

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

NORTH ALLEGHENY SCHOOL DISTRICT,

Petitioner,

v.

NORTH ALLEGHENY FEDERATION OF
TEACHERS, LOCAL 2097, AMERICAN
FEDERATION OF TEACHERS, AFL-CIO
(Federation),

Respondent.

CIVIL DIVISION

NO.

ISSUE NO.

PETITION TO VACATE ARBITRATION
AWARD

CODE:

FILED ON BEHALF OF:
NORTH ALLEGHENY SCHOOL DISTRICT,
Petitioner

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IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

NORTH ALLEGHENY SCHOOL DISTRICT,)	
)	
)	
Petitioner,)	CIVIL DIVISION
)	
v)	CASE NO.
)	
NORTH ALLEGHENY FEDERATION OF)	
TEACHERS, LOCAL 2097)	
AMERICAN FEDERATION)	
OF TEACHERS, AFL-CIO (Federation),)	
)	
Respondent.)	

PETITION TO VACATE ARBITRATION AWARD

AND NOW, comes the Petitioner, by and through its attorneys, Alfred C. Maiello, Esquire, Christina L. Lane, Esquire and Maiello, Brungo & Maiello, LLP pursuant to Section 933 of the Judicial Code, 42 Pa. C.S.A. §933, as amended, and pursuant to the provisions of the Pennsylvania Uniform Arbitration Act, (42 Pa. C.S.A. §7301 et seq.), as amended, and files the within Petition to Vacate Arbitration Award, and in support thereof avers the following:

Parties and Proceeding

1. Petitioner is the North Allegheny School District (hereinafter "Petitioner"), a public school district organized and operated pursuant to the Pennsylvania Public School Code of 1949, as amended, 24 P.S. §1-101 et seq. and having its administrative offices located at 200 Hillvue Lane, Pittsburgh, PA 15237.

2. Respondent, North Allegheny Federation of Teachers, Local 2097, American Federation of Teachers, AFL-CIO (hereinafter "Federation"), is an unincorporated labor organization representing the professional employees of Petitioner, having an address of 10 South 19th Street, Pittsburgh, PA 15203.

3. Petitioner and Federation are parties to a Collective Bargaining Agreement (hereinafter "CBA"), the effective dates of which are July 1, 2015 through June 30, 2020. (A copy of relevant excerpts from the Agreement are attached hereto as Exhibit "A".)

4. A dispute arose between the parties with regard to the termination of a professional employee, Paul Seneca, (hereinafter "Mr. Seneca"), who taught elementary school. At the time of separation, Mr. Seneca taught elementary school physical education classes. Mr. Seneca and Federation officials attended a formal Loudermill conference on June 7, 2018. On this same date, Mr. Seneca received notice of the results of the District's investigation and that he was suspended without pay effective the June 15, 2018 pay.

5. A grievance dated June 11, 2018 was filed with regard to Mr. Seneca's suspension without pay. The grievance form states "Paul Seneca was unjustly suspended without pay and his discharge violates the just cause provision, seniority clause and past practice. The Grievance does not refute the information contained within the District's June 7, 2018 formal suspension notice and the summary of discussions therein

6. As formal action of a school board is required to authorize the issuance of a statement of charges, the North Allegheny Board of School Directors resolved to authorize the Administration and Solicitor to issue a Statement of Charges to Mr. Seneca on July 19, 2018.

7. On or about August 6, 2018, the District formally issued a Statement of Charges and Notice of Hearing ("Statement of Charges") to Mr. Seneca for his termination. (A copy of the Statement of Charges and Notice of Hearing is attached hereto as Exhibit "B")

8. The grievance was processed consistent with the Parties' grievance procedure and appealed to arbitration on June 22, 2018.

9. The matter proceeded to arbitration hearings before Arbitrator Jane Desimone. The hearing consisted of two (2) days of testimony and was held on October 15, 2018 and November 12, 2018.

10. An extensive factual record was developed at the Arbitration Hearing with Arbitrator Desimone consisting of numerous exhibits and testimony. A detailed account of the factual record will not be set forth in this Petition. Rather, a summary of the factual records will be provided herein with a more detailed account of the facts in support of the grounds for appeal to be provided in the Brief in Support of the District's Petition to be filed with the Court as part of these proceedings.

11. On or about April 1, 2019, a Decision and Award was issued by Arbitrator Desimone in which the grievance was sustained in part. The Award reduced the Grievant's discharge to a Three-Day Suspension. The Award reinstated Mr. Seneca with full seniority with compensation for all resulting lost wages and benefits, less any interim earnings received or benefits received. The Decision and Award were delivered to the Solicitor for the Petitioner, on or about April 1, 2019. (A copy of the Decision and Award of Arbitrator Desimone is attached hereto as Exhibit "C".)

Statement of Facts

12. The July 1 2015-June 30, 2020 CBA between the parties was in effect at the times relevant to the facts and grievance in this case.

13. Article XXV-Seniority provides seniority shall be broken and employment terminated for "discharge in conformance with the School Code." See, Exhibit A, CBA, Article XXV, B.

14. Article VIII –Grievance procedure, Section 6 provides the process for selection of an arbitrator. "The remaining individual shall be the arbitrator, provided that the arbitrator shall not have the power or authority to change, add to, subtract from, or modify the terms and conditions of the Agreement between the parties and to the extent that his/her decision adds to, amends or in any way varies the Agreement, it shall be void and of no effect." See, Exhibit A.

15. The parties CBA does not contain a definition of “just cause.” The Arbitrator held the parties did not dispute the principle of just cause as implied in various provisions of the Agreement including the seniority provisions of the Agreement and the Pennsylvania School Code.

16. Section 1121 of the School Code, 24 P.S. 11-1121 requires that all contract between school districts and professional employees contain a clause stating that none of the provisions of the School Code may be waived by the School District employees.

17. Section 1122 of the School Code, 24 P.S. 11-1122 Causes of Termination of Contract, specifically provides as follows:

The only valid causes for termination of a contract heretofore or hereafter entered into with a professional employee shall be immorality; incompetency; 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 employee.

18. A Notice and Statement of Charges for Mr. Seneca’s termination was issued on or about August 6, 2018, charging Mr. Seneca with immorality; persistent negligence in the performance of duties; persistent and willful neglect of duties; persistent and willful violations of school laws of the Commonwealth; willful neglect of duty, and incompetence as contemplated under Section 1122 of the Public School Code of 1949, as amended, 24 P.S. 11-1122 in that of [Mr. Seneca] engaged in conduct which was determined to be a repetitive and pervasive pattern of behavior exhibiting unacceptable and unprofessional conduct and which offends the morals of the community and violates school laws of the Commonwealth which specifically require a professional and ethical educator to provide for the supervision and protection of students from harm.

19. The Statement of Charges contained the following notice to Grievant:

STATEMENT OF CHARGES

The following are the charges which will be presented to the Board of School Directors in support of the termination of Paul Seneca as a professional employee of the North Allegheny School District.

On numerous occasions you engaged in conduct in violation of the Pennsylvania Public School Code Section 1122, 24 P.S. §11-1122, constituting immorality; persistent negligence in the performance of duties; willful neglect of duties; persistent and willful violation of school laws of the Commonwealth; incompetence in failing to supervise the students under your care as the classroom teacher, including but not limited to: causing physical harm to students as a result of your negligent supervision; placing elementary students at risk of harm by your lack of supervision; exhibiting to a marked degree a lack of understanding and care for student safety; violation of the public policy to develop and maintain a safe environment for all students; failing to adhere to the program of improvement dated January 29, 2018; failing to comply with the directives of supervisors on numerous occasions and otherwise correct your misconduct in the exercise of reasonable care and/or effort toward protecting the safety of your students.¹ The following reflects such witnessed and/or specific reports of such misconduct as set forth herein:

- You were warned and had knowledge of the school district's performance expectations in particular its requirements for planned supervision of students, an ethical execution of your professional responsibilities, and have failed to meet them.
- A Plan of Improvement dated January 29, 2018 identifies your deficiencies as: inadequate classroom procedures; poor classroom management; insufficient supervision resulting in an unsafe classroom environment; an unsafe environment which resulted in a student receiving a serious injury and the student leaving your classroom to receive medical care without your knowledge; and an environment where students spend a significant amount of time off-task.
- You acknowledged that the Plan of Improvement dated January 29, 2018 was to address supervision, safe environment, monitoring student activity and keeping students on task.
- Dr. Mathieson, your direct supervisor and as required by your Program of Improvement observed your classroom on May 22, 2017 during the 11:30-12:15 pm class period. During this time period, you were observed sitting and otherwise unengaged with your students. Once you noticed Dr. Mathieson's entry into your classroom you immediately jumped up from your seated position and began to engage with your students. Dr. Mathieson observed you on your personal electronic device for an extended period of time and not providing active supervision to your students.

¹ The italicized text is not found in the Arbitrator's review of the contents of the Statement of Charges at page 2. The full and complete text of the Statement of Charges is contained within Exhibit B.

- The District received reports that a third grade female student, was found locked outside of the Hosack Elementary Building during her scheduled class period with you. It was reported by a staff person that on May 24, 2018 between the hours of 2:45 and 3:00 pm a third grade student assigned to your classroom was found outside behind the building standing unsupervised. The student reported to the staff member that you sent her to go outside to clean up gym equipment and to bring the equipment inside. As the student was locked out of the building, the staff member let her back in and told her to return to your classroom. Thereafter, you sent the same student outside the school building along with other students unsupervised.
- You failed to report the student's extended absence from your classroom to the Building Administration and you did not believe it was necessary as it was not a priority or serious matter.
- Dr. Mathieson, your direct supervisor provided you written notice of your deficiencies and continued lack of supervision on May 29, 2018;
- You were aware and knew of the school district's policies regarding student safety and deliberately chose to ignore them;
- You were informed that the conduct of sitting off to the side and failing to engage with your students was unacceptable;
- Your repetitive acts and omissions regarding the lack of supervision of your students was clearly exhibited in the video reviewed with you and Federation representatives on June 7, 2018. The video identified students repetitively exiting your classroom presumably to get a drink from the water fountain; another group of students exited the classroom after having received a set of keys from you and returned approximately ten minutes later; you are observed on your phone for an approximate period of twenty-five minutes and not supervising your students; and later observed sitting off to the side of the gym on a stool and not until Dr. Mathieson's entrance are you observed supervising the students' game of kickball.
- Your explanation that you did not jump to attention when caught by Dr. Mathieson was negated by the video. Additionally, your explanations for viewing your phone to review and set-up stations as well as the need for students to collect equipment were negated by the fact that prior to the class you have a fifteen minute window of time for set-up of the obstacle course as well as two successive plan periods prior to the 11:30-12:15 pm class period.
- You failed to exert reasonable effort to protect your students from conditions which interfere with learning or are harmful to the student's health and safety.

BACKGROUND

IMMORALITY, PERSISTENT NEGLIGENCE IN THE PERFORMANCE OF DUTES; WILLFUL NEGLECT OF DUTIES; PERSISTENT AND WILLFUL VIOLATION OF SCHOOL LAWS OF THE COMMONWEALTH, AND INCOMPETENCE

Based on the above Background information you have engaged in the following conduct:

1. You have engaged in Immorality, Persistent Negligence in the Performance of Duties; Persistent and Willful Neglect of Duties; Persistent and Willful Violations of the School Laws of the Commonwealth, Willful Neglect of Duty, and Incompetence as contemplated under Section 1122 of the Public School Code of 1949, as amended, 24 P.S. §11-1122 in that you engaged in conduct which has been determined to be a repetitive and pervasive pattern of behavior exhibiting unacceptable and unprofessional conduct as specifically outlined above, and which offends the morals of the community and violates school laws of the Commonwealth which specifically require a professional and ethical educator to provide for the supervision and protection of students from harm.

2. It is further believed that you engaged in such unacceptable, unprofessional and unethical behavior when you repeatedly exposed students to an unsafe learning environment and repetitively failed to provide proper supervision of your classroom.

