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EDUCATION LAW REPORT

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SCHOOL DISTRICT MUST PROVE STUDENT IS NOT A RESIDENT

G.W. v. Avonworth Sch. Dist., 297 A.3d 28 (Pa. Commw. Ct. June 2, 2023). The Pennsylvania Commonwealth Court confirmed, among other evidentiary issues, that when challenging the residence of an enrolled student a school district has the burden to prove the student resides outside the district. In the absence of compelling evidence, the student will remain enrolled, even if the family has produced limited or no evidence the student resides within the district.

SUMMARY AND FACTUAL BACKGROUND

A community member notified Avonworth School District ("District") a District student ("Student") lived with his mother ("Mother"), outside of District boundaries. Student was enrolled in the District based on the father's ("Father") address, located within the District. The District contracted with a private investigator to conduct surveillance of the Mother's home. On seven mornings between October 15, 2021 and November 10, 2021, Student was observed leaving Mother's home in the morning and riding to school in Mother's vehicle. The District notified Father that Student was not a District resident and therefore was not entitled to enrollment within the District. Father requested a hearing before the Board of Directors of the District. At the hearing, the District presented the evidence gathered by the private investigator, along with testimony from the District Superintendent who heard Student's Mother say Student was "staying with her" outside the District.

At the hearing before the Board of Directors, the Father testified Student splits time between the Father and Mother's home, and that when Student stays with him, the Father drops Student at the Mother's home early each morning on Father's way to work. Father explained the school counselor suggested Student should not be left alone due to his self-destructive behaviors, and so the Father drops Student off instead of leaving Student alone at Father's residence.

After the hearing, the District's Board of Directors held Student was not a District resident, and the District was not obligated to provide a free public education. Father appealed this determination to the Court of Common Pleas, which held the District had not proved the Student lived outside of the District a majority of the time. The District then appealed the trial court's order to the Pennsylvania Commonwealth Court, which upheld the trial court's decision.

DISCUSSION

The Pennsylvania Public School Code states, "A child shall be considered a resident of the school district in which his parents or the guardian of his person resides." 24 P.S. § 13-1302(a).

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Regulations of the Pennsylvania Department of Education ("PDE") offer guidance when a student's parents reside in different school districts:

> [t]he child may attend school in the district of residence of the parent with whom the child lives for a majority of the time, unless a court order or court approved custody agreement specifies otherwise. If the parents have joint custody and time is evenly divided, the parents may choose which of the two school districts the child will enroll for the school year. 22 Pa. Code § 11.11(a).

The District first argued the Student had the burden to prove he resided within the District according to the following guidance from PDE: "The school district or charter school has no obligation to enroll a child until the ***parent, guardian, or other person*** having control or charge of the student making the application has ***supplied proof of the child's age, residence, and immunizations as required by law***." 22 Pa. Code § 11.11(b)(emphasis added).

The Commonwealth Court rejected the District's argument explaining Section 11.11(b) requires parents to provide proof of residency upon their initial application for enrollment within the District. However, the school district has the burden of proof when it challenges a student's residency after initially accepting the student's application for enrollment. The Court explained, "The School District could have declined to enroll Student if his residency was unclear at that time. When the School District thereafter challenged Student's residency, the School District had the burden to show that Student was no longer a School District resident."

The Commonwealth Court also addressed testimony from the District Superintendent regarding statements by the Mother that the Student lived with her. The Court held this was inadmissible hearsay testimony because the Mother was not called to testify before the District Board of Directors. The Court explained in administrative hearings, such as the hearing before the Board, hearsay evidence will be allowed "if it is corroborated by any competent evidence in the record." However, the Court held the private investigator's surveillance evidence did not corroborate the Mother's alleged statement because the Father explained why the Student was at the Mother's address on the dates in question. Therefore, the Court explained the superintendent's testimony was impermissible hearsay.

The Court upheld the trial court's decision and explained the District's surveillance evidence was not sufficient to prove the Student resided outside the District, given the Father's explanation that he drove the Student to the Mother's home on the days the surveillance evidence was gathered.

