a reinstatement does not, of course, prevent the central operating committee from immediately initiating appropriate action to demote Mr. Beck in accordance with the procedures of the School Code.

CEMONTCO could have saved itself considerable expense in this case had it simply given Mr. Beck a hearing. CEMONTCO has offered many reasons for not doing so. Most of these reasons are contradictory and, most certainly, confusing. After Mr. Beck was notified in November 1974 of the plan to reduce him to half time status for the following school year, he submitted his request for a hearing before the school board on what he contended was a demotion. His request was denied on the basis that the board had not as yet taken any formal action. However, the date of the solicitor's letter informing him his request for a hearing had been denied came after formal action was taken. It is irrelevant whether the employe's request comes before or after formal action is taken; as long as the administrative board is on notice that the employe does not consent to the proposed action affecting him and has requested a hearing on the basis that he believes it is a demotion, the board must offer the employe a hearing. At one point in the record in this case, CEMONTCO contended that Mr. Beck was not entitled to a hearing because he was supended; but at another point, CEMONTCO contended he was not suspended. CEMONTCO also contended that the case was not ripe for a hearing before the school board until the beginning of the next school year, even though formal action had been taken in February.

CEMONTCO also contends that if Mr. Beck is entitled to any hearing, it must come under the Local Agency Law, 53 P.S. Section 11301 et. seq. Apparently, no hearing was provided because counsel could not agree whether the hearing should come under the Local Agency Law or under the School Code. CEMONTCO should have offered Mr. Beck a hearing, and let the dispute over which law applies be resolved on appeal, should one be taken. Had that been done, the only issue we would have to review on an appeal pursuant to the School Code would be whether the reasons for reducing Mr. Beck's teaching load and salary are justified and supported by substantial evidence on the record.

Accordingly, we make the following:

ORDER

AND NOW, this 6th day of July, 1976, it is hereby ordered and decreed that the appeal of James W. Beck be sustained and that the Joint Operating Committee of the Central Montgomery County Area Vocational Technical School reinstate him without loss of pay, to a full time position as a mathematics instructor;

And it is further ordered that the Joint Operating Committee provide Mr. Beck a hearing should it decide to pursue its plans to demote him to half time status at one half his regular salary.

* * * *

This is the Appeal of Adelia Stanton, a professional employee from a decision of the Board of School Directors of the Coatesville Area School District

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF EDUCATION, HBG.

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

No. 258

John C. Pittenger
Secretary of Education

OPINION

Adelia Stanton, Appellant herein, has appealed from the decision of the Board of School Directors of the Coatesville Area School District dismissing her on the grounds of incompetence, persistent negligence and persistent and willful violation of the School Laws of Pennsylvania.

FINDINGS OF FACT

1. The Appellant is a professional employee, who began teaching in the Coatesville Area School District in 1960. The Appellant resigned in October, 1966, in order to have a baby; she was reappointed to a first-grade teaching position, effective January 3, 1967, on a probationary basis. She was employed continuously by the school district from that time until June 13, 1969, when she requested and was granted a maternity leave of absence. From January, 1970, until September, 1971, she served as a substitute and in September, 1971, she was appointed to a position as an English teacher at the Coatesville Area Senior High School. In the 1974-75 school year she was transferred from her position as an English teacher to grade four at Terry Elementary School.
2. On September 16, 1974, Mrs. Stanton refused to attend a conference with Mrs. Hannah, the guidance counselor; Mr. Sandiford, the school principal; and Mrs. Boddy, a student's parent. The purpose of the meeting was to determine the educational abilities of the student who had transferred from a parochial school. Mrs. Stanton refused to attend the meeting and to render any opinion about whether the child belonged in the fourth grade because she felt she had inadequate time to observe the student in her classroom.
3. As a result of another conference with the Appellant, Mrs. McCarter, whose daughter was in Mrs. Stanton's class, requested that her daughter be removed from that class. The child was unhappy in Mrs. Stanton's class because she felt Mrs. Stanton showed favoritism. At that conference Mrs. McCarter wanted to discuss her daughter's unhappiness in the class and what she believed was Mrs. Stanton's partiality. Mrs. Stanton simply responded, "I have no favorites in my room." Mrs. McCarter characterized the Appellant's atittude as very cold, and she felt she got nowhere as a result of the meeting. Following the conference, Mrs. McCarter complained of Mrs.Stanton's attitude to the Principal. On October 21, 1974, Mrs. McCarter called Mr. Sandiford and requested that her daughter be removed from Mrs. Stanton's class because of her daughter's loss of interest in school. On November 18, 1974, Mrs. McCarter phoned the Principal and requested that her daughter be removed from Mrs. Stanton's classroom. In a letter dated November 22, 1974, the Principal reassigned Mrs. McCarter's daughter to another teacher for the stated reason that the child's math diagnostic test indicated that she had been misassigned.
4. On September 6, 1974, Mrs. Groce, who was in charge of selecting homeroom mothers, sent a letter to all teachers requesting that they notify her as to their preference for a homeroom mother. When the Appellant did not respond, she placed another note in Appellant's school mailbox and also phoned the school's secretary. Although the Appellant never expressed a preference, she told Mrs. Groce on back-to-school night that the homeroom mother selected was objectionable. In defense of her selection, Mrs. Groce asked why Appellant had not responded to her letter. Mrs. Stanton answered, "I don't know anything about your silly letter."
5. Because Appellant was absent on October 22, which was open house during American Education Week, the parents were invited back to Appellant's classroom. Mrs. Edwards made a request to observe Appellant's class on October 23, 1974, during American Education Week. Appellant refused to allow Mrs. Edwards to attend class despite the fact that Mrs. Edwards had been granted permission by the Principal. The stated reason for Appellant's refusal was that Mrs. Edwards had expressed a desire to observe math class, and math class was not being taught that day. Appellant was aware of the school's open door policy during American Education Week.
6. On January 6, 1975, the Principal suggested that Mrs. Holbrook attend Appellant's class to observe what her daughter was learning. Mrs. Holbrook had complained to the Principal that she was dissatisfied with what her daughter was learning. Following the Principal's suggestion, Mrs. Holbrook made an appointment to observe Appellant's class on January 9, 1975. The Principal