3. It is further believed that you engaged in this conduct through the utilization of your authority as a teacher, and that such action was an abuse of your authority in violation of the School Laws of the Commonwealth and also constitutes Immorality, Incompetence, Persistent Negligence in the Performance of Duties, and Willful Neglect of Duty and Intemperance.

North Allegheny School District reserves the right to supplement this Statement of Charges with information discovered at any time up to the date of the hearing.²

20. During the Arbitration hearing Petitioner offered evidence of events that occurred in 2014, 2015 and January 2018 as evidence of the Grievant's persistent and repetitive pattern of misconduct involving his lack of supervision and protection of his students' safety. See, Exhibit C, Arbitration Award, Discussion and Findings p. 14.

21. The Arbitrator deemed this evidence "unfair" as allegedly requiring the Grievant to defend against old incidents. See Exhibit C, Arbitration Award, Discussion and Findings, p. 14.

² Consistent with case law, the Petitioner reserved the right to bring forth additional information in support of the statutory charges for dismissal contained within the Statement of Charges. The Arbitrator failed to acknowledge this reservation of rights in her decision limiting the Petitioner's evidence on "deemed unfairness."

22. The Arbitrator limited the Petitioner to “charges set forth in the Statement of Charges, which related only to the incidents on May 22, 2018 and May 24, 2018.” See Exhibit C, Arbitration Award, Discussion and Findings, p. 14.

23. Section 1127 of the School Code requires the school district to prepare a “detailed statement of charges” to be signed by the school board president and attested to by the secretary. 24 P.S. 11-1127.

24. Notice of the charges are not required to be couched in the precise statutory language, as long as the substance of the charge referred to conduct falling within one of the valid statutory causes for dismissal. Lucciola v. Com, Secretary of Ed., 25 Pa. Commw. 419, 360 A.2d 310 (1976); West Mahanoy Tp. School Dist. v. Kelly, 156 Pa. Super. 601, 41 A.2d 344 (1945).

25. The Statement of Charges are not required to be the equivalent to findings of fact and conclusions of law. Appeal of Bd. of School Directors of Cass Tp., Schuylkill County, 151 Pa. Super. 543, 30 A.2d 628 (1943); Rhodes v. Laurel Highlands School Dist., 118 Pa. Commw. 119, 544 A.2d 562 (1988).

26. In fact general charges, may be supplemented during the course of the hearing with specific allegations of misconduct to the extent the specific examples are fairly comprised within the general charges and do not constitute new or additional charges. McCoy v. Lincoln Intermediate Unit No 12, 38 Pa. Commw. 29, 391 A.2d 119 (1978).

27. The Notice of Charges need not specify each and every example of the charge so long as it provides sufficient notice of the charges to allow the teacher to prepare a proper defense. Ciccione v. West Chester Area School District, TTA 26-91, 31 SLIE 89 (1984).

28. Moreover, specific dates of alleged misconduct need not be set forth in the statement of charges. Wissahickon School Dist. v. McKown, 42 Pa. Commw. 169, 400 A. 2d 899 (1979).

29. Technical or non-material defects with respect to the Statement of Charges will not invalidate the proceedings.

30. Petitioner's Statement of Charges was sufficiently detailed as it provided notice of the basis for termination to Mr. Seneca as he engaged in conduct in violation of the Pennsylvania Public School Code Section 1122, 24 P.S. §11-1122, constituting immorality; persistent negligence in the performance of duties; willful neglect of duties; persistent and willful violation of school laws of the Commonwealth; incompetence on numerous occasions failing to supervise the students under his care as the classroom teacher, including but not limited to: causing physical harm to students as a result of his negligent supervision; placing elementary students at risk of harm by his lack of supervision; exhibiting to a marked degree a lack of understanding and care for student safety; violation of the public policy to develop and maintain a safe environment for all students. This information is sufficiently detailed for Mr. Seneca to lodge a defense.

31. Section 1122(a) of the Code permits a professional employee to be discharged when the employee engages in persistent negligence in the performance of duties ...” 24 P.S. § 11–1122(a). The Code does not define the charge of persistent negligence. Lauer v. Millville Area School District, 657 A.2d 119, 121 (Pa. Cmwlth. 1995).

32. “Dismissal for persistent negligence is warranted when a teacher fails to comply with a directive of supervisors on numerous occasions. In fact, a single act, continued for a period of time, may support dismissal for persistent negligence.” *Id.* (citations omitted; emphasis in original.) For negligent performance to be shown, the school district must prove that the professional employee had knowledge of the school district's performance expectations and had been warned of the consequences of failing to meet them. Negligent performance does not require the existence of a clearly adopted or articulated board policy. However, the professional

employee must be advised that certain conduct is unacceptable. McFerren v. Farrell Area School District, 993 A.2d 344, 357–58 (Pa. Cmwlth. 2010).

33. 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 Lucciola v. Com. Secretary of Ed.*, 360 A.2d 310, 312 (Pa.Cmwlth .1976). “The charge of willful and persistent violation of school laws and the charge of persistent negligent performance of job duties seem often to be combined in a discharge proceeding.” McFerren, 993 A.2d at 357. The same act or conduct may be used to support both charges. Id.

34. To prove charges of willful and persistent violation of a school laws and persistent negligence in performance of duties, the school district must prove (1) persistency in the form of numerous incidents of the same misconduct and (2) knowledge that the conduct in question was wrong and that its repetition could lead to discipline or discharge. For a violation of a school law, the school district must point to an adopted policy or order that was deliberately violated. For negligent performance of a duty, the district must specifically advise the employee of that duty... and the violation must be serious, not picayune. Id. at 358.

35. The Arbitrator failed to consider the prior incidents, intervention and consequences that occurred not just in the 2017-2018 school year, but also for prior school years. A review of the entire record demonstrates that many of the violations that occurred in the 2017-2018 school year were the culmination of repeated prior misconduct which were not corrected despite numerous disciplinary and non-disciplinary interventions by the District. All of which supports the charged misconduct and Grievant’s dismissal pursuant to Section 11-1122 of the School Code.

Standard of Review

36. The Pennsylvania Supreme Court stated in Westmoreland Intermediate Unit # 7 v. Westmoreland Intermediate Unit # 7 Classroom Assistants Educ. Support Pers. Ass’n, 939

A.2d 855 (Pa. 2007) the standard of review is the “essence test”. An application of the essence test as described by the court involves a two-pronged analysis. First, the reviewing court shall determine if the issue as properly defined is within the terms of the collective bargaining agreement. *Id.* at 863. Second, if the issue is embraced by the agreement, and thus appropriately before the Arbitrator, the Arbitrator’s award will be upheld if the Arbitrator’s interpretation can rationally be derived from the collective bargaining agreement. *Id.*

37. The Court also held in Westmoreland that courts should not enforce arbitration awards that contravene law or public policy. *Id.* The party asserting the public policy exception must prove that the award violated a public policy that is “well-defined, dominant, and ascertained by reference to laws and legal precedents and not from general considerations of supposed public interests.” *Id.* at 866. The Commonwealth Court has recognized a public policy exception which applies where the arbitrator’s award requires an employer to do something that is illegal or against public policy, or where the award supports conduct that was illegal or against public policy. Marion Center Area School Dist. v. Marion Center Area Educ. Ass’n, 982 A.2d 1041, 1047 (Pa. Commw. Ct. 2009).

38. Also, under the Uniform Arbitration Act, *42 Pa. C.S. § 7302(d)(2)*, and Upper Merion School District v. Upper Merion Area Education Association, *124 Pa. Commonwealth Ct. 81, 555 A.2d 292 (1989)*, a court is also required to modify or correct an award where it is “contrary to law and is such that had it been a verdict of a jury the court would have entered a different judgment or a judgment notwithstanding the verdict.” Under *42 Pa. C.S. § 7314(a)(1)(iii)* upon application of a party, an award must be vacated if an Arbitrator exceeded her powers.

39. Section 7302(d)(2) of the Uniform Arbitration Act allows a court to modify or correct an arbitration award which is contrary to law in a dispute under the Public Employee Relations Act, Act of July 23, 1970, P.L. 563, as amended, 43 P.S. §§1101.101 – 1101.2301.

See County of Centre v. Musser, 519 Pa. 380, 548 A.2d 1194 (1988); Pennsylvania State Education Ass'n v. Appalachia Intermediate Unit 08, 505 Pa. 1, 476 A.2d 360 (1984). Application of the essence test does not prohibit the court from determining whether an Arbitrator's award is contrary to the law.

Grounds for Appeal

The Decision and Award Fails to Draw Its Essence from the CBA

40. The Decision and Award must be vacated because it fails to draw its essence from the terms of the CBA, it cannot be concluded that the Arbitrator's Decision and Award represents a rational interpretation of the CBA, it is based upon interpretation of practices that are not arbitrable under the specific terms of and, therefore, is outside the scope of the CBA, and it contravenes the Public School Code by placing additional requirements on the Petitioner in conflict with 24 P.S. 11-112 and is, therefore, contrary to law and public policy such that had it been a verdict of a jury, the court would have entered a judgment notwithstanding the verdict.

41. Section 703 of Act 195, 43 P.S. Section 1101.703, provides that:

"The parties to the collective bargaining process shall not effect or implement a provision in a collective bargaining agreement if the implementation of that provision would be in violation of, or inconsistent with, or in conflict with any statute or statutes enacted by the General Assembly of the Commonwealth of Pennsylvania or the provisions of municipal home rule charters."

42. Thus, by statute, actions taken pursuant to a collective bargaining agreement cannot violate the School Code

43. The Arbitrator's Decision and Award does not draw its essence from the terms of the CBA and is not a rational interpretation of the CBA because the Section 11-1127 does not require the level of specificity required by Arbitrator Desimone in the Statement of Charges.

44. In fact, the Petitioner is permitted to bring forth additional facts in support of its charge at a dismissal hearing so long as the employee is aware of the underlying charge, i.e. persistent negligence in the performance of duties.

45. The Arbitrator had no jurisdiction to limit the School District in the prosecution of its case under the mistaken belief the District must specify each and every example of a charge. The Federation argued the District was limited to only the specific incidents outlined in the charge as background information and argued the School District was attempting to “retroactively amend” the Statement of Charges. The Arbitrator committed error by agreeing and restricting her review of the charge for dismissal to two incidents and completely ignoring Petitioner’s extensive evidence of a pattern of behavior that had been previously addressed with Grievant.

46. In effect, the Arbitrator rewrote the CBA, in a manner which violates Section 703 of Act 195, by adding terms and conditions, in violation of and inconsistent with the School Code.

47. The Arbitrator’s Decision and Award does not draw its essence from the terms of the CBA and is not a rational interpretation of the CBA. The Arbitrator rewrote the CBA by inserting a standard of “deemed unfairness” into the parties CBA and just cause for termination. Pennsylvania courts have made clear that a public employer who substantiates cause for an employee’s termination under Section 1122 also establishes just cause under a collective bargaining agreement that requires but does not define it. See Riverview School Dist. v. Riverview Educ. Ass’n, PSEA-NEA , 639 A.2d 974, 979, 162 Pa. Cmwlth. 644 (Pa. Commw. Ct. 1994)(where collective bargaining agreement does not define just cause, conduct violating School Code and school district policy establishes just cause and reserves the question of appropriate discipline to the district). Thus, the Arbitrator’s restriction of Petitioner’s evidence did not fulfill the implicit just cause standard of the CBA.

48. The Arbitrator committed legal error when she added to the parties’ CBA a principle of “deemed unfairness” as requiring the Statement of Charges to be stated with exacting specificity not required by the School Code.

49. The Decision and Award must be vacated because it fails to draw its essence from the CBA since the statutory provisions contained within the school code are not required to be collectively bargained, cannot be implied or read into a CBA in the absence of specific contractual limitations and remain beyond the CBA and beyond the arbitrator's jurisdiction.

