IN THE OFFICE OF THE SECRETARY OF EDUCATION
COMMONWEALTH OF PENNSYLVANIA

TUCKER BIRKHEAD	:	
Appellant	:	
	:	**Teacher Tenure Appeal**
v.	:	**No. 01-24**
	:	
	:	
DOWNINGTOWN AREA SCHOOL DISTRICT	:	
Appellee	:	

OPINION AND ORDER

Tucker Birkhead ("Appellant" or "Mr. Birkhead"), appeals to the Secretary of Education ("Secretary") from the decision of the Board of School Directors of Downingtown Area School District ("DASD" or "District") demoting him from the position of assistant principal to the position of classroom teacher.

FINDINGS OF FACT

1. Mr. Birkhead has been employed by the District since 2003 in a variety of positions. (T BIRKHEAD[1] 26, 341)
2. Appellant has been employed as the assistant principal at the Marsh Creek Sixth Grade Center ("Sixth Grade Center") since 2014. (T BIRKHEAD 49-50)
3. As assistant principal at the Sixth Grade Center, Mr. Birkhead had supervisory authority over teachers and school staff. (T BIRKHEAD 50-51; District Exhibit 12).
4. During his employment with the District, Appellant's employee evaluations were proficient and/or distinguished in sections. (T BIRKHEAD 340; Exhibits TB-6, TB-7, and TB-8)

[1] As used throughout, "T BIRKHEAD" refers to the record of proceeding in this matter that occurred before the Downingtown Area School District.

5. By a document entitled Notice of Allegations; Opportunity To Respond; Investigative Meeting, Administrative Leave with Pay and Directives ("Informal Hearing[2] Notice") dated August 23, 2023, the District provided Appellant with the following allegations:

    a. Making a statement about a student's mother by referring to her physical appearance;

    b. Flirting in school with a teacher in front of other school staff;

    c. Sharing a photo with the Principal in the presence of other staff members of the employee with whom he flirts with a 2023 staff shirt that was too tight;

    d. Making comments with sexual innuendo in front of staff;

    e. Making comments with sexual innuendo at lunch, causing at least one member of the staff to stop having lunch with him;

    f. Making jokes of a sexual nature at team meetings;

    g. Sharing sexually inappropriate post-it notes hung within his closet door with the teacher with whom he flirts at school;

    h. Commenting on a former administrative assistant's (female) chest size, and;

    i. Sending a photo of him sitting in front of a statue with his head between the breasts of a statue. (District Exhibit 4)

6. DASD's Informal Hearing Notice included the following statement,

    "At the meeting/informal hearing, you will be asked questions relevant to the allegations and what disciplinary action, if any, should be taken. A record will be made and kept of the hearing/meeting. Any statement that you make during the meeting can be used against you. However, you are required to cooperate in this proceeding and to answer all questions fully and accurately. If you refuse to cooperate in this investigation and/or refuse to answer any of the questions asked of you, your

[2] The terms, "Informal Hearing", and "Loudermill hearing", were used throughout the District proceedings to refer to the same hearing held on August 30, 2023.

refusal will be considered insubordination which itself can lead to disciplinary action, including dismissal." (District Exhibit 4)

7. The District held an Informal Hearing to discuss the Notice of Allegations contained in the Informal Hearing Notice on August 30, 2023. (District Exhibit 4)
8. Appellant was represented by counsel at the August 30, 2023, Informal Hearing. (District Exhibit 7)
9. Mr. Birkhead received a Notice of Demotion; Request for Consent to Demotion; Failing Rating in the Domain of Professionalism; Directives and Warning dated August 31, 2023. (District Exhibit 6)
10. The District sent a Statement of Charges and Notice to Right to Hearing dated October 24, 2023, to Mr. Birkhead containing the same factual allegations contained in the Informal Hearing Notice, dated August 23, 2023. (District Exhibits 1, 4)
11. A Formal Hearing before the DASD Board of School Directors regarding the recommended demotion of Mr. Birkhead was held on November 29, 2023. (District Exhibit 1)
12. Mr. Birkhead admitted that when speaking to Matthew Barr, principal at the Sixth Grade Center, he referred to the mother of a student as, "good looking" and characterized the reference as, "guy talk". (T BIRKHEAD 52)
13. Mr. Birkhead admitted to making inappropriate jokes in workplace emails and in the physical presence of school employees. (T BIRKHEAD 60-61)
14. As an assistant principal, Mr. Birkhead supervised and evaluated the performance of teachers and other school employees. (T BIRKHEAD 50)

