

ORDER

AND NOW, to wit, this 19th day of September, 1974, the Appeal of Kenneth Smeltz is dismissed.

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Appeal of Dr. Earl A. Becker, a Professional Employee, from a decision of the Board of School Directors of the Allentown School District, Lehigh County, Pennsylvania

In the Office of the Secretary of Education,
Commonwealth of Pennsylvania, at
Harrisburg, Pennsylvania

No. 226

OPINION

John C. Pittenger
Secretary of Education

Dr. Earl A. Becker, Appellant herein, has appealed from the decision of the Board of School Directors of the Allentown School District reassigning him from the position of Director of the Regional Instructional Materials Center to Science and Mathematics teacher, which action, he contends, is an improper demotion.

FINDINGS OF FACT

1. Dr. Earl A. Becker, Appellant, is a professional employee. He began his employment in the Allentown School District in 1946 as a ninth grade general Science teacher, and served in that capacity until 1958. In 1958 the Appellant helped to establish the Allentown School District's Instructional Materials Center, and served as its Director until June, 1972.
2. On October 30, 1971, the Carbon County Board of School Directors and the Lehigh County Board of School Directors established the Lehigh Valley Audio Visual Library and Instructional Materials Center.
3. On the same day, October 30, 1971, the Lehigh Valley Audio Visual Library and Instructional Materials Center agreed to purchase audio visual services from the Allentown School District, in accordance with the terms of the Participating Agreement entered into on that date.
4. Under the terms of the Participating Agreement, it was agreed that the Appellant would be appointed as Director of the Lehigh Valley Audio Visual Library and Instructional Materials Center; in that capacity he was to devote one-half of his time to the Lehigh Valley Center. The other half of his time was to be spent in the service of the Allentown School District. The Appellant remained in the employment of the Allentown School District, with his salary and benefits paid by the District; however, the Lehigh Valley Audio Visual Library and Instructional Materials Center reimbursed the Allentown School District for one-half of the Appellant's salary, in return for the services he performed on behalf of the Center. The Appellant served as Director of the Lehigh Valley Center until June, 1972.
5. The Carbon County Board of School Directors and the Lehigh County Board of School Directors evolved into the Carbon-Lehigh Intermediate Unit, pursuant to the Act of May 4, 1970, Act 102. On October 18, 1971 the Carbon-Lehigh Intermediate Unit resolved to terminate the "October 30, 1961" Participating Agreement with the Allentown School District, effective as of June 30, 1972.
6. It was the intention of the Carbon-Lehigh Intermediate Unit to establish and operate its own audio visual and instructional materials center to serve the School Districts within the Intermediate Unit, including the Allentown School District. The staff of the Intermediate Unit's audio visual center would be employees of the Intermediate Unit. The Appellant applied in the early part of 1972 for the position of Director of the Intermediate Unit's new center, but he was not given the position.

