IN THE OFFICE OF THE SECRETARY OF EDUCATION
COMMONWEALTH OF PENNSLVANIA

NEAL FOLLMAN,	:	
Appellant,	:	Teacher Tenure Appeal
	:	No. 04-22
	:	
SCHOOL DISTRICT OF PHILADELPHIA,	:	
	:	
Appellee	:	

OPINION AND ORDER

Neal Follman ("Mr. Follman" or "Appellant") has appealed to the Secretary of Education ("Secretary") the decision of the School District of Philadelphia ("School District") to discharge him from his employment as a professional employe.

FINDINGS OF FACT

1. Mr. Follman was hired by the School District on or about January 11, 2010, and worked at Constitution High School ("CHS") during the 2020-2021 school year. (Ex. NF-1).
2. Due to the COVID-19 pandemic, CHS was closed for in-person learning from March 14, 2020, until May 10, 2021. (Tr. 17:8-188:11, 196:7-14.)
3. On February 22, 2021, the School District's then superintendent, Dr. William R. Hite, Jr. ("Superintendent" or "Dr. Hite"), informed all employees including Mr. Follman; that, "[a]s part of our multi-layered approach to safely reopen schools for in-person learning, we are launching a robust COVID-19 testing program, which will include asymptomatic and symptomatic testing for all students and staff." (Tr. 178:14-24; Ex.12 at 1.)
4. Dr. Hite's February 22, 2021, email to staff also stated,

> Once in-person learning begins, all on site employees will be tested weekly by medical providers who will come to all schools where in person learning is taking place and in our satellite buildings that support schools, including our garages and

central office. The day and time of testing will vary by location, and all testing will be conducted during school and work hours. The testing program uses Abbott's BinaxNOW COVID-19 Rapid Antigen Test, which is a quick and painless nasal swab that yields results in 15 minutes. (This is not a deep nasal swab that others may have received before that may make some feel uncomfortable.) (Ex. SDP-12 at 1.)

5. The School District's testing program was mandatory for students and employees with an exception for a demonstrated medical exemption. (Ex. SDP-12 at 1.)

6. On May 7, 2021, Mr. Follman submitted a COVID-19 Testing Refusal/Exemption Request Form where he provided the following reasons for refusing COVID-19 testing:

    - EUA[1]
    - Not accurate
    - What is done w/material
    - Relationship w/ Fisher Scientific
    - You are not my medical provider

    (Tr.205: 16-20.)

7. Mr. Follman did not complete the subsequent section of the COVID-19 Testing Refusal/Exemption Request Form to provide a justification for an exemption from the testing requirement. (*Id.*)

8. Ronak Chokshi, ("Mr. Chokshi") interim deputy chief of the School District's Office of Employee and Labor Relations, advised Mr. Follman that the reasons provided on the Testing Refusal/Exemption Request Form were "insufficient cause" for refusing to participate in COVID-19 testing and that Mr. Follman would be coded as being on unauthorized leave starting on Monday, May 10, 2021. Mr. Follman was also notified

[1] Mr. Follman testified that "EUA" referred to "Emergency Use Authorization."

that disciplinary action would follow if Mr. Follman refused to participate in testing after May 12, 2021. (Tr.15:15-24, 62:14-63:4; Ex. SDP-4.)

9. Mr. Follman replied to Mr. Chokshi's. email on May 12, 2021, stating that he continued to "refuse" to "consent" to testing (Tr.64:5-18; Ex. SDP-6.)

10. Brianna Dunn-Robb, CHS's principal ("Principal Dunn-Robb"), issued an Unsatisfactory Incident report (form SEH-204) on May 19, 2021, regarding Mr. Follman's refusal to comply with Dr. Hite's directive. (Tr. 132:11-23; Ex. SDP-5.)

11. Principal Dunn-Robb's report summarized previous communications with Mr. Follman and concluded that Mr. Follman's refusal to comply with the Superintendent's directive warranted termination of his employment. (Ex. SDP-5.)

12. Principal Dunn-Robb conducted a first-level investigatory conference on May 26, 2021, to give Mr. Follman and his union representative an opportunity to respond. (Tr.134:13-135:12; Ex. SD-8.)

