

We further stated to that opinion that:

"In deciding whether a professional employee has 'attempted to cause injury or emotional distress,' we judge the employee's action by the standard of what a person of ordinary sensitivities would expect to be the result of such action. An ignorant, callous or insensitive professional employee will not escape being disciplined for cruelty on the lame excuse that he or she did not intend to injure or cause emotional distress when such results were the logical consequences of the employee's actions." Appeal of John Caffas, Teacher Tenure Appeal No. 239.

The Appellant claims he never intended to injure Donald. The Appellant's intentions are irrelevant; he behaved in a manner which was likely to cause injury to the boy; he had complete control of the situation and could have selected any one of a number of different ways to discipline Donald in a permissible manner, assuming discipline was warranted. Instead, the Appellant decided to intimidate Donald by throwing him into the wall, a method of discipline which directly violates the school district's corporal punishment policy and which no reasonable person would accept as proper.

The Appellant claims that Donald did not hit the blackboard or the bookcase. His testimony is directly contradicted by Donald and students who were eyewitnesses to the incident.

The Appellant contends that a single incident does not justify dismissal on the grounds of cruelty. Section 1122 of the School Code states the reasons for the dismissal of a professional employee; although it qualifies dismissals for negligence or wilfull violation of the school laws by requiring that such offenses be persistent, no such qualification is required for a dismissal for cruelty. In our opinion, a dismissal for cruelty can be based upon a series of incidents, each of which is minor in nature but which collectively indicate a behavior or attitude of cruelty, or it can be based upon a single incident of a serious nature.

We believe that this incident was sufficiently serious for the school board to consider dismissal action. The school board was aware of the Appellant's past teaching record, that he did not have a reputation for cruelty and that this was apparently an isolated incident in his fourteen years of teaching experience. Nevertheless, the school board decided by a 6-1 vote that the Appellant should be dismissed because of cruelty. We find that there is sufficient evidence on the record to support that decision.

The Appellant complains that the school district did not call all of the students who were present in the room as witnesses. It was not necessary for the school district to do this. The testimony of the witnesses that were produced supported Donald's version of the incident. If there were any students who had a different version that supported the Appellant, the Appellant should have called them; it was not the responsibility of the school board to do this.

Accordingly, we make the following

ORDER

AND NOW, this 16th day of July, 1975, it is hereby Ordered and Decreed that the Appeal of Paul D. Landi be and hereby is dismissed.

* * * *

Appeal of Ruth Lesley, a Professional employee, from a decision of the Board of School Directors of the Oxford Area School District, Chester County, Pennsylvania

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

No. 247

OPINION

John C. Pittenger
Secretary of Education

Ruth Lesley, Appellant herein, has appealed from the decision of the Board of School Directors of the Oxford Area School District dismissing her on the grounds of incompetency and immorality.

FINDINGS OF FACT

1. The Appellant is a professional employee. She began her services in the Oxford Area School District in 1963 as a home economics teacher, a position she held until her dismissal in 1974.
2. On May 24, 1974 the Appellant was shopping in the local Acme Supermarket with her two sons. She purchased approximately thirty dollars worth of goods. Upon leaving the store, she was stopped by the store manager and the assistant manager. When asked if she had paid for everything, she admitted she had not. She was taken by the store employes to a private area where her handbag was examined. In the handbag were found the following items belonging to the store which the Appellant had intentionally concealed to avoid paying for them: two spools of thread (value \$0.94), adhesive tape (value, \$0.69) and panty hose (value \$1.00).
3. The Appellant signed a standard Acme form labeled "Acknowledgement." The form contains the following standard clauses:

"This is to acknowledge that I, . . . was stopped on (date)
outside the sales area of the Acme Market at (place).

"At the request of the Acme Markets I consented to a search
of my possessions and, as a result, the following listed merchandise
belonging to Acme Markets, Inc. was found in my possession.
(List of items)

"I hereby acknowledge that this merchandise was not paid for
by me and was intentionally concealed in order that I would not
have to pay for such.

"This acknowledgement is freely given by me without any
rewards or promises of rewards and is being made with my
understanding that it may be used against me.

("Signed) _____."

The Appellant also signed a clause on the form which in essence waived whatever rights she may have had for false arrest or false imprisonment.