The Arbitration Award Violates Public Policy

50. The Arbitrator's Decision and Award must be also vacated based upon the public policy exception as a violation statutory provisions for dismissal of a professional employee. The Arbitrator's Decision and Award violated law and public policy because it curtailed Petitioner's ability to present and prove the School Code's statutory charges for dismissal of a professional employee. The Arbitrator erred as a matter of law in restricting the Petitioner to two incidents rather than reviewing the entirety of the record evidence in support of the charge of willful and persistent negligence in the performance of duties.

51. The Arbitrator's Decision and Award must be vacated based on the public policy exception as a violation of law in that the Arbitrator impermissibly reads into the contract non-negotiated limitations on the School Code provisions for dismissal of a professional employee under Section 1122 and the required procedures set forth in Section 1127.

52. The Arbitrator's Decision and Award must be vacated based on the public policy exception as a violation of law where in the absence of any contract language limiting the Petitioner to exacting specificity in issuing a statement of charges for termination of a professional employee. The Arbitrator has prevented the Petitioner from meeting its burden of proof in ignoring the record evidence and adding a standard of "deemed unfairness" to the CBA that does not exist. In fact, the grievance procedure in the CBA provides that "the arbitrator shall not have the power or authority to change, add to, subtract from, or modify the terms and conditions of the Agreement between the parties and to the extent that his/her decision adds to, amends or in any way varies the Agreement, it shall be void and of no effect."

53. The Arbitrator's decision is contrary to law and violates public policy. There is "an explicit, well-defined, and dominant public policy professional educators are required to ensure the safety of the students under their care. The Arbitrator held Mr. Seneca neglected this duty and erroneously returning him to the classroom.

54. As a matter of public policy, school districts and professional educators have a duty to protect the safety and well-being of student and to maintain a safe educational environment. A professional employee who "is unaware of the whereabouts of one of his young children for more than twenty minutes" does not maintain a safe educational environment for his students.

55. The Arbitrator's Decision and Award must be vacated based on the public policy exception as a violation of positive law requiring those in a position of direct contact with children requiring the possibility of care, supervision, guidance or control or routine interaction with children to ensure the safety of minor children in their care. 23 Pa. C.S. Ch. 63.

56. The Decision and Award must be vacated based on the public policy exception as a violation of positive law as violations of section 6-11 of the Code of Professional Practice and Conduct for Educators serves as a basis for disciplinary action.

57. The Decision and Award must be vacated because it fails to represent a rational interpretation of the CBA as it is contrary to law and the public policy "establishing high standards... in the practice and ethical conduct in the teaching profession." 22 Pa. Code §235.1 et seq.

58. The Decision and Award must be vacated because it fails to represent a rational interpretation of the CBA as it is contrary to law and the public policy "professional educators shall exert reasonable effort to protect the student from conditions which interfere with learning or are harmful to the student's health and safety." 22 Pa. Code §235.4.

59. The Decision and Award must be vacated because it fails to represent a rationale interpretation of the CBA as it is contrary to law and the public policy “the professional educator may not engage in conduct prohibited by: the Public School Code of 1949 (24 P. S. §§ 1-101--27-2702) and other laws relating to the schools or the education of children.” 22 Pa. Code §235.6.

60. The Decision and Award must be vacated because it violates public policy as Arbitrator Desimone found Mr. Seneca’s to have failed to notice the whereabouts of one of his young students for a large portion of the scheduled class period. The student was outside the school building and unaccounted for a marked period of time. The Arbitrator found Mr. Seneca as a professional teacher to be charged with the safety of all children in his care and that he failed to meet this responsibility on May 24, 2018. Mr. Seneca pursuant to his professional certification had a legal duty and responsibility to protect the student from conditions which are harmful to the student’s health and safety as set forth in the 22 Pa. Code §235.4.

61. All of the evidence of records establishes that Mr. Seneca engaged in conduct constituting incompetency, willful neglect of duties, persistent negligence in the performance of duties and persistent and willful violations of or failure to comply with the school laws of this Commonwealth, including the official directives and established policy of the Board of Directors, all as specified under Section 11-1122 of the Public School Code of 1949, as amended.

62. The Arbitrator’s Decision and Award does not draw its essence from the CBA because the Arbitrator improperly interpreted and applies Section 11-1122 of the School Code which provides clear statutory authority to the Board of School Directors to terminate any of its professional employees immorality, incompetency, willful neglect of duties, intemperance, persistent negligence in the performance of duties, and persistent and willful violation of or failure to comply with the school laws of this Commonwealth, including official directives and established policy of the Board of Directors. The Arbitrator clearly holds that Mr. Seneca’s

conduct was inappropriate and that he failed to meet his responsibilities to not place students in harms way. These inappropriate acts were acknowledged and admitted by Mr. Seneca. Therefore, the arbitrator improperly interpreted and applied Section 11-1122 of the School Code which renders her award manifestly unreasonable and contrary to law, and therefore, it does not draw its essence from the CBA.

63. The Decision and Award usurps the authority of the District, in violation of the Code of Professional Practice and Conduct for Educators of 22 Pa. Code §235.4, the Child Protective Services Law Title 23, Section 6303, et seq., the Endangering Welfare of Children law, Title 18 Section 4304, and 24 P.S. Section 11-1122 of the Public School Code. The Decision and Award is, therefore, contrary to law, and must be vacated.

64. The Decision and Award must be vacated because the Arbitrator failed to properly apply and comply with the Public School Code of 1949, particularly 24 PS. § 11-1122 and is therefore against public policy and is contrary to law.

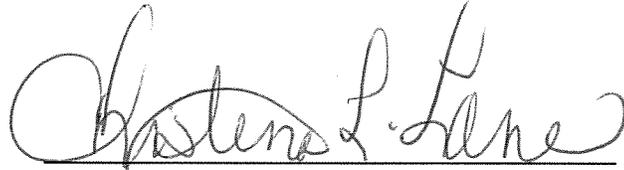
65. The Decision and Award must be vacated because the award is contrary to law, and as such, had it been a verdict of a jury, the court would have entered a different judgment notwithstanding the verdict.

66. The Arbitrator failed to properly apply statutory provisions and public policy, specifically Code of Professional Practice and Conduct for Educators of 22 Pa. Code §235.4, the Child Protective Services Law Title 23, Section 6303, et seq., the Endangering Welfare of Children law, Title 18 Section 4304, and 24 P.S. Section 11-1122 of the Public School Code and as a result, her award was manifestly unreasonable. Thus, it cannot be said that the Arbitrator's Award draws its essence from the CBA. Therefore, since the Court may modify or correct an Arbitrator's Award if it is contrary to law or against public policy, it must be vacated.

WHEREFORE, Petitioner hereby respectfully requests that this Honorable Court vacate the April 1, 2019 Decision and Award of Arbitrator Jane Desimone, deny the grievance and

reinstate the discharge of Grievant, Mr. Paul Seneca. Alternatively, remand the matter with instruction for a full and complete consideration of all evidence of record.

RESPECTFULLY SUBMITTED,

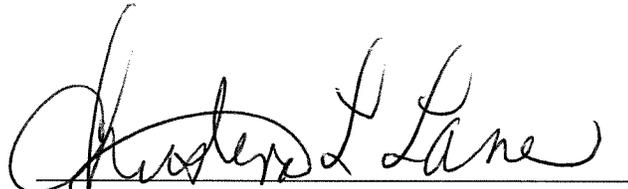
A handwritten signature in black ink, appearing to read "Christina L. Lane". The signature is written in a cursive style with a large initial "C".

Christina L. Lane, Esquire
PA. Id. No. 83677

VERIFICATION

I, CHRISTINA L. LANE, Esquire, Solicitor for the North Allegheny School District, based upon information received, hereby verifies that the statements and averments made in this **Petition to Vacate Arbitration Award** are true and correct to the best of my knowledge, information and belief. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S.A. § 4904 relating to unsworn falsification to authorities.

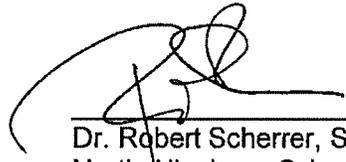
Date: 4/30/19


Christina L. Lane, Esquire
Attorney for North Allegheny School District

VERIFICATION

I, DR. ROBERT SCHERRER, Superintendent for the North Allegheny School District, hereby verify that the facts contained in the foregoing **PETITION TO VACATE ARBITRATION AWARD** are true and correct to the best of my knowledge, information and belief to the extent that the Petition to Vacate Arbitration Award is based on information which I provided to my attorney. To the extent that the content of the Petition to Vacate Arbitration Award is that of my attorney, I have relied upon my attorney in making this Verification. The language of the Petition to Vacate Arbitration Award is not mine but that of my attorney. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S Section 4904, relating to unsworn falsification to authorities.

Date: 4/30/19

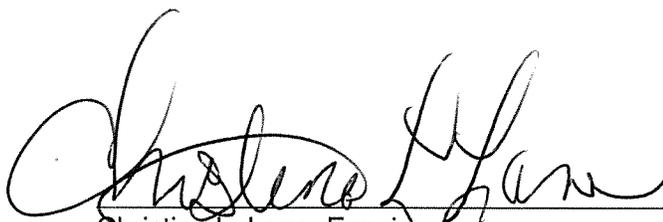


Dr. Robert Scherrer, Superintendent
North Allegheny School District

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a copy of the **PETITION TO VACATE ARBITRATION AWARD** was sent by First-Class, U.S. Mail, Postage Prepaid, this 20th day of April, 2019.

Noah R. Jordan, Esquire
Rothman Gordon
Grant Building, Third Floor
310 Grant Street
Pittsburgh, PA 15219

A handwritten signature in black ink, appearing to read "Christina L. Lane", written over a horizontal line.

Christina L. Lane, Esquire
Attorney for North Allegheny School District

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

NORTH ALLEGHENY SCHOOL DISTRICT,)

)

)

Petitioner,)

CIVIL DIVISION

)

v)

CASE NO.

)

NORTH ALLEGHENY FEDERATION OF)
TEACHERS, LOCAL 2097)

AMERICAN FEDERATION)

OF TEACHERS, AFL-CIO (Federation),)

)

Respondent.)

ORDER

AND NOW, this ____ day of _____, 2019, upon consideration of the
Petition to Vacate Arbitration Award, argument is set for _____, 2019, at
_____ o'clock ____ .M., before the Motions Judge then presiding. It is further ordered:

_____, J.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

NORTH ALLEGHENY SCHOOL DISTRICT,)	
)	
)	
Petitioner,)	CIVIL DIVISION
)	
v)	CASE NO.
)	
NORTH ALLEGHENY FEDERATION OF)	
TEACHERS, LOCAL 2097)	
AMERICAN FEDERATION)	
OF TEACHERS, AFL-CIO (Federation),)	
)	
Respondent.)	

ORDER

AND NOW, this _____ day of _____, 2019, upon consideration of the Petition to Vacate Arbitration Award and after oral argument it is hereby ORDERED, ADJUDGED AND DECREED that the Decision and Award of Arbitrator Jane Desimone, dated April 1, 2019, is vacated and the grievance is DENIED.

_____, J.

ARTICLE I

AGREEMENT

This Agreement entered into this 25th day of February, 2015, by and between the Board of Education of the North Allegheny School District (hereinafter called the "Board" or "District") and the North Allegheny Federation of Teachers, Local 2097, American Federation of Teachers, AFL-CIO (hereinafter called the "Federation").

WITNESSETH

WHEREAS, the Board and the Federation have bargained in good faith under the provisions of the Pennsylvania Public Employees Law, the Act of July 23, 1970, and No. 195 (hereinafter called the "Act" and have reached certain understandings, it is hereby agreed as follows:

ARTICLE II

TERM OF AGREEMENT

The term of this Agreement shall begin on July 1, 2015 and shall continue in full force and effect until June 30, 2020 and then shall thereafter automatically renew for one (1) year periods, unless either party gives written notice to the other of intention to modify or terminate this Agreement no later than one hundred eighty (180) days prior to the Board's budget submission date.

