Spring 2011

EDUCATION NEWS

BUDGET CUTS PROMPT TEACHER FURLOUGHS

Governor Corbett's proposed budget cuts have caused many public school districts to give serious consideration to staffing and program reductions. Many districts are considering the furlough of professional employees, as teacher salaries comprise a large portion of a district's budget. In that process, it is important for districts to be mindful of the requirements set forth in the School Code which govern teacher furloughs. Generally, the layoff of non-professional employees is subject only to whatever limitations may be contained in the relevant collective bargaining agreements. With regard to administrative positions, the furlough provisions of the School Code may apply to administrators who are certified professional employees, such as principals and assistant principals. The focus of this summary is on the legal requirements for teacher furloughs.

FURLOUGHS UNDER SECTION 1124 AND 1125.1 OF THE SCHOOL CODE

Section 1124 of the School Code presently states that a school district may suspend (furlough) professional employees for any of the following reasons: (1) substantial decrease in pupil enrollment; (2) curtailment or alteration of the educational program on recommendation of the Superintendent, concurred in by the Board of School Directors and approved by the Department of Public Instruction (PDE), as a result of a substantial decline in class or course enrollments or to conform with standards of organization or educational activities required by law or recommended by the Department of Public Instruction; (3) consolidation of schools within a district or caused by a merger of districts; and (4) when new school districts are established through merger or reorganization. Presently, these are the only permissible grounds upon which a district can furlough teachers. House Bill 855, which would broaden the grounds for furloughs to include economic reasons, is pending before the Legislature as of this writing, but it has not yet been enacted and will most likely not impact the 2011-2012 budget process.

While the grounds for furloughs are limited under current law, PDE has advised that it will interpret and apply those grounds broadly to afford districts the fullest opportunity to address budgetary restrictions. Until recently, PDE published a Basic Education Circular (BEC) which set forth criteria under which furloughs would be approved. For example, the BEC stated that a decline in enrollment in a class or course was "substantial" for purposes of Section 1124(2) if the District experienced a loss of twenty percent (20%) of student enrollment in that class or course over a five-year period, or if the class or course had less than ten (10) students. However, this Spring, PDE pulled this particular BEC from its online repository, instead displaying a screen that indicated it is "under review." A PDE representative has confirmed that the BEC will not be re-posted in the immediate future, and that PDE removed it because of the possible perception that it could limit a district's ability to apply for a needed furlough.

Under the present law, there are two categories of furlough requests: those which require PDE approval and those which do not. Furloughs based on substantial decrease in enrollment in the district as a whole or based on merger or consolidation of schools or buildings do not require PDE approval, while furloughs which are based on alteration or curtailment of an educational program, decline in class or course enrollments or to conform to standards of organization or educational activities required by law do need to be submitted to PDE for approval.

A furlough request may be made upon multiple grounds, but if the furlough request does not require PDE approval, the teachers' union could challenge the merits of the grounds advanced by the district. For example, several Commonwealth Court cases address challenges to a district's furlough based on decline in district enrollment. In those cases, the Court was called upon to determine when a decline in enrollment becomes "substantial." If you believe that district-wide or class/course enrollment decline provides persuasive grounds for a furlough application, obtain your solicitor's opinion of the enrollment decline in light of the decided cases. In comparison, the union cannot sue the district for implementing a furlough that has been approved by PDE. To that end, the best available furlough route may be the "alteration or curtailment" grounds.

With regard to "alteration or curtailment" applications, all

INSIDE THIS ISSUE:

indications are that PDE will read the "alteration or curtailment" rationale expansively to approve reductions in staff, even if the alteration is limited to reducing the number of teachers in a department or school. Districts requesting furloughs based on "alteration or curtailment" grounds should emphasize that the reduction will permit the district to operate more efficiently, or allow the district to "reallocate resources" from one department to another. At the same time, Districts should emphasize that any reorganization or reallocation of program resources will comply with the Academic Standards and Assessment requirements of Chapter 4 of the Pennsylvania Code. In short, even if a district's "alteration or curtailment" of a program consists only of a reduction of the number of teachers within a grade or department, PDE's approval can be obtained if the school district's application focuses on the operational benefits which will be gained by the staffing change. Based on this approach, an "alteration or curtailment" furlough is the most expedient approach to reduce teaching staff.