13. At the investigatory conference, Mr. Follman objected to the testing program and continued to refuse to comply. (Tr. 135:13-17; Ex. SDP-8.)

14. As a result of Mr. Follman's refusal to participate in the testing program, Principal Dunn-Robb recommended Mr. Follman's termination from employment. (Tr. 135:18-136:2, Ex. SDP-8.)

15. On June 8, 2021, Sheila Wallin, second level hearing officer ("Ms. Wallin"), conducted a second-level conference with Mr. Follman and his union representative on behalf of the School District's Office of Employee and Labor Relations. (Tr. 157:3-159:3; Ex. SDP-9.)

16. Ms. Wallin recommended termination of Mr. Follman's employment and suspension without pay pending a decision on recommended termination. (Tr. 160:7-162:3, 162:14-163:7; Ex. SDP-9.)

17. Subsequent to Ms. Dunn's recommendation, Mr. Follman emailed an undated letter to Ms. Wallin expressing disagreement with Ms. Wallin's recommendation. (Tr. 183:11-184:15, 209:9-12; Ex. NF-9, Ex. NF-29.)

18. On August 19, 2021, the School Board adopted a resolution determining that there was sufficient evidence to support Ms. Wallin's recommendation to terminate Mr. Follman's employment ("Resolution"). (Tr. 272:15-237:14; Ex. NF-15.)

19. Pursuant to the Resolution, the Board's President and Secretary notified Mr. Follman by letter dated September 1, 2021, that the School District was recommending termination of his employment for persistent negligence in the performance of duties and the willful neglect of duties in accordance with section 1122 of the Pennsylvania School Code, 24 P.S. §11-1122, (Tr. Ex. SDP-1 at 1; Ex. NF-1 at 1.)

20. The Statement of Charges Letter advised Mr. Follman that he had the right to contest the recommendation by requesting a hearing under the Local Agency Law or a union grievance proceeding. (*Id.* at 3.)

21. Mr. Follman elected to challenge the recommendation at a hearing under the Local Agency Law. (Tr. 244:16-24; Ex. NF-2.)

22. A hearing was scheduled for December 9, 2021, by videoconference for safety purposes due to the then ongoing COVID-19 pandemic. (Ex. HO-2, HO-3 at 12-15.)

23. Mr. Follman's counsel objected to the hearing being by videoconference, contending that Follman had a constitutional right to an in-person hearing. (Ex. HO-3 at 16-17.)

24. Mr. Follman's objection to a hearing being held by videoconference was overruled and the hearing was rescheduled for January 7, 2022, to allow additional time for Follman's counsel to resolve logistical issues regarding videoconference participation. (Ex. HO-2, HO-3 at 12-15).

25. The January 7, 2022, videoconference hearing was continued to permit Mr. Follman's counsel to recover from COVID-19. (Tr. 35:23-36:12; Ex. HO-3 at 2-4.)

26. On February 17, 2022, Mr. Follman renewed his objection to the hearing being held by videoconference and added an objection to the publication of a hearing notice despite his request for a public hearing. (Ex. HO-4 at 4-8.)

27. The February 17, 2022, objections described in the preceding paragraph were both overruled. (Ex. HO-4 at 1-2.)

28. A videoconference hearing was held on February 28, 2022. (Ex. HO-4 at 1-2)

29. The School District called Mr. Chokshi, Principal Dunn-Robb, and Ms. Wallin as witnesses at the hearing. (Tr. 50:14-123:13, 125:9-153:20, 154:12-185:24.)

30. The evidence presented by the School District included 11 exhibits that were admitted into evidence. (Ex. SDP-1, SDP-2, SDP-3, SDP-4, SDP-5, SDP 6, SDP 7, SDP 8, SDP 9, SDP-11, SDP 12.)

31. Mr. Follman testified as the sole witness in support of his defense. (Tr. 187:4-383:22.)

32. Mr. Follman presented 35 exhibits at the hearing, 28 of which were admitted into evidence. (Ex. NF-1, NF-2, NF-3, NF-4, NF-4A, NF-5, NF-6, NF-7, NF-8, NF-9, NF-10, NF-11, NF-11A, NF-12, NF-13, NF-14, NF-15, NF-16, NF-16A, NF-24, NF-25, NF-26, NF-27, NF-28, NF-29, NF-30, NF-31, NF-32, NF-33, NF-34, NF-35, NF-36, NF-37, NF-38, NF-39.)

