IN THE OFFICE OF THE SECRETARY OF EDUCATION
COMMONWEALTH OF PENNSYLVANIA

ELLIS JONES,	:	
Appellant	:	
	:	
v.	:	**TTA No. 01-11**
	:	
THE SCHOOL DISTRICT OF PHILADELPHIA,	:	
Appellee	:	

OPINION AND ORDER

Ellis Jones, (Mr. Jones), Appellant, appeals the decision of the School Reform Commission (SRC) of the Philadelphia School District (District), terminating his employment with the District as a professional employee. This matter is now before the Secretary to address the District's Petition for Reconsideration (Petition). After further review of this matter, and as discussed more fully below, the Secretary finds that the District initially did not comply with the statutory requirements for dismissing Mr. Jones; however, Mr. Jones subsequently was provided with due process when a hearing was held to determine whether he should be dismissed and the SRC resolved to dismiss Mr. Jones after the hearing. Thus, Mr. Jones is entitled to reinstatement to his position as a teacher with the District from August 10, 2009 to December 15, 2010, the date when the SRC resolved to dismiss him. Mr. Jones shall be provided with any compensation he lost during that time period. However, evidence presented at the hearing supports the SRC's dismissal of Mr. Jones as of December 15, 2010.

FINDINGS OF FACT

1. Mr. Jones was hired as a teacher and professional employee with the District on September 1, 2002. (SDP 116).[1]

2. Mr. Jones was a vocational teacher at Dobbins AVTS for six years until the electronics program was discontinued at Dobbins. (N.T. p. 136).[2]

3. During the 2008-2009 school year, Mr. Jones was assigned to the position of math teacher at Mastbaum AVTS, which is another school within the District, on an emergency certificate.[3] (N.T. pp. 136-39).

4. During the 2008-2009 school year, Mary Dean (Ms. Dean) was the principal of Mastbaum. (N.T. p. 117).

5. On or about April 30, 2009, Ms. Dean received a letter signed by three members of City Year Greater Philadelphia ("City Year") and the Project Manager regarding statements made by Mr. Jones in his classroom. (N.T. p. 119; SDP 24-26).

6. City Year employees are a team of assistant teachers, tutors or mentors that spend most of their time in classrooms working with teachers to help students. (N.T. pp. 53-54).

7. In the City Year letter, the corps members provided the following information:

   a. When a student screamed at Mr. Jones to let him alone and stated "this is f---ing ridiculous", Mr. Jones responded with, "No, you're f---ing ridiculous. It's f---ing ridiculous you come to my class . . . . you staying here not doing anything is f---ing ridiculous."

   b. Students were talking about Viagra and Mr. Jones assured them he had no problem "getting it up." The conversation then turned to colonoscopies

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[1] SDP refers to exhibits submitted by the District and admitted into evidence at the hearing before the SRC Chairman on April 16, 2010.
[2] N.T. refers to Notes of Testimony regarding testimony provided at the hearing before the SRC Chairman on April 16, 2010.
[3] As of the date of the hearing before the SRC, Mr. Jones had become certified in math and technology education for kindergarten through 12th grade. (N.T. pp. 136-37).

and Mr. Jones described his personal experience and the students would shout and laugh when he mentioned anything sexual or biological such as having a "tube inserted into the anus".

c. When explaining what masochistic and sadistic meant, Mr. Jones said sadism comes from the same word as sodomy and when the students said they did not know what sodomy meant, Mr. Jones said "It's when you get f---ed up the ass."

d. Mr. Jones explained to a few students why a man could not urinate with an erection and shouted repeatedly, as the students laughed, "there is a valve at the tip of the penis."

e. When told to do something by the administration, Mr. Jones would tell the class that "This morning Ms. Dean stretched out my asshole over [some issue]", or would say "Don't do that or Ms. Dean will stretch out my asshole."

f. Mr. Jones talked about receiving dye for a CAT scan and said "And I felt a warming sensation starting in my groin" and gestured to his crotch. He also told a female student about the discomfort of "getting your balls crushed."

g. Mr. Jones told the students that kids in the suburbs "huff" and explained how they do it.

h. Mr. Jones told inappropriate jokes, such as "How do you make a hormone. Don't pay her."

i. Mr. Jones would curse and yell at the students when they acted up and often would shout "I'm f---ing sick of this shit."

8. After Ms. Dean received the letter from City Year, she asked a school police officer to conduct an investigation by randomly selecting students from a list of Mr. Jones' students and asking them to write a statement about Mr. Jones. (N.T. pp. 17, 34-35, 43, 119; SDP 27, 28, 29, 30-33).

9. Admitted into evidence were written statements of seven students:

a. two had nothing negative to say about Mr. Jones;

b. one said he was a good teacher and would curse at some of the students or jump into their personal conversations;

c. one said he would curse back at students who used a curse word;

d. one said he talked back to students using bad language but not all the time;

e. one said he talked in inappropriate and unnecessary ways, that he talked about sex and discussed things that should not be discussed in a classroom;

f. one said he talked about females' butts, cursed a lot, said Ms. Dean chewed his butt up, and talked to the students like they were his peers.

(SDP 27-32).