did not inform Appellant of his invitation to Mrs. Holbrook. When Mrs. Holbrook arrived on January 9, 1975, Appellant refused to admit her to the classroom. Appellant persisted in her refusal despite a phone conversation with the Principal, who was home ill, in which he explained the situation. On February 7, 1975, Mrs. Holbrook withdrew her daughter from school when the administration refused to assign her child to a class other than Mrs. Stanton's. The reason given for the withdrawal was Mrs. Stanton's attitude toward the child.

7. A student in Appellant's class was hard of hearing. She was participating in a mainstreaming program in which she spent the morning in Terry Elementary School and the afternoon at the Child Development Center. Mrs. Evans was the teacher hired to work with the hard of hearing students in the afternoon. Appellant was requested to fill out forms which indicated the student's assignments for each day. Mrs. Evans could then review each day's work with the child. Appellant refused to fill out these forms.

8. In a memorandum dated October 23, 1974, the Principal notified Appellant that he felt her relationships with parents, teachers, children and the administration were unsatisfactory.

9. On November 1, 1974, Dr. Becker, the Director of Elementary Education, met with Appellant and the Principal. At that conference, Dr. Becker indicated that Appellant's performance for the year was unsatisfactory because of the problems that existed in Appellant's relationships with parents and colleagues. Specifically, he referred to incidents mentioned in a memorandum of October 23, 1974, from the Principal to Mrs. Stanton. He focused upon the incident with Mrs. Edwards because the district had an open visitation policy for parents to observe in the classroom. In reference to the Boddy incident, he also stressed the importance of meeting with parents to discuss problems. Finally, he emphasized that a cooperative day-to-day relationship between the classroom teacher and the teacher from the Child Development Center was imperative. Specifically, he requested that Mrs. Evans be given access to Appellant's classroom and be given Tammy Heidlauf's daily assignments. A letter summarizing the conference was sent on November 5, 1974.

10. On November 1, 1974, the Principal observed Appellant's class. Her total rating was unsatisfactory.

11. During the morning of February 10, 1975, Appellant was again observed by the Principal. Appellant refused to teach her class when being observed by the Principal. She directed comments to the Principal in front of her students that his presence was disturbing the class.

12. During the afternoon of February 10, 1975, Dale E. Becker, the Director of Elementary Education, observed the Appellant and rated her unsatisfactory for her work to that date.

13. On the morning of February 11, 1975, Appellant was rated unsatisfactory by Ross L. Bortner, Assistant Superintendent for the Coatesville Area School District.

14. On the afternoons of February 11, 1975, and February 13, 1975, Principal rated Appellant's performance unsatisfactory.

15. In January and February, Appellant refused to attend several staff and team meetings because she forgot or was too busy. The Principal recorded Mrs. Stanton as being absent from meetings without a valid reason on the following dates: November 18, 1974; January 6, 1975; January 7, 1975; January 29, 1975; February 10, 1975; February 11, 1975.

16. By letter dated February 14, 1975, Appellant was notified by the president and secretary of the school board of her dismissal, pending a hearing. Attached to the letter was a statement of charges.

17. Hearings before the school board on the charges were held on March 6, 1975, March 17, 1975, and April 7, 1975. On April 17, 1975, at an open board meeting attended by Appellant, the seven board members who attended the three hearings voted unanimously to discharge Appellant on the grounds of incompetence, persistent negligence, and persistent and willful violation of the School Laws of Pennsylvania. By letter dated April 18, 1975, Appellant's attorney was informed of the board's decision.