15. Mr. Birkhead admitted that as an assistant principal, he was expected to ensure that teachers and school employees conduct themselves appropriately at work. (T BIRKHEAD 51)
16. Mr. Birkhead admitted that at the Informal Hearing, he testified that he allowed K.Y., a teacher under his supervision, to place Post-it notes of a sexual nature inside a closet door in the workplace. (T BIRKHEAD 53-55)
17. Appellant admitted to allowing K.Y. to put a Post-it of a sexual nature inside his closet door at work because K.Y. was Appellant's "best friend" other than his "wife". (T BIRKHEAD 54-55)
18. Mr. Birkhead admitted to allowing teachers to refer to him as, "BJ", and viewed the nickname as "double entendre". (T BIRKHEAD 78)
19. Mr. Birkhead admitted to turning the nonsexual reference, "BJs from this point forward" in the subject line of an employee email into something sexual by writing, "I love this subject line.", in an email that Appellant forwarded to K.Y. (T BIRKHEAD 82, 83; District Exhibit 5)
20. Mr. Birkhead admitted to the use of the term, "dinger" as double entendre in reference to a "private part" in an email to school employees and, in front of staff in the lunchroom, as opposed to a different reference to the bell clapper on the Liberty Bell. (T BIRKHEAD 67-71)
21. In response to a staff member's email questioning where the "dinger" was in an illustration of a bell, Mr. Birkhead responded, "I brought my dinger but it was out of the frame." (T BIRKHEAD 69; District Exhibit 5)

22. Mr. Birkhead admitted that the use of the words, “explicit videos” in an employee email was intended as double entendre and confirmed that he provided testimony during the Informal Hearing that his conduct was not appropriate for a person in his position. (T BIRKHEAD 75)
23. In response to a conversation by staff members about a former female employee’s breasts, Mr. Birkhead admitted to stating, “. . . I said I think they’re real. . .” (T BIRKHEAD 85)
24. Mr. Birkhead admitted that he engaged in unprofessional behavior. (T BIRKHEAD 97)
25. Dr. Caroline Duda (“Dr. Duda”), DASD director of human resources, testified that the decision to demote Mr. Birkhead was made after an investigation of school employee complaints and Appellant’s admissions during the Informal Hearing. (T BIRKHEAD 127)
26. Dr. Duda testified that the decision to demote Mr. Birkhead was also based on a determination that he was not suited for the assistant principal position because, “. . . of his lack of professionalism and his inability to understand professional relationships and boundaries with subordinates.” (T BIRKHEAD 128)
27. Ultimately, the DASD Board of School Directors issued an order demoting Mr. Birkhead from the position of assistant principal to the position of teacher. (DASD Board of School Director Decision, November 29, 2023; District Exhibit 3)

DISCUSSION

I. Mr. Birkhead Received Due Process of Law

In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985), the United States Supreme Court held that a public employee has a limited pretermination right to notice of charges against him and an opportunity to respond. See *Antonini v. W. Beaver Area Sch. Dist.*, 874 A.2d 679, 686 (Pa. Cmwlth.2005) (quoting *Loudermill*). In the current matter, Appellant was demoted but his employment was never terminated. Notwithstanding that distinction, Mr. Birkhead was provided a notice of allegations prior to an Informal Hearing held on August 30, 2023. (District Exhibit 4) Subsequently, Mr. Birkhead was provided with a Statement of Charges and Notice of Right to Hearing dated October 24, 2023, prior to the Formal Hearing held before the DASD Board of School Directors on November 29, 2023. (District Exhibit 1) Appellant had the opportunity to respond to the District's allegations and/or charges. Moreover, Mr. Birkhead was represented by counsel at both the Informal Hearing and Formal Hearing prior to his demotion. Based on the record, I conclude that there was due process of law prior to Appellant's demotion.