ARTICLE III

NON-DISCRIMINATION CLAUSE

The parties agree that they will not discriminate against any teacher on the basis of race, color, national origin, sex, age, religion, marital status, or membership or participation in, or association with, the Federation and/or its activities as those terms are defined under applicable federal and state laws.

ARTICLE IV

GENERAL

1. **Savings Clause.** In the event that any provision of this Agreement is or shall be at any time held to be contrary to the law by a court of last resort of Pennsylvania or of the United States or by a court of competent jurisdiction from whose judgment or decree no appeal has been taken within the time provided for doing so, all other provisions of this Agreement shall remain in effect and, within a

18. **Release Time for Federation President.** The elected president of the Federation will be eligible for release time to perform his/her responsibilities as Federation President.
- A. Prior to June 1st of each calendar year, the Federation and the District will meet to determine an appropriate percentage of release time to be granted and to develop a specific schedule for the president for the up-coming school year. The percentage of release time will be between 20% and 50% of the contractual school year. In attendance at that meeting will be the Federation President, the District Superintendent, the Director of Human Resources and any other persons deemed necessary by either party.
- B. The Federation agrees to pay all personnel costs related to this Federation employment, including pro-rated salary and benefits payments. This reimbursement of funds shall be paid directly to the North Allegheny School District through mutual arrangement by the parties.

ARTICLE VIII

GRIEVANCE PROCEDURE

1. **Definition.** The North Allegheny School Board and the North Allegheny Federation of Teachers recognize that in the interest of effective personnel management, a procedure is necessary whereby employees can be assured of a prompt, impartial and fair hearing on their grievances. A grievance shall be defined as follows:
- A. A complaint that there has been a violation, misinterpretation or misapplication of a provision of this Agreement; or
- B. A complaint involving the teacher's work situation; or that there has been a deviation from, or a misinterpretation or misapplication of a practice or of Board policy; or that a Board policy is necessary with respect to a matter for which no policy has been promulgated.
2. **Step One:** Any employee having a grievance, within ten (10) working days after the act or condition giving rise to the grievance or within ten (10) working days after the time when the employee learned or reasonably should have learned of such act or condition, whichever is later, shall discuss such grievance with the building principal and/or his/her designee and attempt to resolve the matter. The employee may be accompanied and/or represented by the Federation building representative.
3. **Step Two:** If the discussion does not satisfactorily resolve the grievance within ten (10) working days after the act or condition or after the time when the employee learned or reasonably should have learned of such act or condition, the grievance may be lodged with the building principal on a form mutually agreed

upon by the administration and the Federation and provided by the School District. A grievance must state the facts upon which it is based. If a contract violation is alleged, the grievance shall set forth the provision of the Agreement alleged to have been violated. Either party shall have the right to request a conference. Such conference shall be conducted within five (5) working days after the grievance is filed. The grievant shall be advised in writing of the time, place and date of such conference and shall have the right to be represented at such conference by the Federation building representative. The building principal shall serve an answer, in writing, upon the employee, if any, and the Federation building representative within five (5) working days after the receipt of said grievance, or, if a conference is requested, within five (5) working days after the conclusion of said conference.

4. **Step Three:** Within five (5) working days after receipt of the principal's answer, the answer may be appealed in writing to the appropriate Central Administrative Staff member, as applicable to the individual's assignment. Upon request of either party, a conference shall be conducted by the appropriate Central Administrative Staff member within five (5) working days after the receipt of the appeal. The grievant shall be advised in writing of the time, place and date of such conference and shall have the right to be represented at such conference by representatives of the Federation, including the chairperson of the Federation grievance committee. The appropriate member of the Central Administrative Staff shall serve an answer, in writing, upon the employee, if any, and the chairperson of the Federation grievance committee within five (5) working days after receipt of the appeal, or, if a conference is requested, within five (5) working days after the conclusion of said conference.
5. **Step Four:** Within five (5) working days after receipt of answer of the member of the Central Administrative Staff, the answer may be appealed in writing to the Superintendent. A conference shall be conducted by the Superintendent within five (5) working days after the receipt of the appeal. The grievant shall be advised in writing of the time, place and date of such conference and shall have the right to be represented at such conference by representatives of the Federation, including the President of the Federation. The Superintendent shall serve an answer, in writing, upon the employee, if any, and the President of the Federation within five (5) working days after the conclusion of said conference.
6. **Step Five:**
 - A. A complaint that there has been a violation, misinterpretation, or misapplication of this Agreement, defined as a grievance under Article VIII, Section 1, Definition, which is not settled in Step Four may be appealed by either party to this Agreement to arbitration before an impartial arbitrator provided that such party gives written notice of appeal to the other party within ten (10) working days following receipt of the answer at the Fourth Step. In the event that the parties are unable to mutually agree upon an arbitrator within five (5) working days after receipt of notice of appeal, they shall notify the Federal Mediation and Conciliation Services and request a

panel of seven (7) arbitrators who are members of the National Academy of Arbitrators from which each party shall alternately strike a name until one (1) name remains. The remaining individual shall be the arbitrator, provided that the arbitrator shall not have the power or authority to change, add to, subtract from, or modify the terms and conditions of the Agreement between parties and to the extent that his/her decision adds to, amends or in any way varies the Agreement, it shall be void and of no effect. The decision of the arbitrator shall be binding on the parties of the Agreement and the employees.

- B. A complaint involving the teacher's work situation, or that there has been deviation from, or a misinterpretation or misapplication of a practice or of Board policy, or that a Board policy is necessary with respect to a matter for which no policy has been promulgated, as defined in definition (B) of this Article, which is not settled in Step Four may be appealed to the Board of School Directors. It may not be appealed to arbitration. The Board or its authorized committee shall hear the complaint prior to its next regular or special meeting and shall serve an answer in writing upon the President of the Federation within five (5) working days after the hearing, provided that, there shall be no less than ten (10) working days between the time that the grievance is appealed to Step Five of the grievance procedure and the date of the hearing. The Federation may be represented at this step by all persons who participated in preceding steps and by its staff and/or counsel. The Federation will have an opportunity to fully present its case and understand the Superintendent's position and the facts underlying that position with respect to the complaints. The decision of the Board on these matters shall be binding upon the parties hereto.
7. **Expense Allocation.** Each party shall bear the expense of the presentation of its case in arbitration. The expense of employment of the arbitrator shall be shared equally by the parties of the arbitration.
8. **Effect of Failure to Appeal.** A grievance not appealed to the next step within the time limit specified above shall be considered settled on the basis of the last answer of the School District's representative. A grievance not answered within the time limits specified above may be automatically moved to the next step.
9. **Grievance Initiated Beyond First Step.** A grievance based on the action of authority higher than the principal shall be initiated at the appropriate step in this grievance procedure. The general procedures relating to that step shall apply to the presentation and adjustment of the grievance, including the right to appeal.
10. **Additional Time.** Additional time at a specific step of this procedure may be granted by mutual agreement between parties.
11. **Scheduling of Conferences and Hearings.** Conferences and hearings held under this grievance procedure shall be scheduled by mutual agreement of the parties.

professional development leave, an employee must complete nine (9) graduate credits or twelve (12) undergraduate credits at an accredited college/university or one hundred eighty (180) hours of approved professional development activities. For a full year leave, all minimums are doubled: eighteen (18) graduate credits, twenty-four (24) undergraduate credits, or three hundred sixty (360) hours.

- 1) An employee seeking a professional development leave must submit to the Human Resources Department a detailed plan describing the activities to be undertaken. (See Teacher Handbook for guidelines.)
- 2) Upon completion of the leave, the employee must provide the District satisfactory evidence (grade transcripts, etc.) that the approved plan was fully completed during the leave.

For additional information, refer to Section 1166-1171 of the Pennsylvania School Code as amended.

4. Educational Travel Leaves. Special leaves for educational travel are available to employees who qualify under the following conditions:

- A. Applicant must be on the top step of the professional salary scale.
- B. Leaves must be for one full school year.
- C. All requirements to qualify for a sabbatical leave must be met.
- D. Professionals seeking such leaves must complete an application which will include the following:
 - 1) An itinerary of destinations in as much detail as possible.
 - 2) A rationale which highlights the educational purpose of the travel and specifies its relationship to the instructional program and curriculum (See Teacher Handbook for guidelines).
- E. Upon return from such leave, the professional shall provide to his/her supervisor evidence that the travel experiences have been incorporated into his/her instructional delivery.

5. Military Leave. A request to the Board of School Directors must be sent along with a copy of the military orders. Any employee inducted into military or naval service shall be considered to be on leave of absence for the entire duration of such service. All rights and privileges shall be reserved to such employee as if he/she continued in the service of the School Board, provided, "that no such leave of absence shall be granted unless said employee shall in writing agree upon termination of said leave to return to employment in said school district

ARTICLE XXV**SENIORITY**

1. **Day One.** Seniority will begin on the first day a professional employee under contract commences work during the school year for which the employee has been most recently hired.
 - A. A temporary professional employee begins to accrue "seniority" effective with the date of hire as a TPE. However, he/she cannot activate tenure rights and accompanying seniority benefits until he/she becomes a professional employee.
 - B. It is the intent of the parties that seniority rights here under shall not accrue to employees while serving as long-term substitutes in the District.
2. **Accrual.** Seniority shall continue to accrue during periods of contract employment, furloughs and approved leaves of absence.
3. **School Year.** An employee who works more than the normal school year shall not accumulate more seniority than the employee who works the normal school year.
4. **Part Time.** Part-time employees will be considered as full-time for the purpose of computing seniority. This shall include those employees who share single positions.
5. **Same Day Hire.** If two (2) or more employees have the same first day, under paragraph 1 above, their order on the seniority list shall be determined by the last digit in their social security numbers, with zero (0) being the most senior number and nine (9) being the least senior number. In the event digits in the same corresponding position are identical, successive digits to the immediate left will be examined in turn until the tie is broken.
6. **Seniority List.** Annually, by the end of October, the District will make available to the Federation a seniority list including every bargaining unit member's name, latest date of hire and areas of current certification. The District will update this list annually, based upon most current information supplied by the bargaining unit members. Written objections to this listing must be submitted to the Office of Human Resources and the Federation, along with documentary evidence supporting the objections within forty (40) calendar days of the seniority list issuance. The District shall respond to any objections within forty (40) calendar days of receipt of the objection(s) and support documentation. In the absence of any objections, the list will be considered as official and in effect for the year until the next issuance date. An employee may, within thirty (30) days of the publication of the official list, grieve placement on the list, but no other grievances shall be submitted under this article.

7. **Broken Seniority.** Seniority shall be broken and employment terminated for any of the following:
- A. Resignation or retirement.
 - B. Discharge in conformance with School Code.
 - C. Absence of three (3) or more consecutive workdays without notifying and securing approval of the District, unless cause, acceptable to the District, exists justifying the failure to notify the District.
 - D. Acceptance of other employment for pay while on approved leave of absence, unless approved by the District.
 - E. Failure of the furloughed employee to report for work within ten (10) calendar days of being notified of a recall in writing by certified mail, except, if the furloughed employee submits proof to the employer that the employee is enrolled in a college program, in which case that employee shall have the option of delaying returning to work until the end of the current college semester. Notwithstanding this provision, the furloughed employee shall not have a break in seniority or employment if the employee declines recall to a position of lesser hours than that from which the employee was furloughed. In such case, the employee must decline in writing via certified mail to the employer within seven (7) calendar days of certified mail receipt of recall notice. A furloughed employee must annually, during the month of March, report to the District his/her current address and intent to accept the same or similar position when offered one.
8. **Curtailement of Professional Staff.** When it is necessary to curtail the size of the professional staff, the District will continue its practice of relying, where possible, on normal attrition. When the required curtailment cannot be achieved by normal attrition, the District will comply with the provisions of the PA School Code (Section 1125) and furlough employees on the basis of reverse seniority within certification area.