7. On February 24, 1972, the Allentown Board of School Directors petitioned the Carbon-Lehigh Intermediate Unit to allow the School District to operate its own, independent instructional materials center, beginning as of July 1, 1972. The Intermediate Unit granted this request.
8. At the May 25, 1972 meeting of the Allentown Board of School Directors, the Board removed the Appellant from position of Director of what was known as Regional Instructional Materials Center, (that is, the position in which the Appellant worked half time for the Allentown School District and half time for the Lehigh-Valley Audio Visual Library and Instructional Materials Center), and assigned him to the position of Mathematics and Science teacher at South Mountain Junior High School for the 1972-73 school term.
9. At the same May 25, 1972 meeting, the School Board established the new position of "Coordinator of Allentown School District Media Center". The person holding this position would devote 100% of his or her time to the Allentown School District as a supervisor of the audio visual materials program (i.e., nonprint materials) and also the library materials program (i.e., printed materials). Notice of the new position, and a job description, was disseminated June 6, 1972. The position was to be an eleven month position. Salary was to be negotiated, however, although it was not made known, the intention of the School District was to pay a salary of around \$15-16,000.00.
10. The Appellant submitted a timely application for the new position of Coordinator of the Allentown School District Media Center. The School District interviewed a number of applicants. It offered the position to one, who was not the Appellant, but was unable to reach agreement on salary. Accordingly, notice of the position was disseminated again in August, 1972. The Appellant reminded the School District that he was still interested in the position. The School District decided in August to appoint another employee of the District to the position, Mr. Edward C. Fee.
11. As Director of the Regional Instructional Materials Center, the Appellant was employed on a twelve month basis at an annual salary of \$16,750.00. In the position of teacher, the Appellant was serving on a ten month basis at an annual salary of \$14,500.00.
12. On October 27, 1972 the Appellant notified the School Board that he considered the change in his status from Director of the Regional Instructional Materials Center to classroom teacher to be a demotion in salary and type of position. Accordingly, he requested a hearing from the Allentown School Board.
13. Hearings were held before the Allentown School Board on January 8 and January 23, 1973. By letter dated March 30, 1973, received on April 2, 1973, the Appellant was informed that the School Board, after having given due consideration to all facts and evidence produced at the hearing, decided to sustain its resolution dated May 25, 1972 changing the Appellant's status from the Director of the Regional Instructional Materials Center to Mathematics and Science teacher.
14. On May 3, 1973 the Appellant's petition of appeal was received in the Office of the Secretary of Education. The Appellant contended that the decision of the Allentown School Board was arbitrary, capricious and a manifest abuse of discretion. The Appellant did not serve the School District with a copy of his petition of appeal. A hearing in the Office of the Secretary of Education was held on June 11, 1973.

DISCUSSION

The Appellant has appealed from what he contends is a demotion of status and salary, namely his reassignment from the position of Director of the Regional Instructional Materials Center to that of Science and mathematics teacher at the South Mountain Junior High School. Section 1151 of the School Code provides in part:

"...but there shall be no demotion of any professional employee either in salary or in type of position, except as otherwise provided in this act, without the consent of the employee, or, if such consent is not received, then such demotion shall be subject to the right to a hearing before the board of school directors and an appeal in the same manner as hereinbefore provided in the case of the dismissal of a professional employee." 24 P.S., Section 11-1151.

In *Tassone v. School District of Redstone Township*, 183 A. 2d 536, 408 Pa. 290 (1962) it was held that the School Board must present valid reasons for its action at the hearing if a demotion has taken place, otherwise the Board's action will not be sustained. Thus, we are presented with three questions to review in this appeal: was the Appellant demoted; did the Appellant consent to his demotion; and, if there was a nonconsensual demotion, did the School Board present valid reasons for its action?

Clearly the reassignment from a supervisory to a teaching position constitutes a demotion in status. In this case, it is obvious that the Appellant's assignment from the position of Director of the Regional Instructional Materials Center to that of teacher, is a demotion in status. It is also a demotion in salary since the Appellant's annual salary was decreased from \$16,750.00 to \$14,500.00. However, it is our opinion that the Appellant is not objecting in this appeal to his assignment to the teaching position, but instead is objecting to the failure of the Allentown School District to appoint him to the new position of Coordinator of the Allentown School District Media Center. The failure to be appointed to a particular position does not come within the definition of demotion as that term was defined in *Smith v. Darby*, 130 A. 2d 661, 388 Pa. 301 (1967). In that case, the Court said:

"A demotion of a professional employee is a removal from one position and an appointment to a lower position; it is a reduction in type of position as compared with other employees having the same status." *Ibid*, 130 A. 2d at 664.

If the position of Coordinator was identical to or nearly identical to the Appellant's former position of Director of the Regional Instructional Materials Center, we would be more receptive to an argument that the Appellant had been improperly demoted when denied the Coordinator's position. It is wrong for a School Board to remove a professional employee from a position by abolishing it and then creating a supposedly new position when, in fact, all that has occurred is that the position is given a new title. The employee, in such a case, might not object to the demotion from a supervisory to a teaching position because, if the supervisory position is legally abolished, he could be suspended in accordance with Sections 1124 and 1125 of the School Code, 24 P.S., Section 11-1124 and 11-1125, should he refuse the teaching position. On the other hand, if the employee knew that the School Board did not intend to abolish the supervisory position, he would be more likely to challenge the demotion since he would have the possibility of maintaining his previous status. This Office will not accept a procedural slight of hand whereby a School Board attempts to demote a professional employee under the guise that it is exercising its legal right to abolish a position for better school management, when, in fact, it is the Board's intention to maintain that position under a different title.