33. Mr. Follman's testimony is summarized as follows.

    a. The testing program was administered by Dr. Hite but the School Board did not pass a resolution authorizing the testing program.

    b. Mr. Follman believed that the test consent forms available on the School District's website would allow the disclosure of test results in violation of the Health Insurance Portability and Accountability Act of 1996 ("HIPPA").

    c. Mr. Follman believed that the rapid antigen test being used by the School District should not be used to diagnose COVID-19.

    d. Mr. Follman did not trust the company selected by the School District to administer the COVID-19 tests based on information that he found on the internet.

    e. Mr. Follman wanted his personal doctor to administer a different COVID-19 test instead of the District's onsite testing program.

    f. Mr. Follman took a COVID-19 test that had not been approved by the FDA and was only authorized under the Emergency Use Authorization provisions of federal law. (Tr. 310:1-311:22, 314:9-18; Ex. NF-30, NF-31.)

34. On August 18, 2022, the School District's Board of Education approved a resolution by a roll call vote of 9-0 to dismiss Mr. Follman from his employment as a teacher. (Agenda & Minutes, Board of Education Meeting, August 18, 2022).

CONCLUSION OF LAW

Mr. Follman was properly discharged from his employment as a teacher for persistent negligence in the performance of duties and willful neglect of duties pursuant to Section 1122 of the School Code.

LEGAL STANDARDS

Mr. Follman was dismissed pursuant to Section 1122 of the Public School Code which provides, in pertinent part:

> The only valid causes for termination of a contract heretofore or hereafter entered into with a professional employee shall be immorality; incompetency; unsatisfactory teaching performance based on two (2) consecutive ratings of the employe's teaching performance that are to include classroom observations, not less than four (4) months apart, in which the employe's teaching performance is rated as unsatisfactory; intemperance; cruelty; persistent negligence in the performance of duties; willful neglect of duties; ...persistent and willful violation of or failure to comply with school laws of this Commonwealth, including official directives and established policy of the board of directors; on the part of the professional employe. 24 P.S. §11-1122.

A tenured professional employee has a property interest in continued employment. *School District of Phila. v. Jones*, 139 A.3d 358, 366 (Pa. Cmwlth. 2016). A tenured professional employee may only be dismissed for the reasons set forth in Section 1122 of the Public School Code. *Foderaro v. Sch. Dist. of Phila.*, 531 A.2d 570, 571 (Pa. Cmwlth. 1987). "It is thus apparent that the legislature intended to protect tenure except for the serious charges listed." *Lauer v. Millvale Area Sch. Dist.,* 657 A.2d 119, 121 (Pa. Cmwlth. 1995).

The purpose of Section 1122 is to provide "the greatest protection possible against dismissal." *McFerren v. Farrell Area Sch. Dist.*, 993 A.2d 344, 353 (Pa. Cmwlth. 2010); (quoting *Lauer v. Millville Area Sch. Dist.*, 657 A.2d 119, 121 (Pa. Cmwlth. 1995)). "Section 1122 was not intended to provide a school district with an arsenal of weapons to use when it wishes to relieve itself of its contractual obligations to a professional employee." *Id.* "[T]o dismiss a professional employee protected by contract requires a serious reason, not 'picayune and unwarranted criticisms.'" *Id.* (quoting *Lauer*, 657 A.2d at 123). In short, the grounds for dismissal listed in Section 1122 must be strictly construed in favor of the professional employee

and against the school district. *McFerren v. Farrell Area Sch. Dist.*, 993 A.2d 344, 353 (Pa. Cmwlth. 2010).