PRACTICAL ADVICE

In challenging an enrolled student's residency, the school district has the burden to prove the student lives outside district boundaries. Therefore, districts should work with their legal counsel to ensure they are gathering sufficient evidence in the event of an appeal by the family.

SCHOOL DISTRICT SUBJECT TO SUIT FOR MANNER OF COMPLETING ACT 168 ("PASS THE TRASH") FORM

Dale McClendon v. The School District of Philadelphia, 2023 WL 4237080 (E.D. Pa 2023). (Federal court held that a school district was subject to due process and breach of contract claims for the manner in which it completed a former employee's Act 168 form).

BACKGROUND

Dale McClendon was employed as a special education assistant teacher by the School District of Philadelphia. In the fall of 2013, McClendon was assigned to care for a specific special needs student at his school, who was part of the class taught by Linda Fitzpatrick. Fitzpatrick previously taught this student during the 2012-2013 school year, during which the student broke two of Fitzpatrick's fingers. Because of the student's behavioral issues and Fitzpatrick's frustration with teaching the student for two years in a row, Fitzpatrick frequently asked McClendon to take the student out of her classroom to work with the student one-on-one. After McClendon was injured by this student during the fall of 2013, however, McClendon told Fitzpatrick that the student would need to spend more time in Fitzpatrick's classroom. Fitzpatrick allegedly reacted angrily to McClendon's telling her that the student would need to be in her classroom more frequently.

Shortly after this conversation, Fitzpatrick notified the District that she witnessed McClendon inappropriately lying on the floor with the student and physically striking the student. According to McClendon, these allegations were entirely false and were created so that Fitzpatrick could avoid interacting with the special needs student and so that the student would be removed from her school. After Fitzpatrick reported these allegations, McClendon was arrested and charged with simple assault, harassment, and endangerment of the welfare of a child. At the preliminary hearing in the criminal case against McClendon, Fitzpatrick testified regarding the alleged abuse that she witnessed. But at the conclusion of the hearing, the presiding judge repudiated Fitzpatrick's allegations and credibility, resulting in McClendon being acquitted of the charges.

After the conclusion of the criminal action and the dismissal of all charges, McClendon filed a defamation action against Fitzpatrick and the District for advancing false allegations of abuse against him. The parties ultimately agreed to settle McClendon's civil action, along with a related grievance filed by his union on his behalf. Among the terms of the settlement, the District agreed to reinstate McClendon or – should he fail to return to work – provide McClendon with a neutral employment reference. The parties also jointly agreed to a non-disparagement clause. McClendon ultimately resigned from his employment with the District.

Since separating from the District, McClendon struggled to find employment opportunities, repeatedly interviewing for positions but never hearing back from potential employers. McClendon eventually secured a position with a charter school. As part of the application process for this position, the school required McClendon to complete an Act 168 form and requested his prior employers to complete that form. The Act 168 Form requires the applicant and the former employer School District to answer "Yes" or "No" in response to the following questions:

> *Have you (Applicant) ever / To the best of your knowledge, has Applicant ever:*
>
> *Been the subject of an abuse or sexual misconduct investigation by an employer, state licensing agency, law enforcement agency, or child protective services agency (unless the investigation resulted in a finding that the allegations were false)?*
>
> *Been disciplined, discharged, non-renewed, asked to resign from employment, resigned from, or otherwise separated from employment while allegations of abuse or sexual misconduct were pending or under investigation or due to adjudication or findings of abuse or sexual misconduct?*
>
> *Had a license, professional license, or certificate suspended, surrendered, or revoked while allegations of abuse or sexual misconduct were pending or under investigation or due to an adjudication or findings of abuse or sexual misconduct?*

McClendon answered each question "No," but the District answered "Yes" to the first two questions. McClendon was then terminated from his employment with the charter school for allegedly providing false information.

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McClendon subsequently filed suit in federal court against the District claiming a violation of due process rights and breach of his settlement agreement. The court rejected the District's motion to dismiss the complaint, concluding that McClendon stated viable claims.