**BEFORE THE BOARD OF SCHOOL DIRECTORS OF
NORTH ALLEGHENY SCHOOL DISTRICT**

In the matter of:)
) Dismissal Proceeding
PAUL SENECA,)
a professional employee)

NOTICE

To:



You are hereby notified that pursuant to Article XI of the Public School Code of 1949, as amended, particularly Sections 1122, 1123, 1126, 1127, 1128, 1129 and 1130, the North Allegheny School District Administration has recommended the initiation of dismissal proceedings against you. At a public board meeting on July 18, 2018, the Board of School Directors approved a Resolution authorizing the initiation of dismissal proceedings against you from your position as a teacher in the North Allegheny School District. The dismissal proceeding is based upon the matters contained in the detailed written statement of charges, such statement of charges being furnished to you herewith.

You are also hereby notified that a hearing before the Board of School Directors and/or Board Hearing Officer on the statement of charges will be conducted in the District's Administrative Offices, North Allegheny School District, on August 22, 2018, beginning at 6:00 P.M. for the purpose of determining whether you should be dismissed from your employment with the North Allegheny School District.

Please be advised that you have the following rights at a hearing:

- (1) The right to be represented by counsel;
- (2) The right to hear the witnesses and evidence against you and to cross-examine said witnesses;
- (3) The right to present witnesses and evidence on your behalf and to testify on your own behalf;
- (4) The right to have your choice of either a public or a private hearing; and
- (5) All other rights guaranteed to you by the Constitution and applicable law.

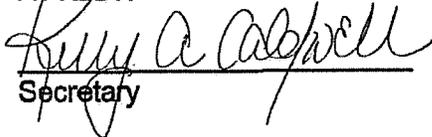
At such hearing, all testimony offered shall be recorded by a competent disinterested public stenographer whose services shall be provided by the North Allegheny School District at its expense. Such hearing may be postponed, continued or adjourned. All testimony at the hearing shall be taken under oath. The School Board shall have the power to issue subpoenas requiring the attendance of all witnesses at any hearing. If you desire the issuance of any subpoena, the Board shall do so at your request.

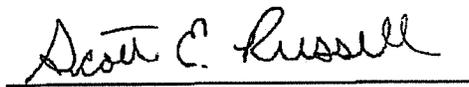
Pursuant to Section 1133 of the Public School Code of 1949, as amended, 24 P.S. §11-1133, and the grievance/arbitration procedure of the collective bargaining agreement, you have the right to elect between a school board hearing as described above or the filing of a grievance and having your discharge decided by an arbitrator; but you do not have the right to both. If you choose to exercise your right to a school board hearing, any provision of the collective bargaining agreement relative to grievances or arbitration shall be void. If you choose to exercise your rights to grievance and arbitration, your rights to a school board hearing will be extinguished. Please notify the Superintendent within ten (10) calendar days of receipt of this notice of whether you desire a hearing before the Board of School Directors or desire to exercise your rights to grievance/arbitration procedures.

If you should have any questions regarding this matter, please contact or have your attorney contact Ms. Christina L. Lane, Solicitor for the North Allegheny School District, who will be representing the administration in the prosecution of this case. Her address and phone number are as follows:

MAIELLO, BRUNGO & MAIELLO, LLP
SouthSide Works
424 South 27th Street, #210
Pittsburgh, PA 15203
412-242-4400

ATTEST:


Secretary



President, Board of School Directors,
North Allegheny School District

Dated: 08/06/2018

**BEFORE THE BOARD OF SCHOOL DIRECTORS
OF NORTH ALLEGHENY SCHOOL DISTRICT**

In the matter of:)
)
PAUL SENECA)
a professional employee)

STATEMENT OF CHARGES

The following are the charges which will be presented to the Board of School Directors in support of the termination of Paul Seneca as a professional employee of the North Allegheny School District.

On numerous occasions you engaged in conduct in violation of the Pennsylvania Public School Code Section 1122, 24 P.S. §11-1122, constituting immorality; persistent negligence in the performance of duties; willful neglect of duties; persistent and willful violation of school laws of the Commonwealth; incompetence in failing to supervise the students under your care as the classroom teacher, including but not limited to: causing physical harm to students as a result of your negligent supervision; placing elementary students at risk of harm by your lack of supervision; exhibiting to a marked degree a lack of understanding and care for student safety; violation of the public policy to develop and maintain a safe environment for all students; failing to adhere to the program of improvement dated January 29, 2018; failing to comply with the directives of supervisors on numerous occasions and otherwise correct your misconduct in the exercise of reasonable care and/or effort toward protecting the safety of your students. The following reflects such witnessed and/or specific reports of such misconduct as set forth herein:

- You were warned and had knowledge of the school district's performance expectations in particular its requirements for planned supervision of students, an ethical execution of your professional responsibilities, and have failed to meet them.
- A Plan of Improvement dated January 29, 2018 identifies your deficiencies as: inadequate classroom procedures; poor classroom management; insufficient supervision resulting in an unsafe classroom environment; an unsafe environment which resulted in a student receiving a serious injury and the student leaving your classroom to receive medical care without your knowledge; and an environment where students spend a significant amount of time off-task.
- You acknowledged that the Plan of Improvement dated January 29, 2018 was to address supervision, safe environment, monitoring student activity and keeping students on task.

- Dr. Mathieson, your direct supervisor and as required by your Program of Improvement observed your classroom on May 22, 2017 during the 11:30-12:15 pm class period. During this time period, you were observed sitting and otherwise unengaged with your students. Once you noticed Dr. Mathieson's entry into your classroom you immediately jumped up from your seated position and began to engage with your students. Dr. Mathieson observed you on your personal electronic device for an extended period of time and not providing active supervision to your students.
- The District received reports that a third grade female student, was found locked outside of the Hosack Elementary Building during her scheduled class period with you. It was reported by a staff person that on May 24, 2018 between the hours of 2:45 and 3:00 pm a third grade student assigned to your classroom was found outside behind the building standing unsupervised. The student reported to the staff member that you sent her to go outside to clean up gym equipment and to bring the equipment inside. As the student was locked out of the building, the staff member let her back in and told her to return to your classroom. Thereafter, you sent the same student outside the school building along with other students unsupervised.
- You failed to report the student's extended absence from your classroom to the Building Administration and you did not believe it was necessary as it was not a priority or serious matter.
- Dr. Mathieson, your direct supervisor provided you written notice of your deficiencies and continued lack of supervision on May 29, 2018;
- You were aware and knew of the school district's policies regarding student safety and deliberately chose to ignore them;
- You were informed that the conduct of sitting off to the side and failing to engage with your students was unacceptable;
- Your repetitive acts and omissions regarding the lack of supervision of your students was clearly exhibited in the video reviewed with you and Federation representatives on June 7, 2018. The video identified students repetitively exiting your classroom presumably to get a drink from the water fountain; another group of students exited the classroom after having received a set of keys from you and returned approximately ten minutes later; you are observed on your phone for an approximate period of twenty-five minutes and not supervising your students; and later observed sitting off to the side of the gym on a stool and not until Dr. Mathieson's entrance are you observed supervising the students' game of kickball.
- Your explanation that you did not jump to attention when caught by Dr. Mathieson was negated by the video. Additionally, your explanations for viewing your phone to review and set-up stations as well as the need for students to collect equipment were negated by the fact that prior to the class you have a fifteen minute window of time for set-up of the obstacle course as well as two successive plan periods prior to the 11:30-12:15 pm class period.

- You failed to exert reasonable effort to protect your students from conditions which interfere with learning or are harmful to the student's health and safety.

BACKGROUND

IMMORALITY, PERSISTENT NEGLIGENCE IN THE PERFORMANCE OF DUTIES; WILLFUL NEGLECT OF DUTIES; PERSISTENT AND WILLFUL VIOLATION OF SCHOOL LAWS OF THE COMMONWEALTH, AND INCOMPETENCE

Based on the above Background information you have engaged in the following conduct:

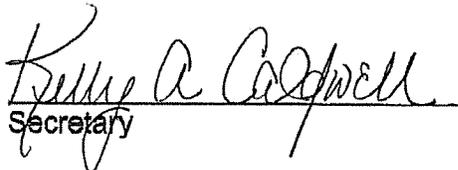
1. You have engaged in Immorality, Persistent Negligence in the Performance of Duties; Persistent and Willful Neglect of Duties; Persistent and Willful Violations of the School Laws of the Commonwealth, Willful Neglect of Duty, and Incompetence as contemplated under Section 1122 of the Public School Code of 1949, as amended, 24 P.S. §11-1122 in that you engaged in conduct which has been determined to be a repetitive and pervasive pattern of behavior exhibiting unacceptable and unprofessional conduct as specifically outlined above, and which offends the morals of the community and violates school laws of the Commonwealth which specifically require a professional and ethical educator to provide for the supervision and protection of students from harm.

2. It is further believed that you engaged in such unacceptable, unprofessional and unethical behavior when you repeatedly exposed students to an unsafe learning environment and repetitively failed to provide proper supervision of your classroom.

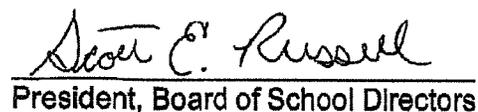
3. It is further believed that you engaged in this conduct through the utilization of your authority as a teacher, and that such action was an abuse of your authority in violation of the School Laws of the Commonwealth and also constitutes Immorality, Incompetence, Persistent Negligence in the Performance of Duties, Willful Neglect of Duty and Intemperance.

North Allegheny School District reserves the right to supplement this Statement of Charges with information discovered at any time up to the date of the hearing.

ATTEST:


Secretary

North Allegheny School District


President, Board of School Directors

FEDERAL MEDIATION AND CONCILIATION SERVICE

IN THE MATTER OF ARBITRATION

Between

NORTH ALLEGHENY SCHOOL DISTRICT

and

NORTH ALLEGHENY FEDERATION
OF TEACHERS, Local 2097

DECISION IN REMOVAL
CASE

(Paul Seneca)

FMCS Case No: 190922-07698

GRIEVANCE: The grievance protests the Grievant's removal as without just cause.

AWARD: The grievance is sustained in part. The Grievant's removal is reduced to a Three-Day Suspension.

HEARINGS: October 15, 2018 and November 16, 2018

RECORD CLOSED: January 14, 2019

AWARD DATE: April 1, 2019

ARBITRATOR: Jane Desimone, Esq.

APPEARANCES

School District

Christina L. Lane, Esq.
James Bradley, Ph.D., Asst. Superintendent
Amanda Mathieson, Ph. D., Principal

Federation

Noah R. Jordan, Esq.
John Hardell, Pres.
Paul Seneca, Grievant

ADMINISTRATION

By notice dated August 24, 2018, the undersigned arbitrator was notified by the Federal Mediation and Conciliation Service of her selection to hear and decide this matter then in dispute between them. Accordingly, hearings were held in Pittsburgh, Pennsylvania on October 15, 2018 and November 16, 2018, at which the parties were provided with a full opportunity to present evidence, both written and oral, and to argue their respective positions. At the conclusion of the hearings, the parties requested additional time in which to submit post-hearing briefs. Briefs were received and exchanged by the arbitrator on January 14, 2019, at which time the record was closed. This matter is now ready for final disposition.

GRIEVANCE AND QUESTION TO BE RESOLVED

On June 11, 2018, the North Allegheny Federation of Teachers, Local 2097 (hereafter referred to as the “Federation”) filed a Grievance Report with the North Allegheny School District (hereafter referred to as the “School District” or the “District”) on behalf of the Grievant, Paul Seneca. The grievance was filed in accordance with the parties’ collective bargaining agreement¹ (hereafter referred to as the “Agreement”) and stated in pertinent part as follows (Joint Ex. 6):

Contract Provision(s) violated: The discharge violates the principles of just cause which is implied in the recognition clause, the seniority clause, and other relevant provisions of the collective bargaining agreement and by the parties’ past practice.