10. Three of the seven students who wrote statements about Mr. Jones testified at the April 16, 2010 hearing before the SRC.

11. One of the students testified that he was not involved in the conversations but heard some of Mr. Jones' statements:

a. It sometimes happened that Mr. Jones involved himself in students' discussions about sex;

b. Heard him use f---ing – but rarely used it;

c. Heard him talk about getting it up;

d. Saw him point to his groin at one point in time;

e. Would answer student's questions about sex;

f. Heard him discuss Viagra with students;

g. Heard him curse at students – moderately low;

h. Would apologize to class for his language but then would happen again.

12. Another student testified that she was told she had to write something about Mr. Jones because other students were telling the school police officer stuff and that people were talking about Mr. Jones' bad language and everything.

a. Mr. Jones would go into peoples' conversations and they were talking about sex or anything;

b. If asked a question about sex, Mr. Jones would answer it;

c. Mr. Jones would curse sometimes, usually in response to a student's behavior –students would curse at Mr. Jones a lot and he would talk back when someone insulted him;

d. Mr. Jones tried not to insult students but couldn't really control the class;

e. Doesn't remember Mr. Jones say f---ing;

f. Several occasions Mr. Jones might have gotten into arguments with students and would sometimes use foul language;

g. Thinks students encouraged Mr. Jones to talk about sex and she's pretty sure he did;

h. She did not hear him talk about Viagra;

i. She wasn't really offended by Mr. Jones' discussions or statements but she did think they were inappropriate in a math class.

13. The third student who testified stated that Mr. Jones cursed a lot and talked to the students as peers and that made her feel little bit uncomfortable.

a. Mr. Jones said Ms. Dean chews his butt up, she uses no lube;
b. Mr. Jones talked about female butts (girl would dance & he'd say why are you shaking your ass in my classroom);

c. Some stuff had sexual connotations.

14. After Ms. Dean received the statements from Mr. Jones' students, she conducted an investigatory conference on June 1, 2009, which included Mr. Jones, a Philadelphia Federation of Teachers ("PFT") staffer, Ms. Jones, and Mr. Bywalski, the District's labor relations assistant. (N.T. pp. 119; SDP 41)[4].

15. Mr. Jones admitted to making some of the statements that were alleged against him but stated they were taken out of context in some cases and were misinterpreted in others.

[4] Ms. Dean stated in her testimony that her conference summary of June 1, 2009 was exhibit SDP 41. SDP 41 states that a conference was held June 15, 2009, which is apparently a typographical error since no one who testified contested that the conference was held on June 1.

In addition, he stated that he was trying to create an atmosphere of trust and rapport with his students. (N.T. pp. 147-158; SDP 38-39).

a. Mr. Jones admitted that he used the f--- word with Luis when Luis reacted to Mr. Jones confronting him about wearing his hoody in the classroom;

b. Mr. Jones admitted telling this joke - how do you make a hormone, don't pay her - but said it was told to medical students when they were talking about different things in the medical program and he was trying to break the ice and get them engaged;

c. Mr. Jones admitted talking about a colonoscopy when a student was distressed about an MRI and thought she was going to have her leg cut off.

16. After the investigatory conference on June 1, 2009, Ms. Dean prepared an unsatisfactory incident report ("SHE-204") and recommended that Mr. Jones' employment with the District be terminated. (N.T. p. 120; SDP 34-35).

17. Mr. Jones sent a letter to Ms. Dean, dated June 15, 2009, regarding the SHE-204. Mr. Jones apologized for his remarks stating he was trying to build trust and rapport with the students and that some remarks were taken out of context and misinterpreted and some were inaccurate and a misrepresentation of what happened in the classroom. Mr. Jones further stated that since he received the concerns from Ms. Dean and City Year members, he immediately changed his approach and apologized multiple times. (N.T. p. 121; SDP 38-39).

18. On June 24, 2009, James Douglass, Assistant Regional Superintendent, held a second-level conference regarding the SHE-204. In attendance were Mr. Jones, the PFT representative, Ms. Jones, and Mr. Bywalski, the labor relations assistant. Ms. Jones spoke for Mr. Jones and stated that Mr. Jones apologized, that the tactic he used to gain respect of the students was not appropriate, that his comments were taken out of context and that he was dedicated to his students. (SDP 43).

19. After the June 24, 2009 meeting, Mr. Douglass recommended that Mr. Jones be terminated from his employment with the District. (SDP 43).

20. On June 25, 2009, Ms. Dean signed the Professional and Temporary Rating Form regarding Mr. Jones, which rated him satisfactory for the 2008-2009 school year. (N.T. p. 142; Jones -1).[5]

21. By letter dated August 10, 2009, signed by the District Superintendent/Secretary of the SRC and the Chairman of the SRC, Mr. Jones was told that they would recommend to the SRC that his employment with the District be terminated. The letter stated that the charges against him constituted "a willful violation of or failure to comply with the School Laws of this Commonwealth, and other improper conduct such as to constitute cause pursuant to 24 P.S. Section 11-1122 of the Public School Code of 1949" and that he had a right to request a hearing before the SRC. (SDP 116).

22. In the August 10, 2009 letter, Mr. Jones was told that the District's payroll department would be advised to make the necessary salary adjustments. (SDP 116).