The Public School Code does not define "persistent and willful violation." *See* 24 P.S. §§ 11-1101 and 11-1122. However, Pennsylvania courts interpret these terms based on their common and approved usage. *Kinniry v. Abington Sch. Dist.*, 673 A.2d 429 (Pa. Cmwlth. 1996). "Persistent" generally means "continuing" or "constant." *Lucciola v. Secretary of Educ.*, 360 A.2d 310, 312 (Pa. Cmwlth. 1976). Persistency is shown where the improper conduct is repeated in a series of separate incidents over a substantial period of time. *Horton v. Jefferson County-Dubois Area Vocational Tech. Sch.*, 630 A.2d 481 (Pa. Cmwlth. 1993). This Court has concluded that there must be sufficient continuity and repetition of negligent acts to support a charge of persistent negligence. *Lauer v. Millville Area Sch. Dist.*, 657 A.2d 119, 121 (Pa. Cmwlth.1995)

On the other hand, "[w]illfulness requires the presence of intention and at least some power of choice." Horton, 630 A.2d at 483. While willfulness or intent can often be inferred from the nature of a particular violation, such intent is not to be presumed where facts do not so indicate. *Cowdery v. Bd. of Educ. of Sch. Dist. of Philadelphia*, 531 A.2d 1186 (Pa. Cmwlth. 1987). Thus, a persistent and willful violation of or failure to comply with school laws requires three elements: persistency, willfulness, and a violation of school law. *See Horton,* 630 A. 2d at 430-431.

Regarding the procedure to be followed for dismissing a professional employee, the Public School Code provides as follows:

> 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.

24 P.S. § 11-1127

> 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 employe. If less than two-thirds of all of the members of the board vote in favor of discharge, the professional employe shall be retained and the complaint shall be dismissed.

24 P.S. § 11-1129

Before any tenured professional employee is dismissed by the school board, the school board must resolve to dismiss the employee and to furnish him with a detailed written statement of the charges upon which his or her proposed dismissal is based and must conduct a hearing before the school board. 24 P.S. § 11-1127; *Vladimirsky v. Sch. Dist. of Phila.*, 144 A.3d 986, 994 (Pa. Cmwlth. 2016); *School Dist. of Phila. v. Jones*, 139 A.3d 358 (Pa. Cmwlth. 2016).

"[W]here a school board undertakes to terminate a contract, dismiss or demote a professional employe, the procedure set forth in the School Code must be strictly followed, and failure on the part of the Board to comply therewith renders an attempted demotion abortive. We can find no provision in the School Code conferring upon the administrative staff of a school district, whether it be the Superintendent or Principal, the authority to demote a professional employee." *Board of School Directors v. Pittenger*, 305 A.2d 382, 386 (Pa. Cmwlth. 1973). When a district dismisses a professional employee without full compliance with the Public School Code, the employee is entitled to reinstatement. *West Shore Sch. Dist. v. Bowman,* 409 A.2d 474, 480 (Pa. Cmwlth. 1979). A professional employee is entitled to a hearing prior to any

demotion in status or pay. 24 P.S. § 11-1151; *Burnett v. Sch. Dist. of Phila.*, 166 A.3d 521, 525, (Pa. Cmwlth. 2017). A demotion is a reassignment to a position which has less importance, dignity, authority, prestige or salary." *Walsh v. Sto-Rox Sch. Dist.*, 532 A.2d 547, 548 (Pa. Cmwlth. 1987).

Section 1131 of the School Code, 24 P.S. § 11-1131, vests the Secretary with authority to hear appeals brought by professional employees from actions of school boards. The Secretary has the authority to review the school board's termination decision *de novo*. *Belasco v. Board of Public Educ. of the Sch. Dist. of Pittsburgh,* 510 A.2d 337, 343 (Pa. 1986). The credibility of witnesses and the weight to be accorded their testimony is within the exclusive province of the Secretary. *Rhodes v. Laurel Highlands Sch. Dist.*, 544 A.2d 562 (Pa. Cmwlth. 1988). Additionally, the Secretary is not required to make specific findings as to the credibility of every witness where the decision itself reflects which witnesses were believed and upon whose testimony the Secretary relied. *Forest Area Sch. Dist. v. Shoup*, 621 A.2d 1121, 1124 (Pa. Cmwlth. 1993). Furthermore, the Secretary is the ultimate fact finder when, as here, he decides to make findings of fact. *Belasco v. Board of Public Educ. of the Sch. Dist. of Pittsburgh*, 510 A.2d 337 (Pa. 1986). The Secretary makes findings of fact based on the preponderance of the evidence. *Fisler v. State System of Higher Educ.*, 78 A.3d 30, 47 (Pa. Cmwlth. 2013).