18. On May 8, 1975, the Appellant's petition of appeal was received in the office of the Secretary of Education. A hearing on the appeal was scheduled for June 6, 1975, but at the request of counsel was continued and was held on July 3, 1975.

19. At the three school board hearings on dismissal, the school board solicitor presented the case for dismissal and ruled on the admissibility of evidence.
20. Section M of the 1972 Professional Employees' Handbook of the Coatesville Area School District states in relevant part:

> "Before a teacher is rated unsatisfactory, a minimum of six observations involving at least three different observers (building principal, department chairman, area coordinators, directors of elementary or secondary education, or the assistant superintendent for instruction) should be made. In addition, a conference of the three participating observers should be held with the teacher involved. If a teacher feels that he has been given an unsatisfactory rating unjustifiably, he may initiate the grievance procedures as outlined on pages 4 to 6 in the contract."

21. Appellant invoked the grievance procedure set forth in Section M to challenge her unsatisfactory ratings within 90 days of the occurrence of the grievance, which complied with the grievance procedures set forth in Section V. (c.) (1.) of the 1973-75 collective bargaining agreement between the Coatesville Area Teachers Association and the Coatesville Area School District.
22. At a meeting on October 17, 1974, the Coatesville Area School Board adopted a classroom observation and performance report in lieu of the Temporary and Professional Employee's Rating Sheet (DEBE-333). Although Appellant was evaluated using the alternative plan, that plan was not approved by the Department of Education until August 5, 1975.
23. The district superintendent did not give written approval of all the unsatisfactory ratings. He did testify that he reviewed the evaluation forms after they were presented to him by the Director of Elementary Education.

DISCUSSION

Appellant contends that the charges of incompetence, persistent negligence and persistent and willful violation of the School Laws of Pennsylvania are not supported by substantial evidence and that the school board violated her due process rights when it allowed the solicitor to act in the dual role of prosecutor and judge. Appellant further asserts that the rating procedures used to evaluate her performance were in violation of Sections 1123 and 1125 of the Public School Code of 1949, P.L. 30, as amended, 24 P.S. Sections 11-1123 and 11-1125. Appellant's final reason for urging her reinstatement is that the school district violated her rights under the collective bargaining agreement by refusing to allow a grievance contesting the fairness of the ratings given to her to proceed to binding arbitration.

With respect to Appellant's second contention regarding due process, we hold that her due process rights were violated by the school solicitor acting in the dual role of "prosecutor" and judge. Recent Pennsylvania court decisions have held that a single attorney may not in the same case handle or "prosecute" the case before the agency and also render legal advice to the agency regarding the case in question. **Horn v. Township of Hilltown**, 461 Pa. 745, 337 A.2d 858 (1975); **English v. North East Board of Education**, 22 Pa. Commonwealth Court 240, 348 A.2d 494 (1975); **In Re: Appeal of Feldman**, 21 Pa. Commonwealth Court 451, 346 A.2d 895 (1975); **Pennsylvania Human Relations Commission v. Feeser**, 20 Pa. Commonwealth Court 406, 341 A.2d 584 (1975).

The hearing proceedings in **English v. North East Board of Education** are analogous to Appellant's hearing before the school board. In **English**, a school employee was dismissed. The solicitor presided at the hearing and made several evidentiary rulings. At the same time, he presented the testimony that tended to show the unsatisfactory ratings of the teacher. The Commonwealth Court held this was a denial of due process. Because the solicitor's role in the

instant case was identical to the solicitor's role in **English**, we are compelled to find that Appellant has been denied due process.

When such an improper procedure occurs, the case must be remanded for a new hearing. **Horn v. Township of Hilltown**, 461 Pa. 745, 337 A.2d 858 (1975); **English v. North East Board of Education**, 22 Pa. Commonwealth Court 240, 348 A.2d 494 (1975); **In Re: Appeal of Feldman**, 21 Pa. Commonwealth Court 451, 346 A.2d 895 (1975); **Pennsylvania Human Relations Commission v. Feeser**, 20 Pa. Commonwealth Court 406, 341 A.2d 584 (1975). Accordingly, the decision of the school board is reversed and we remand the case for proceedings consistent with this opinion.

At the new hearing, Appellant will again face the charge of incompetency. Two unsatisfactory ratings are required before a professional employe can be dismissed for incompetency, **Appeal of Sullivan County Joint School Board**, 410 Pa. 222, 189 A.2d 249 (1963). This requirement of two unsatisfactory ratings is inextricably linked to Appellant's final contention that the ratings did not comport with rating procedures set forth in Section M of the 1972 Professional Employees' Handbook of the Coatesville Area School District.