23. Mr. Jones was paid for his employment with the District for the 2008-2009 school year but not after the 2008-2009 school year.

24. Mr. Jones requested a hearing and it was held on April 16, 2010 before the Chairman of the SRC.

25. At the hearing, District counsel stated that the dismissal of Mr. Jones was based on the grounds of immorality. (N.T. p. 10).

[5] Jones refers to exhibits submitted by Mr. Jones and admitted into evidence at the hearing before the SRC Chairman on April 16, 2010.

26. There is no evidence in the record that, prior to the hearing on April 16, 2010, the SRC had resolved to dismiss Mr. Jones and that it had directed the Chairman and Secretary of the SRC to advise Mr. Jones of his right to a hearing.

27. There is no evidence in the record that the SRC had any knowledge about the charges against Mr. Jones or about the hearing on April 16, 2010, because the hearing was held only before the Chairman of the SRC.

28. The only evidence of the SRC's knowledge of the charges against Mr. Jones and of the hearing held April 16, 2010, was when the SRC resolved on December 15, 2010, to dismiss Mr. Jones, effective August 14, 2009.

29. On September 13, 2011, the Secretary of Education reversed the decision of the SRC and ordered Mr. Jones reinstated to his position as a professional employee and payment of any compensation that he lost due to his dismissal (Secretary's Order).

30. On September 28, 2011, the District, pursuant to 1 Pa. Code § 35.241(a), filed a petition for reconsideration (Petition for Reconsideration) with the Secretary regarding the Secretary's Order.

31. On October 11, 2011, the District filed a petition for review in the Commonwealth Court appealing the Secretary's Order.

32. On October 27, 2011, the Secretary granted the District's Petition for Reconsideration and issued a briefing schedule for the parties to file briefs with the Secretary presenting their respective positions regarding the issues raised in the Petition for Reconsideration.

33. On December 2, 2011, the District filed an application with the Court seeking to have its appeal to the Court stayed pending the Secretary's decision regarding the issues raised in the District's Petition for Reconsideration.

34. The Court issued a Memorandum and Order on December 6, 2011, denying the application for stay because the Secretary's Order purporting to grant the Petition for Reconsideration was a nullity. However, the Court construed the application for stay as including a request to remand the matter to the Secretary.

35. The Court remanded the matter to the Secretary with directions to consider, within thirty (30) days of December 6, 2011, the Petition for Reconsideration filed by the District on September 28, 2011.

36. On December 20, 2011, the Secretary granted the District's Petition for Reconsideration. The Secretary accepted the brief the District had filed on November 28, 2011, setting forth the District's position on the substantive issues raised in the Petition for Reconsideration. The Secretary ordered Mr. Jones to file a brief setting forth his position on the substantive issues raised in the Petition for Reconsideration by January 13, 2012.

37. Mr. Jones filed his brief on January 11, 2012 and the District filed a reply brief on January 27, 2012.

DISCUSSION

Section 1127 and relevant precedent

Section 1127 of the Public School Code sets forth the procedures that must be used when a board of school directors dismisses a professional employee. 24 P.S. § 11-1127. Section 1127 provides that before a professional employee can be dismissed, the board of school directors must provide the employee with a detailed written statement of charges upon which the proposed

dismissal is based. The written notice, which is to be signed by the president and witnessed by the secretary of the board of school directors, must be sent by registered mail to the employee providing the time and place that the employee will be given an opportunity to be heard before the board of school directors. 24 P.S. § 11-1127. In interpreting the requirements of Section 1127, the Commonwealth Court has held that Section 1127 "requires the Board to Resolve to demote the employee and to furnish him with a written statement of the charges prior to the hearing." *Patchel v. Wilkinsburg School District,* 400 A.2d 229, 232 (Pa. Cmwlth. 1979) (emphasis added); S*ee also, Abington School District v. Pittinger,* 305 A.2d 382 (Pa. Cmwlth 1973).

The hearing must be no sooner than ten (10) days and no later than fifteen (15) days after the written notice; however, it can be postponed, continued or adjourned. 24 P.S. § 11-1127. Section 1129 of the School Code provides that after a hearing, "the board of school directors shall by two-thirds vote of all the members thereof, . . . 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." 24 P.S. § 11-1129.

Courts have repeatedly held that "no dismissal of a tenured professional employee can be valid unless the dismissing school district acts in full compliance with the Code." *West Shore School District v. Bowman*, 409 A.2d 474, 480 (Pa. Cmwlth. 1979); *See also, In Re: Swink,* 200 A. 200 (Pa. Super. 1938). "[W]here dismissal proceedings are undertaken the procedures set forth in the Code are mandatory and must be followed strictly." *Covert v. Bensalem School District*, 522 A.2d 129, 130 (Pa. Cmwlth. 1987).

In addition, there is no provision in the School Code that confers on administrative staff, whether a Superintendent or a Principal, the authority to dismiss a professional employee. Thus,

the dismissal of a professional employee cannot become effective until after the hearing has taken place. *See, Pittinger,* 305 A.2d 382; *Tassone v. Redstone Township School District,* 183 A.2d 536 (Pa. 1962).[6]

Based on Section 1127 and the supporting case law, the Secretary previously found that the District failed to comply with the dismissal procedures required for terminating Mr. Ellis. In its Brief in Support of Its Petition for Reconsideration (Brief in Support), the District argues that there were no procedural flaws with the dismissal of Mr. Jones.