4. After signing the form, the Appellant produced a ten dollar bill and paid for the items she had concealed.

5. At a subsequent work session of the board, one of the board members asked the district Superintendent, Dr. Jason Dreibelbis, if he was aware one of the district's teachers had been apprehended for shoplifting. Dr. Dreibelbis was not aware. After the meeting he investigated the matter. Based on his investigation, he recommended that the board hold a hearing; he did not recommend that the Appellant be dismissed.

6. Prior to making that recommendation, Dr. Dreibelbis met with the Appellant and asked for her version of the incident. The Appellant admitted she had concealed the merchandise, saying she did so only because she wanted to see what the store employees would do. Dr. Dreibelbis

suggested that under the circumstances she resign. The Appellant agreed and started to write a resignation, but decided to wait and submit one later. After her admission of the incident, Dr. Dreibelbis suspended her from her teaching duties.

7. The Appellant did not submit a resignation, instead she requested a sabbatical leave for restoration of health. By letter dated June 14, 1974, Dr. Dreibelbis confirmed that the Appellant's telephone request for sabbatical leave would be acted upon. Though the request was informally brought to the school board's attention, no action was taken because the board had decided to proceed with a hearing. The Appellant was informed of this in a letter from Dr. Dreibelbis dated July 10, 1974.

8. By letter dated August 26, 1974, from the president of the Board of School Directors of the Oxford Area School District, the Appellant was informed a hearing would be held on September 10, 1974 on the charges of incompetency and immorality; charges based on the shoplifting incident in the Acme store.

9. The hearing was held as scheduled. Only six board members were present. Because the hour was late when it concluded, the school board postponed making a decision.

10. On September 16, 1974, prior to the regularly scheduled school board meeting, the school board held a private session during which it deliberated what action to take on the charges. Dr. Dreibelbis was present at the meeting. He was asked and responded to a number of questions from board members concerning the Appellant's future job opportunities and her effectiveness as a teacher in light of the shoplifting incident. The school board then voted six to nothing to dismiss the Appellant. Notice of the board's action was sent to the Appellant on September 17, 1974.

11. The Appellant's Petition of Appeal was received in the Office of the Secretary of Education on October 2, 1974. A hearing on the Appeal was scheduled for October 30, 1974 but, at the request of counsel, was rescheduled for November 13, 1974. At the hearing, the Appellant presented testimony concerning the manner in which the school board conducted its deliberations. The Appellant complained that in its deliberations, the board considered evidence which did not appear in the record and, therefore, failed to comply with the procedural requirements of the School Code for the dismissal of a professional employee.

12. The Appellant has had excellent or outstanding ratings prior to the shoplifting incident. After the incident, she received an unsatisfactory rating for unsatisfactory "judgment".

13. The Appellant testified that her family is relatively affluent, that it is not financially necessary for her to work as a teacher.

DISCUSSION

The Appellant contends that the charges of immorality and incompetency are not supported by substantial evidence and that the school board violated her due process rights when it allowed the district superintendent to participate in its deliberations after the hearing and taking of testimony were concluded. With respect to her second contention, we find that the Appellant's due process rights were violated. Accordingly, we must sustain her appeal and order her reinstatement.

Section 1129 of the Public School Code states the procedures the school board must follow after the hearing on the charges brought against a professional employee is concluded. That section provides in part:

"After fully hearing the charges or complaints and hearing all witnesses produced by the board and the person against whom the charges are pending, *and after full, impartial and unbiased consideration thereof*, the board of school directors shall by a two-thirds vote of all the members thereof, to be recorded by roll call, determine whether such charges or complaints have been sustained and whether the evidence substantiates such charges and

complaints, and if so determined shall discharge such professional employee." 24 P.S. §11-1129 (Emphasis added).

The requirement that the board give "full, impartial and unbiased consideration" to the evidence presented at the hearing merely restates fundamental and essential elements of due process. The school board showed bias against the Appellant when it involved the district superintendent in its deliberations. The superintendent had appeared at the hearing as a witness against the Appellant; he had investigated the incident at the Acme Supermarket, as a result that investigation he rated her unsatisfactory and recommended that the board hold a hearing; at the hearing, he testified that, in his opinion, the Appellant's effectiveness as a teacher had been damaged as a result of that incident.

We find that the mere presence of the superintendent during the school board's deliberations creates an impermissible appearance of possible prejudice which justifies reversing the board's decision. In the case of *Horn v. Township of Hilltown*, 337 A2d 858, Pa. (No. 43 January Term, 1975). The solicitor for a township involved in a zoning dispute was also solicitor for the zoning hearing board which was to resolve that dispute. At the hearing before the zoning board the solicitor ruled on evidence presented by the township's opponents and on their objections to evidence he presented on the township's behalf. Thereafter, he advised the zoning board in legal matters concerning the case. The Pennsylvania Supreme Court held:

"In our opinion there need not be a showing of harm in the instant case to sustain a finding of a denial of due process."