DISCUSSION

I. The School District Complied With The Procedural Requirements of the School Code.

Appellant asserts the School District's termination of his employment violated the provisions of Article XI of the School Code related to procedural safeguards to include sections 1127, 1124, 11-1127, 1129, and 1151.

Section 1127 of the School Code provides that:

> "Before any professional employee having attained a status of permanent tenure is dismissed...**such board of school directors shall furnish such professional employee 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 directors shall be forwarded by registered mail to the employee, setting forth the time and place when and where such employee 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." (altered for emphasis), 24 P.S. §11-1122.

Appellant argues that his due process rights were violated because he did not receive an in-person hearing accompanied by counsel. Mr. Follman also argues that the hearing was conducted in a manner that violates the School Code because it was held virtually with a hearing officer rather than the Board of School Directors. (PDE Hearing Transcript, at 30-32.). On September 1, 2021, the School District sent Mr. Follman a letter detailing the charges and providing, ". . . the Administration of the School District of Philadelphia recommend that you be dismissed from employment based on these allegations and administrative findings made against you. The Board of Education resolved that there existed sufficient evidence to support the School District Administration's recommendation of your dismissal and directed the Board Secretary and President to issue . . ." a Statement of Charges. (SDP-01). The notice letter provided a hearing date of September 13, 2021.

In response to the letter from the School District, Mr. Follman's counsel, Attorney Migliore, sent a letter confirming the hearing scheduled for September 13, 2021, at 10:00 a.m. (SDP -10). The Hearing was postponed and then unilaterally changed to a virtual hearing rather than an in-person hearing over the objections of Mr. Follman and his attorney. (Tr. 35:23-36:12; Ex. HO-3 at 2-4). A virtual hearing was held before a hearing officer on February 24, 2021. During the virtual hearing, Mr. Follman had the opportunity to testify and present/enter various

items into evidence. Appellant presented and entered into evidence his COVID test results collected by his own doctor on February 24, 2021. (Ex. HO-4 at 4-8.) Because the virtual hearing was a public hearing that was requested by Mr. Follman, and, there is no evidence of record that the public was precluded from participating in the hearing, Appellant's arguments are without merit.

With respect to the Statement of Charges, the School District sent the letter on behalf of the School Board as required by section 11-1127, 24 P.S. §11-1127. (Tr. Ex. SDP-1 at 1; Ex. NF-1 at 1.) Unlike the facts of the *Vladimirsky* decision, Follman's statement of charges letter explicitly stated that he was suspended pending a decision while also stating that "this is not a final termination on the status of your employment." *Id.* Additionally, the letter was sent following a Board meeting, in which a resolution was approved based on the School Board's conclusion that there was sufficient evidence to terminate and directing that a notice of the right to a hearing be sent to Mr. Follman. *Id.* Therefore, Appellant's reliance on the *Vladimirsky* and *Jones* cases is misplaced. In those cases, the court concluded the terminations of the employees were illegal due to the failure to comply with § 1127 by sending "statement of charges" letters without Board action or approval. Additionally, in *Vladimirksy*, the employee was terminated retroactively on a date preceding the actual vote. In the current matter, Mr. Follman received the letter required by the School Code and was not terminated retroactively via board resolution.

Finally, the fact that a hearing officer was present at the hearing rather than the Board Members does not undermine the School District's position that such a practice is compliant with the School Code. In *Belasco v. Bd. of Public Educ.*, 510 Pa. 504 (1986), the Pennsylvania Supreme Court ruled that both school directors and the board secretary who did not attend the hearing may nonetheless participate in the fact finding and decision-making process by

reviewing the hearing transcript." *Id.* at 514. Additionally, in an earlier case, *Boehm v. Board of Education*, 373 A.2d 1372 (Pa. Cmwlth. 1977), the Commonwealth Court held that school directors may vote based on the findings and do not have to be present at the hearings where the evidence was presented.