But, in this case, we are talking about two different positions. The Coordinator will devote all of his time in the service of the Allentown School District instead of half time as the Appellant did in his capacity as Director of the Regional Instructional Materials Center. The Coordinator's position includes responsibilities in the areas of nonprint and print media. The Coordinator supervises the audio visual program and also has duties supervising the library program. This was made clear by the testimony of Dr. Charles Wilson, Superintendent, and Dr. Desmond Noonan, Assistant to the Superintendent for Instruction and Federal Programs. The Appellant, as Director, served the School District almost exclusively in the area of audio visual media. Since the position of Coordinator of the Allentown School District Media Center was a new position, the Allentown

School Board had the right to open the position to applicants in order to find the person who was best qualified.

Only those demotions that are not consented to require a hearing before the demotion can become effective. Consent to a demotion can be implied from Appellant's actions after notice of the demotion is received. In this case, the Appellant did not object to the May 25, 1972 action assigning him to the position of teacher until October 27, 1972, five months later. There is a limit on how long a person has in which to make his objections to a demotion known; five months is clearly beyond any reasonable limit. Our policy has been to allow approximately ten days after the employee has received effective and unequivocal notice of the Board's action. This policy is derived from Section 1121 of the School Code which suggests that the professional employee who is being dismissed has ten days after receiving notice of his proposed dismissal to request a hearing to challenge it. The Appellant knew when the School Board was changing his status from Director to teacher, it was creating the new position of Coordinator of the Allentown School District Media Center. If he thought that he was entitled to the position of Coordinator for the reason that it was essentially the same as his former position as Director, he should have objected to his reassignment to a teaching position within a reasonable period of time after he became aware of the School Board's actions. This he did not do. Instead he applied for the position of Coordinator; anyone who applies for a position would understand that there is the possibility that he will not get that position. It is our opinion that the Appellant's failure to make timely objection to his assignment to a teaching position constitutes consent to that assignment.

Even if we were to find that the Appellant had made timely objection to the Board's action removing him as Director of the Regional Instructional Materials Center, we would still sustain the Board's action. It was stated in the *Smith v. Darby* case, op. cit., that the provisions of the School Code did not prohibit demotions, but simply provided that a nonconsensual demotion should be subject to a hearing. At that hearing the reason for the demotion must be made clear and apparent by the School Board. The professional employee has the burden to show that the Board's action resulted from arbitrary or discriminatory reasons.

At the hearings before the School Board, the District Superintendent, Dr. Wilson, explained why the Appellant was not given the position of Coordinator. We find that the reasons given are valid and acceptable. Dr. Wilson testified that the School District wanted the Coordinator to take a more active role in bringing the audio visual and library materials into the various schools of the District. Based on a meeting with the Appellant during the Spring of 1972, Dr. Wilson indicated that it was his impression that the Appellant was reluctant to carry out that role. Dr. Wilson also mentioned that the duties of the Coordinator were different from those of the Director and that there would be greater involvement by the Coordinator in the area of printed materials. As has already been pointed out in this opinion, the Appellant lacks experience in this area.

Finally, we note that this appeal was not filed with the Secretary of Education within the thirty day period required by Section 1131 of the School Code, 24 P.S., Section 11-1131; the appeal was one day late. Also, the appeal was not filed in accordance with the law in that the School District had no notice that an appeal was being taken by Appellant, which is also required by Section 1131. The School District objected to the Secretary's jurisdiction to hear the appeal because of these errors. These objections are overruled for the following reasons: there is no evidence that the School District was in any way prejudiced by the Appellant's failure to notify it of his appeal. With regard to the fact that the appeal was received in the Office of Secretary of Education one day after the thirty day period, there is a strong possibility that the petition of appeal had been received in the Department of Education prior to that date but that it was not delivered through the interoffice mail to this Office until May 3.

Accordingly, we make the following

ORDER

AND NOW, this 27th day of February, 1975, the Appeal of Earl A. Becker is hereby denied, and the decision by the Board of School Directors of the Allentown School District to assign Dr. Becker to a teaching position is hereby sustained.