* * *

"In the case at bar, . . . we are presented with a governmental body charged with certain decision making functions that must avoid the appearance of possible prejudice, be it from its members *or from those who advise it* or represent parties before it. In the instant case, the same solicitor represented both the zoning hearing board and the township, which was opposing Appellant's application for a zoning variance. While no prejudice has been shown by this conflict of interest, it is our opinion that such a procedure is susceptible to prejudice and, therefore, must be prohibited." (Emphasis added)

The conflict created by the superintendent's presence is apparent; as a witness against the Appellant his participation in the school board's deliberations can hardly lead to the impartial and unbiased consideration of the evidence.

In the *Horn* case, *op. cit.*, the court held that the appearance of possible prejudice was sufficient justification for reversing the zoning board's decision. While we make a similar finding here, we also find that actual prejudice to the Appellant resulted when the superintendent responded to questions about the case at the private session held for the board's deliberations. The Appellant was not aware of the nature of the superintendent's comments about her and was not given the opportunity to cross-examine him or to present additional rebuttal evidence. This is a clear violation of the Appellant's due process rights.

The superintendent's answers to the board's questions represent additional evidence considered by the board which does not appear in the record of this case. This is a further violation of the dismissal procedures of the School Code justifying reversal of the school board's action, *In re Swink*, 200 A. 200, 132 Pa. Super. 107 (1938); the clear intent of Section 1129 is that the school board confine itself in its decision making process to the evidence presented at the hearing. The record of that hearing is what this office has to review when an appeal is taken. In the case before us, that record is incomplete; testimony given by the superintendent during the school board's deliberations which might have influenced the school board's final decision is not available

for our review.

Our conclusion that the Board of School Directors of the Oxford Area School District and its superintendent violated the Appellant's due process rights should not be regarded as censure of either the school board or its superintendent. We find that the procedural violations, though serious, occurred as the result of inadvertence, not deliberate and wilful intent to violate the provisions of the School Code or the Appellant's due process rights. Actually, we are impressed with their efforts to be fair in what, in our opinion, is a difficult case to decide. Unlike most school districts, the Oxford Area School District had different attorneys to present the evidence and to advise the board; a practice that should receive serious consideration in light of *Horn v. Township of Hilltown*, op. cit.

Because of the incident, the Appellant requested a sabbatical leave for health. Section 1166 of the School Code provides that a professional employee who satisfies the requirements is *entitled* to a sabbatical leave for certain reasons; health is one of those reasons. Based on the evidence present in the record, we are satisfied that the Appellant substantiated her need for a sabbatical leave for health purposes. Therefore, it is our decision that the Appellant's status for the 1974-75 school year be that of a professional employee on a sabbatical leave of absence for health.

Accordingly, we make the following

ORDER

AND NOW, this 11th day of July, 1975, it is hereby Ordered and Decreed that the Appeal of Ruth Lesley be sustained, that she be given a sabbatical leave of absence for health for the 1974-75 school year, and that she be reinstated as a professional employee without loss of pay, as determined in accordance with Section 1169 of the School Code.

* * * *

Appeal of Alvin J. Hoffman, a Professional Employee, from a decision of the Board of School Directors of the Northampton Area School District, Northampton County, Pennsylvania

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

No. 249

OPINION

John C. Pittenger
Secretary of Education

Alvin J. Hoffman, Appellant herein, has appealed from the decision of the Board of School Directors of the Northampton Area School District dismissing him as a professional employee on the grounds of immorality.

FINDINGS OF FACT

1. The Appellant is a professional employee. He has been a full-time employee of the Northampton Area School District from 1961 until the Spring of 1972 when he took a leave of absence because of the incident upon which the charges against him are based. The Appellant taught mathematics, economics and typing in the junior high school and was an assistant wrestling coach.
2. On the evening of April 8, 1972, the Appellant drove up to Miller's Diner and asked a person whom we shall refer to as "David" to give him a hand. David, aged 17, was an eleventh grade student in the Northampton Area School District. He had been one of the Appellant's students when in the ninth grade and was a member of the Junior Fire Squad which was supervised by the Appellant. Believing the Appellant was referring to work to be done at the firehall, David