Facts Upon Which Grievance is Based: Paul Seneca was unjustly suspended without pay.

Relief Requested: The North Allegheny Federation of Teachers request that Mr. Seneca be made whole in every way, including recall to his job and full back pay for all wages and benefits lost.

The issue to be determined is whether the Grievant was discharged for just cause. If not, what shall the remedy be?

¹ **COLLECTIVE BARGAINING AGREEMENT** Between the North Allegheny School District and the North Allegheny Federation of Teachers, Local 2097, July 1, 2015 – June 30, 2020 (hereafter referred to as the “Agreement”).

PERTINENT PROVISIONS OF THE AGREEMENT

The following pertinent provision of the Agreement was cited by the parties in support of their respective positions (Joint Ex. 1):

ARTICLE XXV SENIORITY

1. **Day One.** Seniority will begin on the first day a professional employee under contract commences work during the school year for which the employee has been most recently hired.

A. A temporary professional employee begins to accrue "seniority" effective with the date of hire of a TPE. However, he/she cannot activate tenure rights and accompanying seniority benefits until he/she becomes a professional employee...

7. **Broken Seniority.** Seniority shall be broken and employment terminated for any of the following:

A. Resignation or retirement

B. Discharge in conformance with School Code....

FACTUAL BACKGROUND

The Grievant, Paul Seneca, has taught K-8 elementary school Health and Physical Education for forty-three years, the first twenty-one years spent at St. Bartholomew in Penn Hills, Pennsylvania, followed by twenty-two years at six of the seven elementary schools within the District. The Grievant's last year of teaching with the District was the 2017-2018 school year, during which he taught at Hosack Elementary School. On June 1, 2018, the Grievant was placed on an unpaid suspension. A Statement of Charges followed, in which the District described the Grievant's misconduct as including his failure to complete a Plan of Improvement (POI) as well as his observed actions on May 22, 2018 and May 24, 2018. The Statement of Charges outlined the following (Joint Ex. 5):

- You were warned and had knowledge of the school district's performance expectations in particular its requirements for planned supervision of students, an ethical execution of your professional responsibilities, and have failed to meet them.
- A Plan of Improvement dated January 29, 2018 identifies your deficiencies as: inadequate classroom procedures; poor classroom management; insufficient supervision resulting in an unsafe classroom environment; an unsafe environment which resulted in a student receiving a serious injury and the student leaving your classroom to receive medical care without your knowledge; and an environment where students spend a significant amount of time off-task.

- You acknowledged that the Plan of Improvement dated January 29, 2018 was to address supervision, safe environment, monitoring student activity and keeping students on task.
- Dr. Mathieson, your direct supervisor and as required by your Program of Improvement observed your classroom on May 22, 2017 [2018] during the 11:30-12:15 pm class period. During this time period, you were observed sitting and otherwise unengaged with your students. Once you noticed Dr. Mathieson's entry into your classroom you immediately jumped up from your seated position and began to engage with your students. Dr. Mathieson observed you on your personal electronic device for an extended period of time and not providing active supervision to your students.
- The District received reports that a third grade female student was found locked outside of the Hosack Elementary Building during her scheduled class period with you. It was reported by a staff person that on May 24, 2018 between the hours of 2:45 and 3:00 pm a third grade student assigned to your classroom was found outside behind the building standing unsupervised. The student reported to the staff member that you sent her to go outside to clean up gym equipment and to bring the equipment inside. As the student was locked out of the building, the staff member let her back in and told her to return to your classroom. Thereafter, you sent the same student outside the school building along with other students unsupervised.
- You failed to report the student's extended absence from your classroom to the Building Administration and you did not believe it was necessary as it was not a priority or serious matter.
- Dr. Mathieson, your direct supervisor provided you written notice of your deficiencies and continued lack of supervision on May 29, 2018.
- You were aware of knew of the school district's policies regarding student safety and deliberately chose to ignore them;
- You were informed that the conduct of sitting off to the side and failing to engage with your students was unacceptable;
- Your repetitive acts and omissions regarding the lack of supervision of your students was clearly exhibited in the video reviewed with you and Federation representatives on June 7, 2018. The video identifies students repetitively exiting your classroom presumably to get a drink from the water fountain; another group of students exited the classroom after having received a set of keys from you and returned approximately ten minutes later; you are observed on your phone for an approximate period of twenty-five minutes and not supervising your students; and later observed sitting off to the side of the gym on a stool and not until Dr. Mathieson's entrance are you observed supervising the students' game of kickball.
- Your explanation that you did not jump to attention when caught by Dr. Mathieson was negated by the video. Additionally, your explanations for viewing your phone to review and set-up stations as well as the need for students to collect equipment were negated by the fact that prior to the class you have a fifteen minute window of time for set-up of the obstacle course

as well as two successive plan periods prior to the 11:30-12:15 pm class period.

- You failed to exert reasonable effort to protect your students from conditions which interfere with learning or are harmful to the student's health and safety.

BACKGROUND

IMMORALITY, PERSISTENT NEGLIGENCE IN THE PERFORMANCE OF DUTIES; WILLFUL NEGLECT OF DUTIES; PERSISTENT AND WILLFUL VIOLATION OF SCHOOL LAWS OF THE COMMONWEALTH, AND INCOMPETENCE

Based on the above Background Information, you have engaged in the following conduct:

1. You have engaged in immorality, Persistent Negligence in the Performance of Duties; Persistent and Willful Neglect of Duties; Persistent and Willful Violations of the School Laws of the Commonwealth, Willful Neglect of Duty, and incompetence as contemplated under Section 1122 of the Public School Code of 1949, as amended, 24 P.S. §11-1122 in that you engaged in conduct which has been determined to be a repetitive and pervasive pattern of behavior exhibiting unacceptable and unprofessional conduct as specifically outlined above, and which offends the morality of the community and violates school laws of the Commonwealth which specifically require a professional and ethical educator to provide for the supervision and protection of students from harm.
2. It is further believed that you engaged in such unacceptable and unethical behavior when you repeatedly exposed students to an unsafe learning environment and repetitively failed to provide proper supervision of your classroom.
3. It is further believed that you engaged in conduct through the utilization of your authority as a teacher, and that such action was an abuse of your authority in violation of School Laws of the Commonwealth and also constitutes Immorality, Incompetence, Persistent Negligence in the Performance of Duties, Willful Neglect of Duty and Intemperance.

North Allegheny School District reserves the right to supplement this Statement of Charges with information discovered at any time up to the date of the hearing.

The District issued the Grievant a Notice of Loudermill Hearing and Statement of Charges on June 4, 2018 (Joint Ex. 2). The Grievant attended the hearing on June 7, 2018, accompanied by

Federation officials and counsel. By letter dated June 7, 2018, Superintendent Robert Scherrer reviewed the evidence presented against the Grievant and concluded that there was “sufficient grounds as to the allegations of the Code of Conduct for Professional Educators, incompetency, negligence, persistent negligence in the performance of duties, willful neglect of duties and/or persistent and willful violations of or failure to comply with the school laws of the Commonwealth, as set forth in the School Code” (Joint Ex. 3). The Grievant was placed on suspension without pay effective June 8, 2018. Following a public Board meeting convened on July 18, 2018, the Grievant’s dismissal was approved by the Board on August 6, 2018. The grievance in protest of this course of action was timely filed on June 11, 2018.

During his tenure with the District, the Grievant received ratings of Satisfactory every year of his twenty-two years of employment, through the 2016-2017 school year. However, on January 29, 2018, he was placed on Plan of Improvement (POI) as a result of performance concerns raised by the District following an incident with a student earlier in the month. The POI document outlined the identified deficiency, improvement expectations and recommended strategies for correcting the deficiency. It also set forth an assessment plan and a timetable for the Grievant’s successful completion of the improvement plan. The POI stated that observations were to be conducted during the weeks of February 20, 2018 and April 16, 2018, with a formal midpoint meeting to be held on March 22, 2018 and follow-up final summary meeting on May 22, 2018.

Four observations of the Grievant’s classroom were scheduled and conducted in accordance with the POI schedule. Principal Dr. Amanda Mathieson conducted the first such observation on February 26, 2018, with a post-observation review completed on March 6, 2018. The mid-point meeting was then held on March 22, 2018, again conducted by Principal Mathieson. The next observation took place on April 16, 2018, with a post-observation meeting on April 20, 2018. On May 21, 2018, Federation Representative Marcia Casey emailed Principal Mathieson regarding the Grievant’s final summary meeting scheduled for May 22, 2018, indicating that she could not attend due to a scheduling conflict. Principal Mathison’s email response on May 21, 2018 was as follows (Federation Ex. 1):

We were going to hold the meeting tomorrow at 3:45, but I completely understand that it will not work with your schedule. We can look at another day to meet where you can attend if that’s okay [smile emoji] – We had a great mid-point meeting, and I would love to have you involved with this final meeting. I’ll check with Paul [the Grievant] to see what he would prefer as well and we can look to find a day that works with your schedule...

Although he completed his required eighteen hours of online training by May 5, 2018, the Grievant did not submit all of the required self-assessment feedback until the evening of May 21, 2018.

On May 22, 2018, Principal Mathieson conducted an informal walk-through observation of the Grievant's 5th Grade class. The District submitted security camera footage of the full class period, documenting the Grievant's conduct in teaching the class and controlling student behavior. As described in the District's post-hearing brief as Proposed Findings of Fact Nos. 65 and 66, the footage depicts the following:

65. The video footage shows Mr. Seneca holding his cell phone from the point of student entry in his classroom and for an extended period of time approximately 25 minutes. (SD-2, SD-16)

- Student[s] enter class, PS [Paul Seneca] enters at the end of the student line, holding his cell phone out in front of him.
- Student[s] stand in lines while PS give[s] some direction while still looking down at his cell phone
- Group of students surround PS while PS is still holding cell and looking at his cell phone
- Students running around in unstructured activity while PS still has head down looking at cell phone
- PS walks to center of gym still holding cell phone
- PS walks back up toward wall still looking at cell phone. Two students at top of the frame are wrestling
- PS stops by classroom cart and is still looking and swiping his screen with head down
- PS still on cell phone, looking down, swiping when student[s] approach him

(SD-16)

66. The video footage of the May 22, 2018 classroom reflects students leaving his classroom without his direction or a hall pass. The students also leave in groups. (SD-2, SD-16 "Students continue to leave and enter the frame near entrance to the hallway).

The District also submitted security camera footage of an incident occurring on May 24, 2018 involving a student in the Grievant's third-grade class. The footage shows the Grievant placing his hand on the shoulder of a student and directing her to the door to the gym. The footage then documents the student having been unsupervised outside of the school building for twenty-

two minutes. When the student returns to the gym, the Grievant is documented sending the same student and three other students out of the gym a second time. (School District Ex. 2)

Principal Amanda Mathieson has been employed by the District for eleven years, currently as the Principal of Hosack Elementary School. In this position, her supervision of professional staff includes formal and informal observations, walk-through observations, and evaluations. With regard to the Grievant, she relayed that there had been an issue in November of 2017 that had resulted in her involvement. At that time, a student in the Grievant's class was being bullied by another student. Even though the two students were to be separated, they had interactions in the Grievant's class. Principal Mathieson further explained that on January 10, 2018, another student was seriously injured in the Grievant's classroom, with a bloody nose and a concussion. The student went to the nurse's office without the Grievant being aware of what had occurred. She explained that as a result of this incident, the Grievant received a one-day suspension and was placed on the POI. The one-day suspension was issued without a Loudermill hearing and was apparently thereafter rescinded. Principal Mathieson referenced another incident dating back to December 4, 2015 involving the Grievant and safety concerns.

