsel for the school board requested, and received, a continuance of the January 4, 1973 hearing on the basis that the board would provide a hearing in January. This request was confirmed by letter dated January 6, 1973.
11. A hearing was scheduled for and held on January 18, 1973. All parties, including the entire school board, were present. However, the hearing was continued shortly after it began because television cameramen insisted on filming the entire proceedings, even though they had been requested not to take any pictures during the hearing.
12. On February 5, 1973 Appellant filed an additional petition with the Secretary of Education, in which he informed this office that the January hearing before the board was not held, and requested the Secretary of Education to reverse the board and to reinstate him.
13. By letter dated February 27, 1973 the board informed the Appellant's counsel that a hearing would be offered on March 7, 1973 before the board, and that an alternative date of March 23, 1973 was being reserved for additional proceedings. The Appellant was notified by letter dated March 1, 1973.
14. By letter dated March 2, 1973, confirming a phone conversation, Appellant's counsel informed the board that he felt the March 7, 1973 date had been arbitrarily set and that he did not believe that the school board could hold a hearing in the case because a timely appeal had been filed with the Secretary of Education. Therefore, he was advising his client not to attend the hearing.
15. By letter dated March 2, 1973, the Department of Education informed both parties that at the Appellant's insistence a hearing before the Secretary of Education would be held on March 15, 1973.
16. On March 7, 1973, at a special meeting, eight of the nine board members were present to hold a hearing. The Appellant did not attend. The board put on only one witness, Fred Darr, Secretary to the board, who read into the record the correspondence between the Appellant and the board.
17. A hearing on the appeal was held at the Department of Education in Harrisburg on March 15, 1973.
18. By letter dated March 19, 1973 Appellant's counsel informed the board that he would not be available for the March 23, 1973 hearing, and he requested that when the board arranged any future dates, it consult with him to see if he was available.
19. By letter dated April 26, 1973, the Appellant's counsel was informed by the board that the dates of May 7, 9, 14, 16, and 18 were proposed for a continuation of the hearing before the board.
20. By letter dated May 9, 1973, Appellant's counsel informed the board that it was his stated legal position that when a appeal was taken with the Secretary of Education, the board could not take any further legal action until the Secretary rendered his decision; and that the Appellant would not attend any hearings offered by the board.

DISCUSSION

The right of a professional employe to a hearing before being demoted is stated in Section 1151 of the Public School Code, which provides in part:

"...but there shall be no demotion of any professional employe either in salary or in type of position without the consent of the employe, or, if such consent is not received, then such demotion shall be subject to the right to a hearing before the board of school directors and an appeal in the same manner as hereinbefore provided in the case of the dismissal of a professional employe."

This right extends to a professional employe who *alleges* that he or she has been demoted in salary or in type of position, even though the school board takes the position that its action was not a demotion, *Smith v. Darby School District*, 388 Pa. 301 (1957). In the *Smith* case, Mr. Justice Jones, now Chief Justice, stated on behalf of the Pennsylvania Supreme Court that Section 1151:

"...of the School Code does not prohibit a school board from demoting a professional employe, but simply provides that a nonconsensual demotion shall be subject to a right to a hearing." *Smith v. Darby*, *ibid*, p. 308.

The right to a hearing applies even on an alleged demotion:

"When a professional employe claims he has been demoted in type of position and/or salary he is entitled to a board hearing just as a professional employe claiming an unlawful dismissal is entitled to a hearing." *Smith v. Darby*, *ibid*, p. 318.

At the hearing on an alleged demotion, two questions are before the school board:

"When a professional employe claims he has been demoted it is the school board's duty to grant him a hearing. At that hearing two questions are before the school board: (1) whether or not the professional employe has been demoted either in type of position or salary, and, (2) in the event that the professional employe has been demoted, the reason for such demotion must be made clear and apparent." *Smith v. Darby*, *ibid*, p. 319.

The professional employe who alleges that he or she was demoted must establish before the board that a demotion has occurred. Having established the existence of the demotion, the professional employe must also establish that he or she was demoted for improper reasons if the employe seeks to have the board's action rescinded. Otherwise, the board's action will be presumed to be valid, and the demotion will be effective as of the date of the board's decision after the hearing.

"While there is a presumption that the board has acted in a valid and proper manner, ... yet the Appellant should have an opportunity to be heard before the board and at such hearing to present any evidence which he may have indicating that the board's action resulted from arbitrary or discriminatory reasons. The burden will be on the Appellant to prove the impropriety of the board's action." *Smith v. Darby*, *ibid*, p. 320.

See also *Brownsville Area School District v. Lucostic*, Pa. Cmwlth., 297 A. 2d 516 (1972).

The Secretary of Education does not have jurisdiction to review the merits of an alleged demotion until after the hearing before the school board. As Justice Jones said in *Smith v. Darby School District*:

"*After* [the board] hearing, the right of Appellate review by the Superintendent of Public Instruction and by the various courts would naturally follow." *ibid*, p. 318. (Emphasis added)

The review by the Secretary of Education is the same as is provided in an appeal from a dismissal. Justice Jones said that at the hearing before the Secretary of Education,

"...it becomes the [Secretary's] duty to review the official transcript of the record of the school board hearing, to hear and consider any additional testimony as he may deem advisable, and, after hearing argument and after a review of the testimony, to enter such order affirming or reversing the school board as appears just and proper." *Smith v. Darby*, *ibid*, p. 316-317.