According to the School Board Minutes for August 18, 2022, the school board voted and "RESOLVED, that there exists sufficient evidence to support the recommendation of the superintendent and/or his designee to terminate employment, from the School District of Philadelphia, of the following employees effective August 18, 2022", including Mr. Follman's termination. (Agenda & Minutes, Board of Education Meeting, August 18, 2022). Additionally, the minutes indicate that the Board resolved & adopted the Hearing Officer's Findings of Fact/Conclusions of Law, separately from the other individuals on the list. *Id.* Section 1129 provides in relevant part,

> **§ 11-1129. Vote required for dismissals**
>
> 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 employe. If less than two-thirds of all of the members of the board vote in favor of discharge, the professional employe shall be retained and the complaint shall be dismissed . . . 24 P.S. §11-1129.

Because the evidence of record demonstrates that Mr. Follman received the Statement of Charges in compliance with Section 1127 and the Board of School Directors adopted and approved a resolution consistent with Section 1129, I conclude that the procedural requirements. for the dismissal of Appellant were met.

Appellant next contends that the School District acted improperly by invoking a suspension without pay prior to a hearing as an illegal demotion. Section 1151 of the School Code reads as follows:

> The salary of any district superintendent, assistant district superintendent or other professional employe in any school district may be increased at any time during the term for which such person is employed, whenever the board of school directors of the district deems it necessary or advisable to do so, but there shall be no demotion of any professional employe either in salary or in type of position, except as otherwise provided in this act, 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 employee. 24 P.S.§ 11-1151

Appellant also raises the issue of whether the procedure for a demotion is applicable to the current case. However, the application of Section 1151 of the School Code is limited to demotions. Additionally, suspensions are a form of discipline not covered under Section 1151. In *Rike v. Commonwealth*, the Supreme Court held that the Secretary of Education does not have appellate jurisdiction over disciplinary suspensions issued by a school board. *Rike v. Commonwealth*, 508 Pa. 190 (1985). In *Rike*, a school board conducted an investigation and hearing regarding sexual harassment allegations against a teacher. Following the hearing, the Board voted to suspend him 6-3 and the teacher appealed. Ultimately, the court ruled that the Secretary of Education lacks appellate jurisdiction when a disciplinary suspension without pay is imposed for causes justifying dismissal under § 1122.

In the present case, Mr. Follman was placed on "unauthorized leave without pay" on May 10, 2021. However, his status was changed to "Suspension without pay" after two investigatory conferences were conducted. After the second-level conference conducted by hearing officer, Sheila Wallin ("Ms. Wallin"), Ms. Wallin recommended termination and suspension without pay pending a decision on the recommended termination. (Tr. 157:3-159:3; Ex. SDP-9.) Appellant

contends that permitting "a suspension of pay of a tenured teacher without any hearing held by the Board is constitutionally repugnant and cites *Goldberg v. Kelly*, 397 U.S. 254 (1970). However, the U.S. Supreme Court explicitly stated that the termination of welfare benefits involves "a crucial factor...not present in the case of the blacklisted government contractor, the discharged government employee, the taxpayer denied a tax exemption, or virtually anyone else whose government entitlements are ended. *Id.*, 264-266. In contrast, Mr. Follman was not a recipient of welfare benefits and the current case involves employment rather than the termination of such benefits. Therefore, Appellant's application of *Goldberg* is not germane to the current appeal before the Secretary. Moreover, Mr. Follman received a pre-deprivation notice and the opportunity to be heard before his status was officially changed to a suspension without pay. (Ex. SDP-07), (Ex. SDP-08).