District's Arguments

Based on the District's interpretation of the Secretary's September 13, 2011 Opinion and Order, the District argues that there were no procedural flaws in the dismissal of Mr. Jones for the following reasons:

1. Dr. Ackerman, District Superintendent, had the powers and authority of the Secretary of the SRC at the time she signed the August 10, 2009 letter; thus, the letter was witnessed by the Secretary of the SRC, which makes a factual predicate for the Secretary's previous decision erroneous.

2. The Secretary erred when he elevated the form of the August 10, 2009 letter over its substance because, in substance, the administration levied a suspension without pay (and not a dismissal) upon Mr. Jones pending his potential SRC hearing.

3. Neither section 1127 of the School Code nor any applicable precedent requires a school board (as distinguished from the district administration) to conduct a pre-charge

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[6] Although *Pittinger* and *Tassone* are cases involving demotions of tenured professional employees, the Court in *Pittinger* stated that "such demotion [of a professional employee] must strictly follow the procedure set forth in Section 1127 for dismissal of professional employes." *Pittinger,* 305 A.2d at 386. In following this procedure, the court in *Tassone* held that a demotion would not become effective until after the hearing took place and, in *Pittinger,* held that administrative staff did not have the authority to demote a professional employee.

investigation, as the Secretary stated in his previous decision. In addition, the District argues that pursuant to *Lyness v. Com., State Bd. of Medicine,* 605 A.2d 1204 (Pa. 1992), such a pre-charge investigation by the board would violate Mr. Jones' due process rights.

4. The Secretary erred when he determined that the SRC hearing was a nullity because it occurred before only one member of the SRC and there was no evidence that other SRC members were even aware of the hearing.

5. If there were procedural irregularities, the remedy is remand, not reinstatement.

August 10, 2009 Letter - Dr. Ackerman

In order to show that Dr. Ackerman had the powers and authority of the Secretary of the SRC when she signed the August 10, 2009 letter, the District attached to its Petition for Reconsideration three pages of the SRC's Public Meeting Proposed Resolutions for March 19, 2008. On pages 2-3, a proposed resolution states that the District, through the SRC, appoints Dr. Ackerman as the Chief Executive Officer of the District with the powers and authority of District Superintendent and Secretary/Treasurer of the SRC. *See Exhibit B to Petition for Reconsideration.*

However, there are no pages attached to the Petition for Reconsideration from the March 19, 2008 public meeting that evidence that the proposed resolution regarding Dr. Ackerman was voted on and approved. Although it is common knowledge that Dr. Ackerman was the Chief Executive Officer of the District during the time relevant to Mr. Ellis' dismissal, it is not common knowledge that she also had the power and authority of the Secretary/Treasurer of the SRC. Even accepting that Dr. Ackerman had such power and authority, as discussed further below, the District did not fully comply with the legal requirements for dismissing a professional employee.

August 10, 2009 letter - Suspension

In its Petition for Reconsideration, the District, for the first time, argues that the August 10, 2009 letter sent to Mr. Ellis was actually a letter from the administration levying a suspension without pay on Mr. Ellis. Neither at the hearing before the SRC nor at the hearing before the Secretary did the District ever claim that the August 10, 2009 letter was actually a letter by which the administration was notifying Mr. Ellis that he was being suspended without pay. There was no evidence provided at either hearing that Mr. Ellis was ever advised that he was being suspended without pay. The letter recommends his dismissal and there is no mention of being suspended without pay. The District's newly stated claim that the substance of this letter was the administration notifying Mr. Ellis that he was being suspended without pay is not supported by the evidence. Thus, the Secretary has no basis to accept the District's newly asserted claim that the letter was notification to Mr. Ellis that he was suspended without pay.

Interestingly, the District also argues that the August 10, 2009 letter meets the procedural requirements for dismissal of a professional employee as set forth in Section 1127 because it was signed by the President of the SRC and witnessed by the Secretary of the SRC. Thus, the District now argues that this letter is to serve two purposes: (1) a letter from the administration purporting to notify Mr. Ellis that he is being suspended without pay; and (2) the SRC's notice of charges against Mr. Ellis pursuant to the procedure for dismissals set forth in Section 1127 of the School Code. However, as stated above, this letter did not inform Mr. Ellis that he was being suspended without pay and the District is making this claim for the first time in its Petition for Reconsideration. Also, even if it is accepted that Dr. Ackerman had the authority and powers of the Secretary of the SRC and signed the letter in that capacity, which was not indicated on the

letter, the District, as discussed below, did not fully comply with the legal requirements for dismissing a professional employee.

Pre-charge Investigation

The District argues that "nothing in Section 1127 of the School Code requires a school board (as distinguished from the district administration) to conduct a pre-charge investigation such as the one that the Secretary required in his opinion." *Petition for Reconsideration, p. 3.* The District further argues that there is nothing in applicable precedent requiring any action by the school board. The District misinterpreted the Secretary's previous Opinion because the Secretary did not state that the SRC was required to conduct a pre-charge investigation. In addition, the District's position that the school board, or SRC in this case, was not required to take any action, is inaccurate.