The Appellant contends that the Secretary of Education can reinstate him to his former position even though there has not been a hearing before the school board and the Secretary of Education does not have a transcript he can review. His position is that he was demoted and that the school board has not provided a hearing. Therefore, by virtue of Section 1151 of the School Code and *Tassone v. School District of Redstone Township*, 408 Pa. 290, 183 A. 2d 536 (1962), he should be reinstated since a demotion cannot become effective until after a hearing before the school board.

The Appellant's contention would have some merit if the school board were willing to admit or stipulate that its action was a demotion. This it has not done. The weakness in the Appellant's case is that he accepts as a proven fact what has yet to be established - namely, whether or not he was demoted.

The burden of proving that he was demoted rests with the Appellant. He has not attempted to meet this burden. Nor has he attempted to prove, if in fact he was demoted, that the school board demoted him for improper reasons. For these reasons alone, the Appellant's request for reinstatement must be denied.

His request for reinstatement must be denied, also, because the Secretary of Education does not have jurisdiction to review the merits of an alleged demotion until after the required hearing before the school board. When a professional employe requests a hearing before the school board to challenge what the employe believes to be a demotion, the school board has no discretion, it must provide the hearing. Should the school board fail to perform this duty, the proper remedy is to take a mandamus action against the board and compel it to perform. The Appellant's failure to attend a hearing before the school board deprives the Secretary of Education of the information he needs to make his decision.

The Appellant alleged that the school board had failed to hold a hearing at his request. Correspondence between the school board and the Appellant and his attorney indicates that the school board has recognized its duty to provide a hearing and has made numerous attempts, both before and after an appeal was filed with this office, to hold a hearing. With the exception of the January hearing, the Appellant has refused to attend these hearings.

The Appellant argues that the filing of his appeal with the Secretary of Education acted as a supersedeas, and that the school board could not take any further action in the case, even if such action included an effort by the board to fulfill its legal obligations and provide a hearing. This argument must fail for a number of reasons. First, the Secretary of Education does not have jurisdiction to review the merits of an appeal of this nature in the absence of a hearing before the school board, so the appeal was improperly filed. Secondly, the Appellant has not cited any statutory authority, nor any cases to support his position. A review of the law, however, indicates that the filing of an appeal with the Secretary does not act as a supersedeas. The school board acted properly in its offers to hold a hearing after the appeal was filed. The Appellant's refusal to accept the board's offers was error.

The Appellant also refused to attend the August 28, 1972 hearing before the school board on the basis that the board did not provide proper notice as is required by Section 1127 of the School Code. This was error. Section 1127 requires a statement of the charges brought by the school board against a professional employe to support a dismissal, signed by the president and attested by the secretary of the board. Section 1151 of the School Code on demotions does provide for an appeal in the same manner as for a dismissed employe. This requirement merely relates to the procedure of the appeal after the hearing, *Bilotta v. The Secretary of Education*, Pa. Cmwlth., 304 A. 2d 190 (1973).

In an alleged demotion, the professional employe is the moving party, not the school board. The board cannot be expected to provide reasons supporting a demotion when the board's position is that a demotion has not occurred. The other notice requirements of Section 1127 would only serve to delay a matter in which the school board has no discretion, except for setting the time and date of the hearing. All that is required is reasonable notice of the hearing, sent by someone who can speak for the board. In this case the school board offered the Appellant the opportunity to have a hearing at the first regularly scheduled board meeting to be held after the Appellant's request for a hearing was received. The Appellant failed to accept that offer.

The past practice by this office on appeals concerning alleged demotions where there has not been a hearing before the school board has been to remand the case to the school board and order it to provide a hearing. In many of those cases, the issue on the appeal has been the school board's refusal to provide a hearing when requested. That is not an issue in this case. The school board has made numerous efforts to provide a hearing. In our opinion, the record shows that the responsibility for the failure to hold a hearing must rest with the Appellant and not with the school board.

However, it is also our opinion that the Appellant would have attended the offered hearings had he not been misinformed. Section 1131 of the School Code permits the Secretary of Education to enter such an order as to him appears just and proper. The law clearly intends that a professional employe shall have the right to a hearing to challenge an alleged demotion. While the Appellant's failure to attend hearings offered by the school board might affect any future remedies he may seek, under the circumstances of this case, we do not find that he has lost his right to a hearing.

In view of the foregoing, we make the following

ORDER

AND NOW, to wit, this 29th day of June, 1973, the Appeal of Donald B. Irwin from the action of the Greater Johnstown School Board is sustained in part, and the said School Board is hereby ordered to set a date for a hearing before it on the claimed demotion of Donald B. Irwin.

* * * *

Appeal of Donald W. Kemmerer, a Professional Employe, from a decision of the Board of School Directors of the Pine Grove Area School District, Schuylkill County, Pennsylvania

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

No. 223

OPINION

John C. Pittenger
Secretary of Education

Donald W. Kemmerer, Appellant herein, has appealed from a decision of the Board of School Directors of the Pine Grove Area School District, Schuylkill County, Pennsylvania, terminating his contract and dismissing him as a professional employe.

FINDINGS OF FACT

1. Donald W. Kemmerer was employed in the Danville Area School District from September 1969 to June 1971, thereby earning professional employe status.
2. He was employed as a substitute in the Pine Grove Area School District for the 1971-72 school year.
3. He was hired as a professional employe with the Pine Grove Area School District in July 1972 as an instructor in music.