II. The School District established sufficient grounds for dismissal pursuant to the Public School Code.

The School District's reasons for the termination of Mr. Follman include the failure to follow directives related to COVID-19 testing or provide a compliant excuse for not undergoing testing arranged by the School District. Specifically, the School District asserts that Mr. Follman's conduct constitutes "persistent negligence in the performance of duties" under Section 1122 of the School Code. The Pennsylvania Supreme Court reasoned that, an educator is persistently negligent when, "the violation occurs either as a series of individual incidences, or as one incident carried on for a substantial period of time." *Strinich v. Clairton Sch. Dist.*, 494 Pa. 2976, 305 (1981). In the *Strinich* case, a teacher was found to have been persistently negligent by failing to maintain a grade book in the manner required; failing to report for cafeteria duty; and being "unreasonably hostile" towards his superior on numerous occasions. *Id.* at 5-8. Not unlike the teacher in *Strinich*, Follman was directed, by his principal, to comply with the School

District's COVID-19 testing requirement but repeatedly refused from February 2021 until his termination more than one year later in August 2022.

In *Johnson v. United Sch. Dist.*, 201 Pa. Super 375 (1963), a teacher, on numerous occasions was directed to attend a school "Open House" and meet with parents. Despite her employer directing her to attend, she continuously refused to obey this direction, and "advised her administrative superior that she would not attend." *Id.* at 377. The Court ruled that a school board may properly terminate a teacher after they persistently refuse to obey the direction of their employer and instead follows their "own personal whims and pleasures." *Id.* at 379. The Court reasoned that, "the plaintiff here not only closed her eyes to a directive, but arrogantly persisted in her announced intention not to comply with the directive. This conduct was an act of negligence and would also be classified as persistent and willful violation of the school laws.

In the matter before the Secretary, Mr. Follman failed in the performance of his duties over a period of approximately eighteen (18) months. Despite the efforts of the School District to return students and teachers to in-person learning by requiring weekly testing for staff and students, Mr. Follman ignored the directives of his superiors; preferring to substitute his own judgment for that of the School District's Administration regarding the health and safety of students and school staff during an ongoing public health crisis. Such conduct falls squarely within the Pennsylvania Supreme Court's definition of persistent negligence because eighteen (18) months is a substantial period of time. Additionally, Appellant's refusal to be tested or provide a reasonable medical excuse for an exemption resulted in him not returning to the classroom. Based on the foregoing, the record supports the School District's allegation that Mr. Follman was persistently negligent in disregarding the directives of his superiors regarding COVID-19 testing.

In *Metz v. Bethlehem Area Sch. Dist.* 177 A.3d 384 (Cwlth. 2018), a teacher was placed on unpaid suspension by the Human Resources Director after he was asked to submit to drug testing and he refused. The Human Resources Director also informed him that if he refused, then "he would be placing his job in jeopardy." *Id.* at 387. Five days later, after finally completing the drug test with a positive result for cocaine, he was discharged. The Court ruled that a teacher must comply with orders to complete medical testing/examination when the school district has reasonable suspicion to believe that they pose a threat to the welfare of students. *Id.* at 392-393. In the current matter, the record in this case supports the School District's assertion that in order to protect the health and safety of students and staff in the district, it was necessary to implement a mandatory testing program to mitigate the spread of COVID-19.

Follman's refusal to comply with a mandatory testing program constituted willful neglect of duties because he neglected his basic duty to comply with the directives of the District Administration in order to return students and staff safely to the classroom during the COVID-19 pandemic. Furthermore, Follman's actions prevented his own return to his teaching duties. Follman was directed to comply with the district's mandatory testing policy by multiple officials from the School District and had several opportunities to explain his position or comply. Additionally, Mr. Follman was warned about the consequences of not complying with a mandatory health-related testing procedure. Based on the foregoing, the School District had grounds for the termination of Mr. Follman's employment for willful neglect of duties.

III. The Superintendent acted within his authority in mandating COVID-19 testing for staff and students during a public health crisis.

Appellant also asserts that his dismissal was improper because the Superintendent lacked the authority to enact a mandatory COVID-19 testing policy. However, Appellant does not cite a specific statutory or regulatory prohibition that would restrict a superintendent from

implementing a testing program during a global pandemic or a district policy that would limit the Superintendent's authority to enact COVID-19 testing requirements. In the current matter, the Board did not rescind the Superintendent's implementation of the testing program and the School Board's vote to terminate Mr. Follman undermines any suggestion that the Board did not concur with the actions of the Superintendent. Follman directly, and repeatedly, refused to obey his superior, Principal Dunn-Robb. On May 26, 2021, Principal Dunn-Robb held a first-level investigatory conference with Follman and his union representative to discuss her "Unsatisfactory Incident Report." (Ex. SDP-5). However, Follman continued to object to the directive of his immediate supervisor to comply with the testing program. (Hearing Officer's Recommendation, page 3, #11-15). Moreover, Follman continued to refuse to participate in the School District's COVID-19 testing program up until the date of his termination.