The Supreme Court of Pennsylvania, in **Milberry and Philadelphia Federation of Teachers v. Board of Education of the School District of Philadelphia**, ____Pa. ____, 354 A.2d 559 (1976), held that a school district may agree in a collective bargaining agreement to arbitrate an unsatisfactory performance rating of a teacher. In finding one such agreement valid, the Supreme Court stated, *inter alia:*

> "The Public School Code provides that the tenured teacher has the right to a public hearing before the board, that two-thirds of the board members must vote for dismissal, and that the tenured teacher has the right to appeal an adverse decision to the Secretary of Education and eventually to the courts. The agreement neither modifies nor creates an alternative to that dismissal procedure...." (emphasis added) 354 A.2d 559, 562 (1976).

The Supreme Court held that the review by an arbitrator of the propriety of a rating merely provides an additional procedural protection. That additional protection is an impartial determination of an important evidentiary matter -- the fairness of the unsatisfatory rating.

Milberry stressed the limited effect of an artibrator's review of an unsatisfactory rating upon the dismissal process. The arbitrator's scope of review is limited by the provision on rating in the particular collective bargaining agreement that he is reviewing. Under Section 903 of the Public Employee Relations Act of 1970, P.L. 563, as amended, 43 P.S. Section 1101.903 [hereinafter referred to as PERA], the arbitrator resolves "disputes or grievances *arising out of the interpretation of the provisions of a collective bargaining agreement.*" (emphasis added) In the instant case the unsatisfactory ratings are reviewable by the arbitrator only to test justifiability. **Milberry** also limited the effect of the arbitrator's review to a determination of whether the particular unsatisfactory ratings may be used as evidence to support incompetence.

Finally, if a school district questions an arbitrator's authority to make a decision binding on the parties to the agreement, the Pennsylvania Labor Relations Board under Section 1301 of PERA, 43 P.S. Section 1101.1301 determines whether the grievance must be submitted to binding arbitration.

After reorganizing the limitations upon the arbitrator's review, it is also important to evaluate the impact of that review on the school board's decision and the Secretary's Appellate review. When a professional employee elects to have an arbitrator review the fairness of his/her rating, under **Milberry** the school board and the Secretary will be bound by the arbitrator's determination of whether the unsatisfactory rating's were valid. Whether there are two unsatisfactory ratings to support the charge of incompetency can be decided only after the arbitrator makes his final determination on the ratings.

In the instant case, the teacher has elected to have the arbitrator determine the justifiability of the unsatisfactory rating. In so doing, she has waived the right to contest the unfairness of the unsatisfactory ratings before the school board or the Secretary.

As stated above, the arbitrator's right to make a binding decision under a specified collective bargaining agreement is decided by the Pennsylvania Labor Relations Board. The PLRB, in **PLRB V. Coatesville Area School District,** PERA-C-7158-E, has held that the Appellee school district must submit the propriety of Appellant's unsatisfactory ratings to binding arbitration. Therefore, at the new hearing before the school board the arbitrator's determination of the fairness of Appellant's ratings will be binding. Before the school board's dismissal of the Appellant on the ground of incompetence can be finalized it must have the arbitrator's decision as to the propriety of the ratings.

Accordingly, we make the following:

ORDER

AND NOW, this 13th day of August, 1976, it is hereby Ordered and Decreed that the decision of the Board of School Directors of the Coatesville Area School District be reversed, and that the case be remanded to the Board.

* * * *

GRANT D. STEFFEN, Appellant
v.
The Board of School Directors
of the South Middleton Township School District — Teacher Tenure Appeal No. 259

OPINION

John C. Pittenger
Secretary of Education

Grant D. Steffen, Appellant herein, has appealed from the decision of the board of school directors of the South Middleton Township dismissing him as a professional employe on the grounds of incompetency.

FINDINGS OF FACT

1. Mr. Steffen, Appellant, is a professional employe. He is certificated in the areas of Special Education, Elementary Education, and Social Studies. He graduated from Lycoming College in 1962 and taught two years at Central Dauphin School District as an elementary teacher in grades 4 and 5. During the 1964-65 school year he worked as an elementary teacher in Harrisburg School District teaching grade 5. During the 1965-66 school year he taught Special Education, grades 7 through 9, at the Warwick Union Junior High School. From 1966 through 1968 he taught Special Education in the Lower Dauphin School District. In August of 1968, he began his employment in the South Middleton Township School District as a teacher of special education.
2. In June, 1972, Dr. Joseph M. Mainello became superintendent of the South Middleton Township School District. Dr. Mainello instituted a uniform evaluation procedure for all professional employes, requiring probationary employes to be rated at least four times a year and tenured employes at least twice a year. Before Dr. Mainello's appointment, the school district lacked established evaluation procedures.
3. In the summer of 1973, Dr. Mainello requested and received school board approval to revise the district's special education program for secondary students. Under the old program, these