II. The Denial of Appellant's Request for the Production of a File and Additional Testimony Was Within the Hearing Officer's Discretion.

Before deciding the substantive merits of this appeal, it is necessary to address Appellant's February 9, 2024, motion requesting the production of an investigative file and a witness for deposition. The motion was denied by the hearing officer without prejudice. Subsequently, Appellant filed a motion for reconsideration of the hearing officer's previous ruling and that motion was denied with prejudice. Despite Appellant's request, there is nothing in the Teacher Tenure Appeal Act, or in applicable regulations requiring discovery or additional testimony during a Teacher Tenure appeal.

Section 351.8 states,

> (a) Testimony shall be received and recorded at the hearing before the board. The hearing before the Secretary will be held for the purpose of reviewing the legal questions involved. However, additional testimony may be taken at the discretion of the hearing examiner.
>
> (b) Where there has been no prior hearing before the board, testimony may be taken subject to the discretion of the hearing examiner.
>
> (c) If either party to a proceeding wishes to offer testimony, a notice of intent to offer testimony shall be delivered to the Secretary and to opposing counsel at least 14 days before the hearing. 22 Pa. Code §351.8

While additional testimony may be taken at a Teacher Tenure Appeal hearing, pursuant to Section 1131 of the School Code, it is within the discretion of the Secretary to decide whether that additional evidence is admitted. 24 P.S. §11-1131. 22 Pa. Code §351.8. *Dohanic v. Department of Education*, 533 A.2d 812 (Pa. Cmwlth. 1987); appeal denied 541 A.2d 1392 (Pa. 1988). Therefore, it was within the hearing officer's discretion to deny Appellant's motions. Moreover, due to the extensiveness of the record developed at the District level proceedings that included email communications acknowledged by Mr. Birkhead, and his own testimony, the hearing officer's denial of Appellant's motions will be left undisturbed.

III. The School District Had Sufficient Grounds For Demoting Mr. Birkhead

As for the substantive issues involved in this appeal, Appellant's demotion is subject to Section 1151 of the School Code which provides in relevant part,

> . . . there shall be no demotion of any professional employe either in salary or in type of position, except as otherwise provided in this act, without the consent of the employe, 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 employe. 24 P.S. §11-1151

For a demotion to be overturned on other than procedural grounds, the employee has the burden of proving the action to be arbitrary, discriminatory or founded upon improper

considerations. *Lucostic v. Brownsville Area School District*, 6 Pa. Commonwealth Ct. 587, 297 A.2d 516 (1972). *Sharon City School District v. Hudson*, 34 Pa. Commonwealth Ct. 278, 286, 383 A.2d 249, 253 (1978), *Smith v. Darby School District*, 388 Pa. 301 (1957). Furthermore, there is a presumption that the action of a school board in a case involving a demotion is valid. *Department of Education v. Kauffman*, 21 Pa. Commonwealth Ct. 89, 343 A.2d 391 (1975).

A comparison of the statutory provisions covering the dismissal of a professional employee under Section 1122 of the School Code with the provision covering the demotion of the employee under Section 1151 indicates the former sets forth the reasons and the procedure for an employee's dismissal. However, unlike Section 1122, Section 1151 merely provides the procedure to be followed but not the underlying reasons to support a demotion. *Smith*, 388 Pa. 301, at 307. Therefore, any professional employee may be demoted if the employee is provided with a hearing and, the demotion is not made in an arbitrary or discriminatory manner. Moreover, the just cause standard required for an employee dismissal is not applicable to an employee demotion under Section 1151. *Id*.