TIMELINE AND PROCESS FOR APPLYING FOR FURLOUGH APPROVAL FROM PDE

PDE furlough approval under Section 1124 on "alteration or curtailment" grounds calls for the superintendent to recommend and for the district's board to approve a program change by Resolution. The Resolution should identify the positions to be reduced, recite the grounds for the furlough application and state the board's concurrence in the superintendent's recommendation. The rationale for the recommendation to alter or curtail the district's educational program can be contained either in the Resolution or in a separate document. The rationale does not need to be lengthy.

PDE will typically act on an application within five to ten (5-10) business days, depending on whether additional information is requested, with a decision communicated in writing. It is important to note that the district is not required to implement an approved furlough plan and may furlough some or none of the positions which are approved to be eliminated.

Furloughed teachers must be offered the opportunity to request a hearing before the district's board for the purpose of determining whether the furloughed employee was properly the employee with the least seniority and the employee required to be furloughed under Section 1125.1. However, there is no requirement to actually hold the hearing unless the employee makes a request for one.

NOTICE REGARDING CLOSURES OF A SCHOOL OR DEPARTMENT UNDER SECTION 524 OF THE SCHOOL CODE

Separate from the furlough requirements contained in Sections 1124 and 1125.1 of the School Code, there is another provision which potentially affects any decision to furlough teachers. Section 524 of the School Code states that a district may not close any "school or department" unless the district provides written notice to any affected professional employee sixty (60) days prior to the first day of the school term in which the closing takes effect. If the required notice is not provided, affected employees will continue to receive their salary for the entire school year in which the closing was to take effect, and their furlough is not effective until the end of that school year.

The School Code is unclear as to what constitutes a "school or department" for purposes of this provision. PSBA's legal department has suggested that the list of "additional schools and departments" set forth in Section 502 of the School Code may provide a relevant definition, in which case the notices would need to be sent only if an actual school building were closed or if a program such as kindergarten was eliminated. However, given the severe consequences that accompany the failure to provide a required notice and the relative ease of providing the notice, a district should consider sending a notice to any teacher who may be affected by a furlough. The deadline for sending the notice is sixty (60) days, measured backwards from the start of the district's 2011-2012 instructional term, or approximately sometime in late June. Prior to issuing the notices, the district's board should pass a Resolution authorizing the Administration to provide the notices to professional employees affected by the closing of a school or department.

COLLECTIVE BARGAINING AGREEMENT (CBA) PROVISIONS

Aside from the requirements imposed by the School Code in Sections 1124 and 1125.1, districts may be subject to additional requirements to the furlough process through collective bargaining. The district's teachers' contract must be reviewed to determine whether there are any other limitations on furloughs. Contract language may remain effective even if Sections 1124 and 1125.1 are amended. To that end, if your district is in negotiations or preparing to enter negotiations with teachers, keep in mind that any additional limitations you negotiate or continue to have in your teachers' contract may override any flexibility afforded to districts by new legislation.

REALIGNMENT OF STAFF

In the event that the District does furlough professional employees, the requirements to realign staff are governed by Section 1125.1 of the School Code and any additional limitations set forth in the parties' CBA. In general, displaced employees with greater seniority are provided the opportunity to fill positions for which they are certified and which are being filled by less senior employees. The specific application of Section 1125.1 and your teachers' contract to a realignment of staff should be addressed by your district's solicitor.

The above is intended to summarize the most significant issues facing school districts contemplating teacher furloughs. While the requirements may be significantly different in a year or so, these are the rules we have to play by in this difficult budget season.

COMMONWEALTH COURT REINS IN OOR

As more and more appeals from the Pennsylvania Office of Open Records (OOR) make their way to Commonwealth Court, the ability of OOR to expansively order the release of records is becoming more limited. Several recent Commonwealth Court decisions have established parameters which impact public access to school district records.