In his previous Opinion, the Secretary stated that the "record does not contain any resolution passed by the SRC that it had sufficient evidence to support its belief to dismiss Mr. Jones by a certain date, and that the Chairman and the Secretary of the SRC were to notify Mr. Jones of this fact and advise him of his right to a hearing." *See Opinion, Sept. 13, 2011.* The source of that quoted language is the Commonwealth Court. *See, Pittinger*, 305 A.2d 382, 387.

In interpreting the requirements set forth in Section 1127 for the dismissal of professional employees, the Commonwealth Court has held that Section 1127 "requires the Board to Resolve to demote the employee and furnish him with a written statement of the charges prior to the hearing." *Patchel v. Wilkinsburg School District*, 400 A.2d 229, 232. In *Pittinger*, the Court held that if a school board initially failed to comply with this procedural requirement, in order to cure such a procedural defect in dismissing a professional employee, "the Board only needed to have passed a resolution that it had sufficient evidence to support its belief, to demote Albrecht

by some given date, and therein to direct the Secretary and President of the Board to serve notice upon Albrecht of this fact and to advise him of his right to a hearing." *Pittinger*, 305 A.2d at 387 (emphasis added).

As stated above, the underlined language is similar to the language used in the Secretary's previous Opinion regarding Mr. Jones' termination. This language does not require the board to conduct a pre-charge investigation. This language only means that the board is to review the charges so it can determine, as a preliminary matter, whether the charges provide sufficient evidence to support termination if the charges are proved at a hearing. If the board makes the preliminary determination that termination would be supported if the charges were proved at a hearing, the board is to direct the President and Secretary to serve notice on the professional employee and advise the employee of his or her right to a hearing. Thus, the language from *Pittinger*, as used by the Secretary in the previous Opinion, refutes the District's argument that the Secretary required the SRC to conduct a pre-charge investigation or that applicable precedent did not require any action by the SRC.

In Mr. Jones' case, there is no evidence that the SRC reviewed the statement of charges, passed a resolution that it had sufficient evidence to support its belief to dismiss Mr. Ellis and notified the Secretary and President of the SRC to serve notice on Mr. Ellis of this fact and to advise him of his right to a hearing. This is similar to the *Pittinger* case where the notice of a hearing before the board was signed by the president and secretary of the board but counsel for the school board testified that the board did not see the charges until the first hearing. 305 A.2d at 384. Similarly, in Mr. Jones case, because the SRC did not issue a resolution stating that it found the charges sufficient to support termination if proved at a hearing, there is no evidence that the SRC ever reviewed the charges prior to the hearing that was held in April 2010. Thus,

based on *Pittinger* and *Patchel,* the District failed to follow the required procedures for terminating a professional employee. In quoting language from the *Pittinger* and *Patchel* cases, and requiring that the District comply with such procedures, the Secretary was not requiring that the SRC conduct a pre-charge investigation. The Secretary was requiring the District to comply with the requirements of Section 1127 as interpreted by the Commonwealth Court.

Interestingly, the District did not address the cases of *Pittinger* and *Patchel* in its Brief in Support of its request for reconsideration, but simply argued that *Lyness v. Com., State Bd. of Medicine,* 605 A.2d 1204 (Pa. 1992), would prevent the SRC from conducting a pre-charge investigation. However, as explained above, the Secretary did not require that the District conduct a pre-charge investigation; thus, *Lyness* is not applicable to the instant case. In addition, even if *Lyness* were applicable to the instant case, the District failed to cite to any of the *Lyness* progeny that differentiate the due process procedures required when an entity is acting as an employer rather than acting as a regulator. A few of these cases are discussed below, and they explain this difference.

Lyness Progeny

In *Harmon v. Mifflin County School District*, 651 A.2d 681 (Pa. Cmwlth. 1994), *reversed on other grounds*, 713 A.2d 620 (Pa. 1998), the school board terminated a non-professional employee pursuant to Section 514 of the Public School Code.[7] The employee challenged the

[7] Although Mr. Harmon was terminated pursuant to Section 514 of the Public School Code rather than Section 1127 of the Public School Code, the case is clearly applicable to terminations pursuant to Section 1127. Section 514 provides that the board of school directors "shall after due notice, giving the reasons therefor, and after a hearing if demanded, have the right at any time to remove any of its officers, employees or appointees for incompetency, intemperance, neglect of duty, violation of any of the school laws of this Commonwealth, or other improper conduct." 24 P.S. § 514. This is similar to Section 1127 for the termination of professional employees where prior to terminating a professional employee the board of school directors must provide the employee with a written notice of the charges against the employee, provide a hearing, if

termination arguing that, based on *Lyness,* there was an impermissible commingling of functions because under Section 514, the school board makes a probable cause determination, holds a hearing when requested, and then determines if just cause is established to terminate the employee.

