

LABOR LAW ALERT

By Richard B. Galtman

Given the financial burdens besetting school districts, there is a natural inclination to try to reduce costs by reducing staff, and in particular, by furloughing professional staff.

As you are no doubt aware, in order to furlough professional employees, school districts must adhere to the provisions of Sections 11-1124 and 11-1125.1, including the procedures outlined therein. In particular, the furlough of such employees can only be predicated upon the reduction in positions based upon one of four specific causes outlined in Section 11-1124 and only in accordance with the procedures outlined in Section 11-1124 and Section 11-1125.1. Under the School Code, the term "professional employee" as used in Section 11-1124 and Section 11-1125.1 refers to tenured professional employees as opposed to "temporary professional employee" which is used to refer to non-tenured professional employees.

Nowhere in Section 11-1124 does the statute refer to temporary professional employees. As expressly stated in both Sections 11-1124 and 11-1125.1, the causes, requirements, procedures, and protections stated therein exist only in relation to the suspension (furlough) of Professional Employees. Neither code section expressly grants any procedural or substantive protections or rights to temporary professional employees in any instances covered by either section. Therefore, on their face, Sections 11-1124 and 1125.1 do not apply to the furlough of non-tenured professional employees. Thus, the natural conclusion may be drawn that non-tenured professional employees may be "furloughed" for any reasons and under any process. Based upon two Commonwealth Court cases from the late 1970's and a recent arbitration decision issued earlier this month, the answer is that this is not so.

In 1977, in *Phillippi v. School District of Springfield Township*, 367 A.2d 1133 (1977), the Commonwealth Court ruled that temporary professional employees are not "professional employees" within the meaning of Section 11-1124 and 1125.1. The Court specifically held that the term "professional employee" as used in Sections 11-1124 and 11-1125.1 refers only to tenured professional employees and does not include temporary professional employees. More importantly, the Court held that temporary professional employees are not entitled to be suspended pursuant to Sections 11-1124 and 11-1125.1 and the procedures and rights outlined in both sections do not apply to temporary professional employees in such instances. However, in permitting the school district to suspend (non-renew) the employees in question, the Court reasoned by analogy that Sections 11-1124 and 11-1125.1 do provide "sound reasons" for the non-renewal of temporary professional employees and thus, the school district could refuse to renew the contracts of non-tenured temporary professional employees for those same reasons. (*Id.*, 367 A.2d at 1140-1141)

Less than three years later, in *Cigarski v. Lake Lehman School District*, 407 A.2d 460 (1980), the Commonwealth Court held that Section 11-1124 did not apply to temporary professional employees. However, the Court noted that the reasons contained in Section 11-1124 by analogy "are also sound reasons for the non-renewal" of a Temporary Professional Employee. (citing *Phillippi v. School District of Springfield Township*). However, the Court held that because none of the Section 11-1124 reasons were presented by the school district related to the non-tenured

employees at issue, their suspensions were to be reversed. (*Id.*, 407 A.2d at 462) Therefore, although the Court again held that Section 11-1124 does not apply to non-tenured professional employees, it ruled that one of the reasons specified in §1124 must nevertheless be present if a non-tenured professional employee is to be suspended. The Court reasoned that the rights guaranteed to non-tenured employees would be undermined if a non-tenured employee could be "suspended" for any reasons and, since the legislature failed to address this problem, the Court will fill the gap by making the requirements of Section 11-1124 applicable.

As a result of these two decisions, at least since 1978, if a school district chose to non-renew non-tenured professionals, at minimum, the school district could not do so unless one of the reasons specified in §1124 existed. However, it was commonly understood, based upon the case law, that the procedures outlined in sections 11-1124 and 11-1125.1 still did not apply to those non-tenured employees facing elimination unless specifically incorporated into a collective bargaining agreement or unless such rights were otherwise expressly granted. Earlier this month, an arbitration decision has called that understanding into question.

In a recent arbitration decision issued this month related to the non-renewal of temporary professional employees, the arbitrator upheld the aforementioned case law by ruling that the district was required to cite one of the reasons approved in 11-1124. In that instance, the parties had stipulated that the district had non-renewed the three employees due to its curtailment of specific course offerings and classes expressly permitted under Section 11-1124(2). However, in response to the district's defense, the arbitrator further held that because the reason stated for the non-renewals was the curtailment or alteration of programming permitted under Section 11-1124(2), in order to be valid, the employer was required to comply with the procedural requirements stated in Section 11-1124 which included obtaining PDE approval for such curtailment.

Read on its face and in the context of the Commonwealth Court's prior rulings, it is our belief that there is no basis for ruling that the substantive or procedural requirements of Sections 11-1124 and 11-1125.1 apply to the non-renewal of temporary professional employees. Certainly, nowhere in those decisions did the Commonwealth Court require that the procedures outlined in Sections 11-1124 and 1125.1 must be followed in such instances. However, while we view this current arbitration decision as inexplicable and unwarranted, the decision now calls into question the long held belief that such PDE approval is not required or necessary unless the curtailment/alteration in question will impact tenured professional employees. This decision certainly will be asserted by PSEA and Federation representatives in the wake of expected layoffs and terminations in the coming weeks and months. School districts will have to decide whether and to what extent it is prudent to seek PDE approval prior to asserting curtailment/alteration as the basis for terminating non-tenured professional employees.

Clients who have questions regarding issues discussed in this article, or any education law matter, should feel free to call us at 215-345-9111 or 570-654-2210.