Principal Mathieson testified that she conducted an informal unannounced observation of the Grievant's classroom on May 22, 2018. Because of concerns of how the Grievant was conducting the class, she viewed camera footage after the class. Her concerns included students "aggressively" hitting a ball and the Grievant's reaction of standing up when he saw her enter the gym. She agreed that physical education class is more energetic than a regular classroom and that she has no experience teaching the subject.

With regard to the incident on May 24, 2018, Principal Mathieson referenced three paraprofessionals who witnessed the 3rd Grade student locked outside of the building. Special Education Assistant Sara Muckian and Paraeducator Autumn Pawloski testified and provided statements indicating that Special Education Assistant Sue Louis took point on the incident. Ms. Louis also testified and provided a statement dated June 7, 2018, in which she relayed seeing the student standing near some gym equipment, with the following occurring (School District Ex. 20):

...There were two other Special Ed. Assistants and myself outside in the playground where the swings are with the multi-disability students. There were Autumn Pawloski, Sara Muckian and myself. It was approximately 2:55 P.M. As we were monitoring our students, we noticed a girl standing near some gym equipment up on the hillside behind the other play set. We were outside for a few minutes. We decided I would walk over. I asked her if she was waiting for her Gym

class. I believe she said she was waiting for some kids to come out to take in the equipment with her, so I walked back to monitor our students. Another few minutes passed and no one came out so I walked back over to her and said I would let her in so she could tell the teacher that she needed some help to bring all the equipment in. She agreed. She did not seem upset. I believe she was in third grade. Shortly after she went in, a group of students came out and took the equipment in. I walked over to let them in thinking no one was holding the door, but one student was.

Assistant Superintendent of Elementary Education James Bradley was involved in the ongoing supervision of the Grievant, including his POI. Dr. Bradley relayed incidents involving the Grievant dating back to 2015, in which the District was concerned about his failure to properly supervise students. With regard to the POI, he recalled that the final meeting was scheduled for May 22, 2018. He asserted that the meeting was rescheduled because the Grievant did not submit his self-assessment feedback until late May 21, 2018. Superintendent Robert Scherrer was also involved in the decision to discharge the Grievant, for which he referenced the Grievant's history of performance issues dating back to 2015, with all of the misconduct involving his lack of appropriate supervision thereby compromising student safety.

The Grievant, Paul Seneca, described his experience during his twenty-two years of teaching physical education for the District. He noted that he has volunteered for extracurricular activities, including the Recess Club, the Healthy Eating club and popular after-school programs. He has also coached girls' basketball. The Grievant testified that he willingly entered the POI in January of 2018 with the goal of improving his teaching skills. Based upon the feedback that he received during the POI period, he believed that he was on track to successfully completing the program. Indeed, he believed that as of May 21, 2018, he had fulfilled his obligations under the POI, with only a final meeting to be scheduled and held. It was his understanding that the May 22nd meeting was rescheduled at Federation Vice President Marcia Casey's request, with it to be rescheduled on May 29th or May 30th.

With regard to the incident on May 22, 2018, the Grievant recalled that he normally would have conducted his 5th grade gym outside but decided to have the class in the gym due to the heat and humidity. As a result, he had the students play a game called "500", which involves batting and rolling soft, squeezable balls. He asserted that he was using his cell phone during the class because his teaching iPad had not charged. He explained that he was looking at cell phone while also addressing students. He did so at times while sitting on a stool, which he believed to be an acceptable practice. In responding to camera footage of students leaving the gym, the Grievant

explained that due to inadequate storage, some equipment needed to be retrieved from the other side of the divider that split the gym in half.

In explaining the incident occurring on May 24, 2018, the Grievant recalled teaching his third-grade class during the final period of the day, running from 2:30 to 3:15 pm. He again had planned to be outside but decided to have the class inside due to the weather. He agreed that at some point, he told a female student to retrieve equipment from outside of the gym. However, he maintained that he never told her to go outside. Rather, he asserted that his directions were to get the equipment that is kept inside the school building. Furthermore, he was unaware that the student or the other students who subsequently assisted her went outside of the building until after the fact. At that point, he asked the students why they exited the building but did not report the matter to Administration because no one was harmed. The Grievant agreed that the student was gone for about twenty minutes from his classroom before returning without the equipment.

The Grievant noted that after both incidents, he was asked to supervise up to seventy-five students during a Parent Volunteer Breakfast on May 25, 2018. He emphasized that he loves his job and would like the opportunity to continue what he considers to be his vocation. He acknowledged that he has made mistakes but considers them to be minor in nature.

CONTENTIONS OF THE PARTIES

School District

The School District contends that the Grievant's discharge was for just cause, in full accordance with the Agreement. In labor disputes involving school districts, the collective bargaining agreement must be interpreted in light of the School Code, with the arbitrator's decision rationally derived from the terms of the Agreement. Asserting that it submitted substantial evidence to support the Grievant's dismissal, the School District believes that it met the necessary burden of proof to prevail in this matter. It summarizes the required burden of proof as follows (excerpt from the School District's post-hearing brief):

In sum, to prove charges of willful and persistent violation of school laws and persistent negligence in performance of duties, the school district must prove (1) persistency in the form of numerous incidents of the same misconduct and (2) knowledge that the conduct in question was wrong and that its repetition could lead to discipline or discharge. For a violation of a school law, the school district must point to an adopted policy or order that was deliberately violated. For negligent performance of a duty, the district must specifically advise the employee of that

duty...and the violation must be serious, not picayune. *Id.* At 358. [*Flicklinger v. Lebanon Sch. Dist.*, 898 A.2d 62 (Pa. Cmwlth. 2006)]

Applying these principals, the School District cites the Grievant's persistent conduct despite being warned of its unacceptability. Dating back to 2014, the Grievant received numerous summons and directives related to student safety and appropriate student supervision. The District argues that the Grievant's conduct during the 2017-2018 school year must be examined in relation to this lengthy period of intervention and disciplinary consequences. After a student injury on January 10, 2018, the Grievant was given a one-day suspension and placed on a POI. Despite this notice of ongoing concerns regarding the Grievant's active supervision of his students, the Grievant did not correct his behavior as demonstrated by the incidents that occurred on May 22, 2018 and May 24, 2018. According to the District, this persistent conduct supports the Grievant's termination for having violated Section 23 P.S. §11-1122 of the School Code.

The School District asserts that the Grievant willfully and intentionally disregarded his duty to supervise and provide a safe environment for his students, thereby providing a basis in and of itself for his dismissal. In this regard, it particularly cites to the Grievant having sent a student and then a group of students outside to retrieve gym equipment on their own. Asserting that the Grievant willfully failed to abide by the District's policies and the ethics requirements of the School Code, the District argues in its post-hearing brief:

Seneca willfully failed to abide by the District's policies and these ethics statements. He was the professional educator in charge of the safety of a third grade student who he sent outside of the secure elementary building alone to collect equipment. Clearly, he was aware of the need to monitor student safety and willfully took action to disregard the student's safety. His actions placed the student at risk of harm. His active participation in his POI and his statements of wanting to improve are contradicted by his own actions. He failed to note her absence of over twenty minutes. The District has clearly outlined its expectations that he actively supervise and provide a safe environment for students. Mr. Seneca understood these directives. Disobedience of the District's reasonable expectations to ensure student safety is persistent and willful violations of the law.

Finally, the District argues that it had just cause to dismiss the Grievant because he engaged in conduct that constitutes incompetence. While incompetency is not defined in the School Code, the School District asserts that its meaning has been defined by the Courts as an incapacity to teach arising out of a lack of substantive knowledge, lack of desire or a lack of physical ability. Citing to numerous court cases, the District maintains that the Grievant's failure to engage, supervise and

otherwise protect the safety of his students amply demonstrates his incompetence to fulfill his professional teaching responsibilities.

For all of these reasons, the School District believes that it acted in accordance with the Agreement and respectfully asks that the grievance be denied in its entirety.

Federation

The Federation's position is that the School District acted without just cause in dismissing the Grievant effective August 6, 2018. Initially, it takes issue with what it believes is the District's retroactive amendment of the Statement of Charges upon which the Grievant's discharge is based. Citing to the Public School Code, 24 P.S. § 11-1127, it emphasizes that professional employees are entitled to a "detailed written statement" of the charges upon which a dismissal is based. The Statement of Charges issued to the Grievant set forth charges relating to two specified dates – May 22, 2018 and May 24, 2018. The Federation maintains that the District's efforts to expand these charges to include events from 2014, 2015 and January of 2018 is improper. Furthermore, it asserts that the District has attempted to retroactively amend the Statement of Charges. As both actions are improper, the Federation argues that the Grievant's discharge should be considered solely on the charges listed in the Statement of Charges.

Before addressing the specific charges, the Federation disputes that the Grievant was under a POI at the time of his discharge. Contrary to the assertions of the District, it maintains that he had completed all of his requirements as of the evening of May 21, 2018, and was only waiting for a final meeting that had been delayed due to the unavailability of his Federation representative, Vice President Marcia Casey. As such, it argues that the District's reliance on the Grievant's incompleteness of the POI is purely form over substance and therefore should not influence the charges against him.

Turning to the first of the two events upon which the Grievant's dismissal should be considered, the Federation maintains that there was nothing "objectively objectionable" about the Grievant's handling of his 5th Grade class on May 22, 2018. Rather, it views the District's efforts as an attempt to distort facts in order to manufacture a reason to take disciplinary action. In order to do so, it improperly used security camera footage for evaluative purposes, which ultimately resulted in the false accusation that the Grievant was observed on his cell phone for an extended period of time. As there was no justifiable reason to review the footage, the Federation believes that the District was merely seeking support for its desire to discipline the Grievant.

The Federation asserts that the Grievant did not act inappropriately on May 22, 2018, with his actions described as follows in its post-hearing brief:

In reality, Mr. Seneca did not act, or fail to act, in any way during this class period that merited discipline, and certainly not discharge. He explained during his testimony that, as Dr. Mathieson had stated, the class was supposed to take place outside but had to be moved inside at the last minute due to weather. Mr. Seneca testified that the stations, or activities, in that day's lesson plan, which were connected to the upcoming Field Day, were much more difficult to do inside the half gym as opposed to outdoors. He explained that he set up the stations for the students to play 500 and then used his cell phone to attempt to review his class manual, photos, and instructional videos, which he normally reviews on his District-issued iPad. As stated above, Mr. Seneca said that he continued to observe his students while checking the documents on his phone, as well as when he directed students to retrieve extra equipment from the other side of the gym and from his office and later when repairing one of the batting tees. Mr. Seneca that at a certain point, he no longer was satisfied with how the class was going, so he sat the students down, delivered a few minutes of lecture, and then broke into a game of kickball, which is what the students were playing when Mr. Mathieson entered the class.

As far as sitting down during class, Mr. Seneca explained that he used a couple of stools and set them up on opposite sides of the gym as a reminder to move back and forth. He also explained that he positioned them in a manner in order to keep the full class in front of him and in his line of vision. Both of these practices (moving during the class and positioning) were mentioned as best practices in the modules he completed as part of his POI. Significantly, Mr. Seneca confirmed that he was aware that the District operated a security camera in the gym and he testified that he assumed that this footage regularly was reviewed by administration. This proves the sincerity of his testimony that he did not believe that any of his actions during this class period were improper or that they would be disapproved of by his supervisors.

Turning to the incident during the Grievant's 3rd Grade class on May 24, 2018, the Federation posits that the matter was the result of a misunderstanding between the Grievant and a student and resulted in no actual harm. The Federation argues as follows in its post hearing brief:

It is clear that Mr. Seneca did not instruct his student to go outside and instead she did so entirely as a result of her misunderstanding his instructions. Additionally, as was acknowledged by Dr. Mathieson, the student involved was no harmed in any way. Mr. Seneca explained that since no harm came to the student and because he had explained to her at the end of the class that she misunderstood his instructions and that she was not to leave the building unaccompanied, he did not believe he had any reason to report his event to administration. Mr. Seneca was asked directly whether he intended to withhold information from administration or cover up what had happened. He emphatically denied this and once more stated his belief that

there was nothing to report. Given the facts involved, Mr. Seneca's decision not to report anything was entirely appropriate. The District, at least initially, seemed to agree that this was not a concerning incident, as Dr. Mathieson asked Mr. Seneca to supervise roughly 75 children, including District students, in the gym during the parent volunteer breakfast the very next day. As such, the events of May 24, 2018 also did not provide the District with just cause to discharge or otherwise discipline him. (Emphasis in original.)