The Commonwealth Court noted that even though *Lyness* requires "that there be a 'wall of separation' between those preferring the charges and those adjudicating the charges in an agency, that does not mean that complete separation has to be observed in every case for due process requirements to be met." *Harmon*, 651 A.2d at 685. The Commonwealth Court stated,

> Even though Section 514 requires a school board to terminate an employee and hear the challenge to that termination, *Lyness* simply doesn't apply because the "interests" involved in the employment relationships are totally different than in independent agency actions regulating individuals. We have recognized this distinction and determined that the same type of due process requirements do not apply to school boards as they do to other independent administrative agencies.

Harmon, 651 at 686. Citing to *Covert v. Bensalem Township School District*, 522 A.2d 129, 131 (Pa. Cmwlth. 1987), the Court in *Harmon* further noted that making charges against an employee presupposes that the board had some knowledge of the facts upon which the charges were based and unless the board had an opinion that the charges, if sustained, would warrant dismissal, the charges should not have been made. Nothing more is required of board members than that they hear and determine charges against an employee on the evidence given before them, uninfluenced by other previous impressions.

In *Behm v. Wilmington Area School District,* 996 A.2d 60 (Pa. Cmwlth. 2010*) appeal denied* 23 A.2d 1057 (Pa. 2011), the Commonwealth Court stated that, in *Harmon*, "We established a 'continuum of due process rights' approach, observing that the type of due process

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requested, and then determine whether to terminate the employee for any of the reasons identified in Section 1122. 24 P.S. §§ 11-1122, 11-1127.

hearing that is required is dependent upon the forum, the relationship of the parties, the interests at stake and should be consistent with the goal of reducing the risk of arbitrary government action." *Id.* at 65-66. Further, the Court stated,

> [I]n *Lyness*-type cases, where a single independent agency serves multiple functions while regulating the licensing of individuals, walls of separation are required between the functions. However, the same due process requirements do not apply to school boards acting, not as a regulator, but as an employer. We stressed that hearings before licensing boards may deprive those that appear before them of their ability to practice their profession anywhere in the Commonwealth, whereas, when an employee is terminated, it does not prevent him from working, but only prevents him from working for that employer. Thus, we concluded that, although a school board is required to terminate an employee and hear the challenge to that termination, *Lyness* simply does not apply.

Id. at 66, n. 10.

Finally, Commonwealth Court noted that in *Lyness*, the Pennsylvania Supreme Court stated that,

> [A] mere tangential involvement of an adjudicator in the decision to initiate proceeding is not enough to raise the red flag of procedural due process. Our constitutional notion of due process does not require a *tabula rasa.* However, where the very entity or individuals involved in the decision to prosecute are "significantly involved" in the adjudicatory phase of the proceedings, a violation of due process occurs.

Behm, 996 A.2d at 65, n. 9.

The above case law supports the conclusion that the procedural requirements set forth in Section 1127, as interpreted by the Commonwealth Court in *Pittinger* and *Patchel*, do not violate due process. Although a school board is required to pass a resolution that it believes there is sufficient evidence to dismiss a professional employee if such charges are proved at a hearing, if requested, due process is not violated. The *Lyness* progeny provides that an entity acting as an employer is not subject to *Lyness* as are agencies that act as regulators. Thus, the SRC was required to follow the procedures set forth in Section 1127 for terminating a professional

employee, as interpreted by the Commonwealth Court in *Pittinger* and *Patchel,* and it failed to do so.

Hearing Before SRC Chairman

The District alleges that the Secretary erred when he determined that the SRC hearing was a nullity because it occurred before only one member of the SRC and there was no evidence that other SRC members were even aware of the hearing. The District argues that all board members need not attend a hearing on charges for dismissal as long as any absent board member reads the hearing record prior to voting.

In making this argument, the District again misinterpreted language in the previous Opinion. The Secretary did not state that all members of the SRC had to be in attendance at such a hearing. The Secretary noted in his previous Opinion that because the hearing was held before only one member of the SRC, it was further evidence that the SRC did not have knowledge of charges against Mr. Jones, did not review the charges against Mr. Jones and did not resolve that there was sufficient evidence to proceed with a hearing, as was required under Section 1127. The only evidence in the record that the SRC had any knowledge of the charges against Mr. Jones was when it voted to dismiss him by a resolution passed on December 15, 2010, eight (8) months after the hearing was held.

Remand or Reinstatement

The District argues that even if there were procedural irregularities, the remedy is remand rather than reinstatement. However, the cases cited to support the District's position are inapposite to the instant case. In the cited cases, the matters were remanded to the districts so that the districts could hold hearings that had not been held. In Mr. Jones' case, a hearing was held so there is no basis for a remand order. In addition, in Mr. Jones' case, the District failed to

strictly comply with required procedures for terminating Mr. Jones, which is a basis for reinstatement, at least until the SRC complied with the requirements of Section 1127. *See, Pittinger*, 305 A.2d 382; *Patchel*, 400 A.2d 229.