In a January 6, 2011 decision, the Commonwealth Court ruled that e-mails from an individual Township Commissioner's home computer were not public records. In *Silberstein v. Commonwealth*, the Court reasoned that one official is not a local agency and has no authority to make decisions binding upon the local agency. As an individual public official, the Township Commissioner in that case had no authority to act alone on the Township's behalf. Therefore, information located on an individual public official's personal computer does not fall under the Right-to-Know Law's (RTKL) definition of a public document because it is not a record of the Township's activity. As a caution against potential abuse, the Court noted that the current RTKL has effectively established safeguards to protect against the possibility that an agency may attempt to shield public records from disclosure by simply storing the records on a computer that is not in the physical possession or control of the agency. The Open Records Officer of the agency must inquire of each public official as to whether they have possession, custody or control of a requested record that could be deemed public. The Open Records Officer must then determine whether the record is public, whether the record is subject to disclosure, or whether the public record is exempt from disclosure. After making these inquiries in *Silberstein*, the Court determined that the Township Commissioner's e-mails were personal and not public records.

Another Commonwealth Court decision issued on January 6, 2011 did not directly arise from an appeal from an OOR decision. In *Millford Township v. McGogney*, although the Township Solicitor instructed the Township's Open Records Officer not to release unredacted legal invoices which had been requested, especially when the requester had pending litigation against the Township, the Open Records Officer nevertheless released unredacted legal invoices. This necessitated an injunction filed by the Solicitor to prevent the requester from releasing the unredacted records to others and also to return the records to the Township. The requester relied upon the RTKL and argued that the Open Records Officer had the authority under the RTKL to determine whether or not to release the records and refused to return the documents. The Commonwealth Court held that the attorney/client privilege trumped the ministerial duties of the Open Records Officer under the RTKL. Since the attorney/client privilege is "owned" by the client, in this case, the Township, the Open Records Officer had no individual authority to waive the attorney/client privilege, and therefore, did not have the statutory authority to override the Solicitor.

On January 31, 2011, the Commonwealth Court in *Honaman v. Township of Lower Merion* put an end to the growing practice that had developed in the real estate settlement business since the RTKL went into effect. Settlement companies had been using the RTKL as a means to avoid no lien letter and tax certification fees which pre-dated the RTKL. Almost from its first decision, OOR consistently ruled in favor of the settlement businesses and ordered local municipalities and school districts to obtain the records from their tax collectors and turn them over to the settlement companies, all at only $0.25 per page rather than the previous fees for no lien and tax certification letters. This opened the floodgate for similar-type requests. The Commonwealth Court has now ended this practice. In fact, the Court went further to hold that records of the tax collectors are not accessible through the RTKL at all. Put simply, if someone desires to obtain those records, they must contact the respective tax collectors and submit the required no lien and tax certification fees.

Finally, in a recent decision issued on April 4, 2011, the Commonwealth Court addressed a request for records and reports of academic honor code violations in *Sherry v. Radnor Township School District*. Procedurally, the requester asked permission from OOR to depose two witnesses or require OOR to conduct a hearing. The Commonwealth Court specifically held that a requester had no right to discovery as part of the right-to-know process or any specific due process protections. Further, the Commonwealth Court held that the requested records were exempt as non-criminal investigation records and that release of the records was also precluded by the Family Educational Rights and Privacy Act (FERPA).

Our office will continue to monitor new Commonwealth Court decisions and periodically report on those having significant impact on school district operations.

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NEW ADA REGULATIONS IMPACT SCHOOL DISTRICTS

On March 15, 2011, the new Americans with Disabilities Act ("ADA") regulations took effect governing access to state and local governmental facilities and other facilities generally open to the public, including school facilities. Compliance with the new standards will be required for new construction, alterations and barrier removal as of March 15, 2012. The new regulations require facility owners to afford easier access to the disabled on everything from amusement rides to judicial facilities. The regulations also create new requirements for ticketing, service animals, wheel chairs and other power driven mobility devices, and lodging facilities. The new regulations also provide a general safe harbor in which non-compliant facilities built in compliance with the 1991 standards or UFAS would enjoy a safe harbor and not be required to comply until the facilities or the affected components were subject to a planned alteration. Similar safe harbor rules were adopted for path of travel components until alterations occur.

Visit the Newsletter section of our website, mbm-law.net to access the complete 2010 ADA Revised list of Requirements. If you have any questions, please contact David Raves dr@mbm-law.net.