The Federation argues that the District's investigation into the allegations against the Grievant were in violation of his due process rights. In addition to improperly relying on security camera footage, it maintains that the Grievant was denied the opportunity to timely review the evidence against him. For this reason as well as the lack of substantive evidence in support of the charges, the Federation asks that the grievance be sustained. It requests that the Grievant be reinstated with full seniority and all lost wages and benefits.

DISCUSSION AND FINDINGS

The Grievant, Paul Seneca, was discharged from his employment as an elementary school Health and Physical Education teacher effective August 6, 2018. This action was subsequent to his placement on an unpaid suspension on June 1, 2018. On June 11, 2018, this grievance was filed in protest of the disciplinary action, which encompassed his subsequent removal. The Agreement does not contain specific language requiring discipline, including discharge, to be for just cause. Nevertheless, the parties do not dispute that the principle of just cause is implied in various provisions of the Agreement, including the seniority provision of Article XXV, as well as an established past practice and the Pennsylvania School Code. As such, the issue to be determined is whether the Grievant was discharged for just cause.

The just cause standard places a substantial burden of proof on the employer. Initially, the evidence must establish that the employee acted as charged. Once the employer clears this evidentiary hurdle, it must then establish that the discipline was a reasonable response given the totality of the circumstances. In short, this requires the discipline to be consistently applied; corrective and not punitive in nature; and not unduly harsh in light of any mitigating circumstances.

In a Notice dated August 6, 2018, the Grievant was issued a Statement of Charges pertinent to the District's recommendation that dismissal proceedings be initiated against him. After a notifying the Grievant of his rights, the District set forth the Grievant's alleged misconduct. The Statement of Charges specified that the Grievant had been warned and had knowledge of the

District's performance expectations, and had been placed in a Plan of Improvement (POI) dated January 29, 2018 for his classroom supervision deficiencies. It then outlined two incidents – one occurring on May 22, 2018 involving his 5th Grade class, and one occurring on May 24, 2018 involving a 3rd Grade student. Finally, the Statement of Charges described the notice provided to the Grievant and the camera footage that documented the Grievant's actions before concluding that he failed to “exert reasonable effort to protect your students from conditions which interfere with learning or are harmful to the student's health and safety”. Based on all the information, the District concluded that the Grievant engaged in the following misconduct:

- Immorality
- Persistent Negligence in the Performance of Duties
- Persistent and Willful Neglect of Duties
- Persistent and Willful Violations of the School Laws of the Commonwealth
- Willful Neglect of Duty
- Incompetence as contemplated under 24 P.S. §11-1122
- Unprofessional and unethical behavior by repeatedly exposing students to an unsafe learning environment by repetitively failing to provide proper classroom supervision
- Abuse of his authority as a teacher in violation of the School Laws of the Commonwealth, constituting Immorality, Incompetence, Persistent Negligence in the Performance of Duties, Willful Neglect of Duty and Intemperance.

In addition to the conduct described in the Statement of Charges, the School District referenced events involving the Grievant that occurred in 2014, 2015 and January of 2018. These events were raised at arbitration as evidence of the Grievant's persistent and repetitive pattern of misconduct involving his lack of sufficient supervision of his classroom and students. The District's attempt to submit camera footage of these events was objected to by the Federation. This objection was sustained, with the evidence ruled inadmissible because the earlier events were not cited in the Statement of Charges and were from up to four years prior. While reference and testimony as to the prior matters were deemed admissible as evidence of the Grievant's knowledge of the District's performance expectations, it was deemed unfair to require the Grievant to defend against old incidents at such a late time. The District was therefore limited to the charges set forth in the Statement of Charges, which related only to the incidents on May 22, 2018 and May 24, 2018. These incidents are considered separately as follows:

I. The events of May 22, 2018, involving the Grievant's 5th Grade Class

While the parties do not totally agree as to what occurred in the Grievant's 5th Grade class on May 22, 2018, several basic facts are either agreed upon or unrefuted. On that date, the Grievant planned on conducting the class outside but moved it indoors due to inclement weather, namely heat and humidity. The class was held in the gymnasium, with students participating in a game called "500", which involved hitting soft balls with bats and running bases. The Grievant was present during the game, during which he utilized his cell phone. Principal Mathieson conducted an informal observation of the Grievant's class that began after the game was in progress. Camera footage captured the entire class period.

The District found the Grievant's conduct during the class to be objectionable, rising to the level of misconduct due to his failure to adequately supervise his students. In particular, it concluded that the Grievant allowed students to leave the gym without a hall pass and without his directions; that his lack of supervision permitted two students to wrestle; that the game was actually unstructured and chaotic; and that the Grievant was on his cell phone during much of the class when he should have been engaging his students. In support of these factual conclusions, the District cited to both the observations of Principal Mathieson and submitted camera footage.²

The School District maintains that the camera footage and Principal Mathieson's observations establish that the Grievant was not adequately or properly supervising his class. However, the Grievant provided a full explanation of what was going on in his 5th Grade class on May 22, 2018. He explained that his students were actively engaged in the game of "500", which he described as an energetic and fun game entailing physical activity, score keeping and taking turns. Furthermore, while he agreed that he was utilizing his cell phone during the class, it was only to access teaching materials because his District issued iPad had not charged. The Grievant further testified that he was cognizant of where he placed his stool to sit, as he was aware that he had to keep a visual of the children as much as possible. Finally, he maintained that any students leaving the gym were doing so with his permission, in order to retrieve equipment from the other side of the gym or use the restroom or water fountain.

² The Federation objected to the submission of this camera footage, arguing that it was used for evaluative purposes without justification. Upon further consideration, this objection is overruled. The camera footage is considered in conjunction with all of the evidence presented concerning the Grievant's actions on the two days in question.

After careful consideration, it is concluded that the Grievant's explanation is consistent with the submitted camera footage and the observations of Principal Mathieson. Contrary to the assertions of the School District, there is no indication that the Grievant willfully neglected his duties. While Principal Mathieson may have had grounds to question how the Grievant ran the class, none of the conduct either described or captured on camera footage came close to the alleged level of willful neglect, negligence of duty, incompetence, immorality or other unethical behavior. Likewise, there is no indication that the Grievant abused his authority as a teacher. As the evidence does not support these allegations, the charges as they relate to the Grievant's actions on May 22, 2018 are unfounded.

II. The events of May 24, 2018, involving a student in the Grievant's 3rd Grade class.

Similar to the May 22, 2018 incident, there is little dispute as to what occurred on May 24, 2018. If anything, the facts of this incident are even more firmly established by the record. Once again, the Grievant had planned to conduct the class outside but moved it to the indoor gymnasium due to heat and humidity. With this move inside, he directed a student to retrieve equipment to be used in the gym. The student understood this to be a directive to retrieve equipment from outside. After going outside, she was unable to get back in the building and was locked out for approximately twenty minutes. She was eventually observed by three paraprofessionals, who let her back into the building. The student returned to the gym and then went with a group of students to again retrieve equipment. While the Grievant questioned the students as to why they went outside, he did not report the incident to the Administration.

Rather than dispute these events, the Grievant provided an explanation for what occurred. He agreed that he directed the student to retrieve equipment to be used indoors during class. However, he maintained that at no time did he direct her or any other students to go outside. Rather, he asserted that the students were only to retrieve equipment that was kept inside, by the doors to the outside of the building. The Grievant explained the incident as a product of a simple misunderstanding. Because no student was harmed, he did not report the incident to the Administration.

The Grievant's explanation for what happened is found to be credible. There is no indication that he directed the student to go outside, but rather, believed her to understand that the

gym equipment would be located inside the building. As witness testimony and camera footage provides no indication that any student was harmed in any way, his failure to report the matter is also understandable. Nevertheless, the fact that the Grievant did not direct the student to go outside does not alter the fact that he was unaware of the whereabouts of one of his young students for more than twenty minutes. Indeed, it is unclear why the Grievant did not notice that she had not returned with necessary equipment for a large portion of the scheduled class period. While fortunately nothing happened to the student while she was outside and unaccounted for, the Grievant's inattentiveness could have resulted in either physical or psychological injury to her. As a professional teacher, the Grievant is charged with the safety of all of the students in his class. At a most basic level, this requires him to know their whereabouts. The Grievant's failure to meet this responsibility placed the student in harm's way on May 24, 2018.

In light of all of the evidence documenting what occurred on May 24, 2018, it is concluded that the Grievant's conduct was not willful, immoral, or an abuse of his professional authority. Rather, it constituted a neglect of his basic duty to keep his students accounted for and safe. By directing the student to retrieve equipment and then not noticing when the student did not return to class after an extended period of time, the Grievant failed in his basic obligations as a teacher. To allow this level of inattentiveness to continue without correction would be complicit in the Grievant's inattentiveness, thereby rendering the District negligent as well. It is therefore concluded that the charges against the Grievant as they relate to his negligence on May 24, 2018 are supported by the record and the Grievant acted as charged in this regard.

* * * * *

After careful consideration of all of the evidence presented, it is concluded that the School District met its burden of proving a portion but not all of the charges against the Grievant. In reaching this conclusion, it is apparent that the Statement of Charges is overbroad, with alleged misconduct far beyond the Grievant's actions and culpability. There is no evidence to support the charge of immorality, unethical behavior, abuse of authority, or even willful neglect of duties. These heightened allegations implying moral turpitude do not describe the Grievant's behavior, but rather, result in an avoidance of the heart of his conduct by eliciting an emotional response of denial. The Grievant's misconduct is limited to his inattentiveness with regard to a 3rd Grade student on May 24, 2018, when he failed to notice that she was absent from his class for an

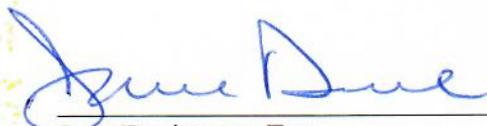
extended period of time. While this conduct did not rise to the full scope of the District's allegations, it nevertheless constituted an unacceptable neglect of duties that required a disciplinary response.

On January 29, 2018, the Grievant entered into a POI that had been implemented by the School District in response to his previous inattentiveness and failure to appropriately supervise students. As of May 21, 2018, he had completed all of the requirements of the POI, with only the final summary meeting to be held. Throughout this process, the Grievant's willingness to cooperate and learn better teaching techniques was documented by the School District. This documentation provides evidence both that the Grievant was fully aware of his deficiency and his attempts to address the problem. His failure to keep track of a student on May 24, 2018 further demonstrates that he needs to do better – his continued lack of supervision cannot be tolerated.

The Grievant has an extended career in education spanning forty-three years, the last twenty-two of which have been with the District. Through the 2016-2017 school year, the District rated his performance as Satisfactory. When the Grievant's negligent actions on May 24, 2018 are considered in conjunction with this extended record, it is concluded that his discharge was unduly harsh and not consistent with the gravity of his conduct. The discharge is therefore reduced to a three-day suspension. The Grievant is to be returned to work taking into account this suspension, made whole for all resulting lost wages and benefits, and with full seniority.

AWARD

The grievance is sustained in part for the reasons set forth above. The Grievant's discharge is reduced to a Three-Day Suspension. The District is directed to reinstate the Grievant with full seniority and compensate him for all resulting lost wages and benefits, less any interim earnings or benefits received. The undersigned shall retain jurisdiction should a dispute arise in the implementation of this Award.



Jane Desimone, Esq.
Arbitrator
April 1, 2019