In the recent case of *Migliore v. The School District of Philadelphia,* ___ A.3d ___, 2013 WL 3156533 (2013)[8], the Commonwealth Court held that the procedures used by the District to demote Mr. Migliore did not comply with Section 1127. In that case, Mr. Migliore received a letter signed by SRC Chairman Archie and District Superintendent/SRC Secretary Ackerman advising that they would recommend to the SRC that he be demoted. Mr. Migliore alleged that his supervisors removed him from his position as a principal and reassigned him to another position constituting a demotion in fact; but that the demotion was legally ineffective because the SRC did not hold a hearing prior to his demotion. Commonwealth Court agreed with Mr. Migliore that he had been demoted in fact when the District took action against him effecting a change in his authority, prestige and responsibilities before any hearing was held by the SRC. The Court noted that in *Patchel* it had "recognized that a demotion in fact could occur even before a hearing, although a hearing was required to lawfully effectuate the demotion." *Migliore,* p.7, *quoting Patchel*, 400 A.2d at 231. However, in the *Migliore* case, the Court held that it "need not inquire whether the District's subsequent procedures were effective to cure the prior improper demotion, because before the SRC could reschedule its hearing Migliore aborted the process by retiring." *Migliore,* p. 8.

Just as in the *Migliore* case, an August 10, 2009 letter signed by the SRC Chairman and District Superintendent was sent to Mr. Jones notifying him that they would recommend to the SRC that he be dismissed. At the time of the August 10, 2009 letter, the District removed Mr. Jones from his position as a teacher and paid him for the 2008-2009 school year, but not

[8] The *Migliore* case is not a reported opinion; thus, it is cited for its persuasive value not as binding precedent.

thereafter. Thus, Mr. Jones was dismissed, in fact, from his employment with the District as of August 10, 2009.

Mr. Jones' hearing was held April 16, 2010, before the Chairman of the SRC and the SRC resolved to dismiss him on December 15, 2010. Therefore, Mr. Jones was dismissed in fact on August 10, 2009. However, because Mr. Jones' dismissal could not be legally effective until the SRC resolved to dismiss him, Mr. Jones is entitled to be reinstated to his position as a teacher in the District from August 10, 2009 to December 15, 2010.

Mr. Jones was provided a hearing on April 16, 2010 and, on December 15, 2010, the SRC resolved to dismiss Mr. Jones based on testimony and evidence presented at the hearing. Therefore, the Secretary must determine whether there was sufficient evidence presented at the hearing to support the SRC's decision to dismiss Mr. Jones.

Evidence and Testimony Support Mr. Jones' Dismissal

Immorality is defined as "a course of conduct as offends the morals of the community and is a bad example to the youth whose ideals a teacher is supposed to foster and elevate." *Horosko v. School District of Mount Pleasant Twp.*, 6 A.2d 866, 868 (Pa. 1939) *cert denied* 308 U.S. 553 (1939); *Horton v. Jefferson County-Dubois Area Vocational Technical School,* 630 A.2d 481, 483 (Pa. Cmwlth. 1993) 6 A.2d at 868. The District bears the burden of proving that: (1) the underlying acts that it claims constitute immorality actually occurred; (2) such conduct offends the morals of the community; and (3) the conduct is a bad example to the youth whose ideals the educator is supposed to foster and elevate. *Palmer v. Wilson Area School District,* TTA No. 5-94, pp. 205-06. Deciding whether conduct offends the morals of a community is a legal determination "and only can be sustained if legally correct and supported by substantial evidence." *Id* at 209. If there are insufficient facts from which the Secretary can determine or

infer whether the conduct offends the morals of the community, no legal determination can be made on the issue of immorality. *Id.*

In this case, the District provided sufficient evidence at the hearing on April 16, 2010 to support the SRC's dismissal of Mr. Jones on the basis of immorality. Information provided by City Year employees who worked in Mr. Jones' class consisted of the following:

a. When a student screamed at Mr. Jones to let him alone and stated "this is f---ing ridiculous", Mr. Jones responded with, "No, you're f---ing ridiculous. It's f---ing ridiculous you come to my class . . . . you staying here not doing anything is f---ing ridiculous."

b. Students were talking about Viagra and Mr. Jones assured them he had no problem "getting it up." The conversation then turned to colonoscopies and Mr. Jones described his personal experience and the students would shout and laugh when he mentioned anything sexual or biological such as having a "tube inserted into the anus".

c. When explaining what masochistic and sadistic meant, Mr. Jones said sadism comes from the same word as sodomy and when the students said they did not know what sodomy meant, Mr. Jones said "It's when you get f---ed up the ass."

d. Mr. Jones explained to a few students why a man could not urinate with an erection and shouted repeatedly, as the students laughed, "there is a valve at the tip of the penis."

e. When told to do something by the administration, Mr. Jones would tell the class that "This morning Ms. Dean stretched out my asshole over [some issue]", or would say "Don't do that or Ms. Dean will stretch out my asshole."

f. Mr. Jones talked about receiving dye for a CAT scan and said "And I felt a warming sensation starting in my groin" and gestured to his crotch. He also told a female student about the discomfort of "getting your balls crushed."

g. Mr. Jones told the students that kids in the suburbs "huff" and explained how they do it.

h. Mr. Jones told inappropriate jokes, such as "How do you make a hormone. Don't pay her."

i. Mr. Jones would curse and yell at the students when they acted up and often would shout "I'm f---ing sick of this shit."