Appellant asserts that the District lacked sufficient grounds for his demotion and, the direct testimony provided as evidence was based on hearsay. If the only evidence of record in support of Appellant's demotion was uncorroborated hearsay, such a foundation would be problematic, if not fatal, to the District's position. However, there is sufficient evidence of record in the form of Mr. Birkhead's own admissions related to unprofessional written and oral communications that support the District's decision to demote him due to the supervisory professional responsibilities of an assistant principal.

The record in this case is replete with admissions by Mr. Birkhead regarding the specific conduct alleged and the unprofessional nature of that conduct. As the supervisor of teachers and other staff, Mr. Birkhead admitted that he and his "best friend", K.Y., a teacher under his supervision, would, sometimes engage in, "inappropriate jokes", in front of school staff. (T. BIRKHEAD 60) Appellant also referred to a student's mother as, "good looking" to his supervisor, Matthew Barr, principal at the Sixth Grade Center, and characterized the statement as, "guy talk". (T BIRKHEAD 52) Another lapse in professional conduct included Mr. Birkhead's comment about the breast size of a former employee. (T BIRKHEAD 85) Specifically, instead of modeling professional behavior or taking action to stop an inappropriate workplace conversation, Mr. Birkhead added to the conversation by expressing his own opinion about whether a former employee's breasts were real. *Id*.

Mr. Birkhead also admitted that he made comments in front of staff containing double entendre and sexual innuendo. Examples of Mr. Birkhead's conduct include permitting staff to refer to him as "BJ" and his own use of the term in a sexual way (T BIRKHEAD 78; District Exhibit 5). Mr. Birkhead also used the term, "dinger", a term referenced in staff emails to identify the clapper on the Liberty Bell, by responding to the question, "Where's the dinger?", by stating "I brought mine but it's not in the frame." (T BIRKHEAD 69; District Exhibit 5) Another example involved Appellant's statement that, "I feel bad about missing explicit videos", in response to a staff email. (T BIRKHEAD 75; District Exhibit 5)

While Appellant contends that different individuals may have a different understanding of the meaning of the terms, "sexual innuendo", or, "double entendre", the issue on appeal is not Mr. Birkhead's intent to offend others. The appropriate legal standard to apply is to inquire whether the demotion was made in an arbitrary or discriminatory manner. *Harris v. School*

District of Philadelphia, 624 A.2d 784, 786 (Pa. Cmwlth. 1993). An arbitrary action is one "based on random or convenient selection rather than on reason." Moreover, an action is not arbitrary merely because it does not effectuate a policy in the most effective or efficient manner, so long as it has some rational basis. *Bd. of Pub. Educ. of Sch. Dist.* v. Thomas, 399 A.2d 1148 (1979).

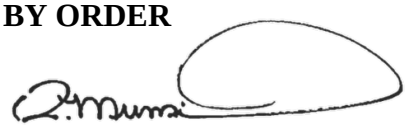
Regardless of the intent of Appellant's written and oral communications in the workplace, Mr. Birkhead admitted that his conduct was inappropriate for a professional setting. (T BIRKHEAD 97) Due to the multiple examples of improper workplace communications and Mr. Birkhead's admissions regarding his unprofessional conduct, I conclude that Appellant has failed to show the demotion was arbitrary, discriminatory, or founded upon improper considerations. Therefore, the District had sufficient grounds to demote Mr. Birkhead. Accordingly, I affirm the District's decision and issue the following order.

ORDER

AND NOW, this 15 th day of July 2024, it is ordered the Downingtown Area School District's demotion of Tucker Birkhead is hereby affirmed.

Date Mailed:

BY ORDER



Khalid N. Mumin, Ed.D.
Secretary of Education

Email, Mailing, and/or Personal Delivery Date: **July 16, 2024**

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