Because Appellant has not cited any controlling authority that would nullify the School District's COVID-19 testing procedure, there cannot be a violation of the Sunshine Act as Appellant argues because the Sunshine Act only applies to "Agency" action. The present case does not involve agency action. "Agency" is defined as "the body, and all committees thereof authorized by the body to take official action or render advice on matters of agency business, of all the following: the General Assembly, the executive branch of this commonwealth...or any State, municipal, township or school authority school board, school governing body, commission, the board of trustees..." 65 Pa. Cons. Stat. § 703. As a result, the Sunshine Act's requirement of publishing and providing an opportunity for comment only applies to governing bodies not individuals. Furthermore, the Superintendent of the School District is not an agency as defined by the Sunshine Act.

IV. Appellant's liberty interests in avoiding COVID-19 testing in order to keep his teaching position is not unlimited and Appellant fails to present evidence that his 1st Amendment rights were violated.

Appellant asserts various arguments that his liberty interests were violated when he was not permitted to have COVID-19 testing performed by his own medical provider. However, Mr. Follman's liberty interests are not unlimited and must be balanced against the School District's interest in returning students and school staff to in-person learning safely. In *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), the Supreme Court held that an individual's liberty interests did not outweigh the state's compelling interest in eradicating small pox. In *Murray v. Pittsburgh Bd. Of Educ.*, 759 F. Supp. 1178 (W.D. Pa. 1991), the U.S. Western District Court of Pennsylvania applied a 4 part analysis to address the same issue utilized by the U.S Supreme in *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570 (1980). The District Court ruled that a school district's need to conduct a medical examination is likely to outweigh a teacher's privacy interests when: (1) the type of information requested is routinely requested for the particular occupation; (2) the potential harm of nonconsensual disclosure is low; (3) when the employer has a legitimate need for the information; and (4) where there is recognizable public policy favoring the disclosure of information to school administrators. *Id.* at 1181.

In the present case, the type of information that was requested of Mr. Follman was *becoming* routine in workplaces across the country, especially schools and universities, due to the ongoing pandemic. The potential harm of nonconsensual disclosure is low. It was a covid test/nose swab. The only medical information that was being collected based on these results was whether Appellant was positive or negative for COVID-19 at the time of a given test. Additionally, this information is easily discoverable by others when a teacher receives a positive test result. Many schools were implementing quarantine guidelines, so that if someone tested positive, others who had been in close contact with them would have to quarantine for several days. Similar to the

teacher in *Murray*, Mr. Follman failed to meet the burden of proof on this element. The plaintiff has the burden of producing evidence that there is an actual risk of nonconsensual disclosure, or that there has ever been such a disclosure in violation of his privacy. *Id.* at 1182. Additionally, the School District had a legitimate need for the information that it wanted from Mr. Follman. The School District implemented the testing program so that it could open the schools safely. Therefore, there was a recognizable public policy supporting workplaces and schools' adoption of mandatory testing.

Appellant also argues that his right to expression under the 1st Amendment was impeded by the School District regarding the School District's COVID-19 testing procedure. However, there is no evidence of record to support that claim.

Accordingly, for the foregoing reasons, I enter the following order affirming the dismissal of Mr. Follman.

OFFICE OF THE SECRETARY OF EDUCATION
COMMONWEALTH OF PENNSYLVANIA

NEAL FOLLMAN,	:	
Appellant	:	Teacher Tenure Appeal
v.	:	No. 04-22
	:	
SCHOOL DISTRICT OF PHILADELPHIA,	:	
Appellee	:	

ORDER

AND NOW, this 20th day of October, the School District of Philadelphia's dismissal of Neal Follman is hereby affirmed.

Date Mailed: 10/20/2023

Khalid N. Mumin, Ed.D.
Secretary of Education