Some students who were in Mr. Jones' class stated the following:

a. It sometimes happened that Mr. Jones involved himself in students' discussions about sex;

b. Heard him use f---ing – but rarely used it;

c. Heard him talk about getting it up;

d. Saw him point to his groin at one point in time;

e. Would answer students' questions about sex;

f. Heard him discuss Viagra with students;

g. Would apologize to class for his language but then would happen again.

h. Mr. Jones would curse sometimes, usually in response to a student's behavior –students would curse at Mr. Jones a lot and he would talk back when someone insulted him;

i. Mr. Jones tried not to insult students but couldn't really control the class;

j. Several occasions Mr. Jones might have gotten into arguments with students and would sometimes use foul language;

k. Mr. Jones said Ms. Dean chews his butt up, she uses no lube;

l. Mr. Jones talked about female butts (girl would dance & he'd say why are you shaking your ass in my classroom);

m. Some stuff had sexual connotations;

n. She wasn't really offended by Jones's discussions or statements but she did think they were inappropriate in a math class;

o. His talking to them like peers (cursing) made her uncomfortable a little bit.

In addition, Mr. Jones admitted to making some of the statements that were alleged against him as follows:

a. Mr. Jones admitted that he used the f--- word with Luis when Luis reacted to Mr. Jones confronting him about wearing his hoody in the classroom;

b. Mr. Jones admitted telling this joke - how do you make a hormone, don't pay her - but said it was told to medical students when they were talking about different things in the medical program and he was trying to break the ice and get them engaged;

c. Mr. Jones admitted talking about a colonoscopy when a student was distressed about an MRI and thought she was going to have her leg cut off.

However, Mr. Jones claims that the statements were taken out of context in some cases and misinterpreted in others. Even though Mr. Jones claims that some of his statements were taken out of context or misinterpreted, he apologized to Ms. Dean in a letter dated June 15, 2009 stating that he was trying to create an atmosphere of trust and rapport with his students; but, he never refuted or provided evidence that the statements were not made. (N.T. pp. 147-152; SDP 38-39). Additionally, in his June 15, 2009 letter, Mr. Jones stated that when he received the concerns from Ms. Dean and City Year employees, he immediately changed his approach. (SDP 38-39).

Although some students did not have negative comments about Mr. Jones, the above statements from three students and the City Year employees, as well as Mr. Jones' failure to refute that the statements were made, supports the District's claim that the acts that underlie its claims of immorality actually occurred.

The District also provided evidence that Mr. Jones' conduct offends the morals of the community and is a bad example to the youth whose ideals the educator is supposed to foster and elevate. Ms. Dean testified that Mr. Jones' statements were offensive, offended the community and set a bad example to the students. (N.T. pp. 122-131). Ms. Dean graduated from a public school in the District, was a public school teacher, and an administrator in the District; thus, she was qualified to testify about whether Mr. Jones' statements offended the morals of the

community and set a bad example for the youth whose ideals Mr. Jones was supposed to foster and elevate.

CONCLUSION

After reviewing the arguments of the parties regarding the matters raised in the Petition for Reconsideration, I find that the District has not provided any new evidence or argument to support its position that it followed the statutorily prescribed procedures necessary to terminate Mr. Jones, at least initially. On August 10, 2009, the District sent Mr. Jones a letter stating that it would recommend to the SRC that he be dismissed. The District then terminated his pay as of the end of the 2008-2009 school year and did not allow Mr. Jones to teach after the 2008-2009 school year. There is no evidence in the record that Mr. Jones was ever advised that he was being suspended without pay. Mr. Jones was provided with a hearing before the Chairman of the SRC on April 16, 2010. However, the SRC did not resolve to terminate Mr. Jones employment until December 15, 2010.

Therefore, Mr. Jones was terminated, in fact, as of August 10, 2009; but the termination did not and, under law, could not have any legal effect until December 15, 2010, when the SRC resolved to terminate Mr. Jones' employment. Thus, Mr. Jones shall be reimbursed any amount of compensation he lost due to his improper dismissal between August 10, 2009 and December 15, 2010. *See, Arcurio v. Greater Johnstown School District*, 630 A.2d 529 (Pa. Cmwlth. 1993); *Shearer v. Secretary of Education*, 424 A.2d 633 (Pa. Cmwlth. 1981).

However, the evidence and testimony provided at the April 16, 2010 hearing is sufficient to sustain the SRC's decision to terminate Mr. Jones on the basis of immorality, as of December 15, 2010.

Accordingly, the following Order is entered:

IN THE OFFICE OF THE SECRETARY OF EDUCATION
COMMONWEALTH OF PENNSYLVANIA

ELLIS JONES,	:	
Appellant	:	
	:	
v.	:	**TTA NO. 01-11**
	:	
THE SCHOOL DISTRICT OF PHILADELPHIA	:	
Appellee	:	

ORDER

AND NOW, this 9th day of November 2013, Mr. Jones shall be reinstated to his position as a professional employee and shall be reimbursed any amount of compensation that he lost due to his termination, in fact, during the period of time from August 10, 2009 to December 15, 2010. However, Mr. Jones' termination is sustained as of December 15, 2010.

Carolyn C. Dumaresq, D.Ed.
Acting Secretary of Education