DISCUSSION

The court concluded that the circumstances alleged by the complaint were sufficient to state a due process claim for deprivation of McClendon's reputational interests. The court explained that the first question on the form asked the District whether McClendon had ever "[b]een the subject of an abuse or sexual misconduct investigation by any employer, state licensing agency, law enforcement agency, or child protective services agency" – but this question explicitly excluded any investigation which "resulted in a finding that the allegations were false." Despite McClendon having been acquitted of the charges following a finding that the accuser, Fitzpatrick, was not credible, the District nonetheless responded affirmatively to this question, thus implying that McClendon was guilty or likely guilty of abusing a student. That the District was willing to reinstate McClendon or provide him with a neutral reference should he seek employment elsewhere was consistent with his argument that the District considered the allegations to be false.

The court also concluded that the actions of the District, as alleged, could support a claim for breach of the non-disparagement clause of the parties' settlement agreement. The court rejected the District's argument that McClendon's claim was barred by the provision of Act 168 providing immunity to school districts for responding to the questionnaire since the statute excludes immunity for providing information known to be false.

PRACTICAL ADVICE

The *McClendon* decision illustrates the importance to school administrators of carefully considering the questions asked of former school employers by the Act 168 form. While the statute generally immunizes school officials from responding to the inquiries, that immunity does not extend to providing information that is untrue. Here, that the former employee was investigated for abuse or sexual misconduct did not warrant an affirmative response where the investigation determined the allegations of abuse or sexual misconduct to be unfounded or false.

The decision also demonstrates that standard provisions in separation agreements may not always be appropriate, particularly in instances where an employee resigns in the context of allegations or investigations of abuse or sexual misconduct. While a non-disparagement clause is common to separation agreements, school districts should consider the need to qualify any such covenant by reserving the right to provide information as necessary to comply with Act 168, to comply with other applicable law, or to defend claims against the school district.

EMPLOYEE'S UNEXCUSED ABSENCE DUE TO ILLNESS HELD NOT TO BE WILLFUL MISCONDUCT DESPITE PRIOR PATTERN OF ABSENTEEISM

O'Leary v. Unemployment Compensation Board of Review, No. 775 C.D. 2022 (Pa. Cmwlth. Ct. Aug. 7, 2023). The Commonwealth Court of Pennsylvania reversed the Unemployment Compensation Board of Review's decision denying employee unemployment benefits after determining that there was no willful misconduct where claimant was terminated for an unexcused absence due to illness instead of his excessive pattern of absenteeism.

BACKGROUND

The Claimant was a full-time security guard at Luzerne County Community College ("LCCC"). Claimant had issues with attendance and tardiness throughout the duration of his employment with LCCC. In October 2018, Claimant received a warning about his attendance. In October 2019, Claimant again received a verbal warning about his attendance, after which Claimant requested to be transferred to the night shift which LCCC accommodated. Between October and November of 2019, Claimant was tardy or absent approximately ten times. In November 2019, Claimant received a written warning about his attendance.

In December 2019, while preparing to report for work for his shift, Claimant experienced a fast heart rate, dizziness, and collapsed on the floor. Claimant was incapacitated and unconscious for approximately three hours until Claimant's father found him. Once Claimant became conscious, he answered a phone call from his supervisor. During that phone call, Claimant apologized for missing his shift due to having "an attack." However, due to the previously described events, Claimant never formally called off from work. The following month, Claimant was discharged from his employment.

The Department of Labor and Industry found that Claimant was eligible for unemployment compensation benefits, a decision which LCCC appealed. Before the Unemployment Compensation Board of Review ("Board"), due to telephone connection problems, Claimant was unable to attend the telephonic hearing. Based on LCCC's testimony alone, the Board found that Claimant was ineligible for benefits. However, a second telephonic hearing was subsequently held to permit Claimant to testify. After the second hearing, the Board found that Claimant did not have a good cause for his absence from the first hearing and affirmed the earlier decision of the Board. Claimant subsequently appealed and the trial court vacated the Board's decision and remanded it for consideration of the merits of the case. On remand, the Board determined that Claimant was ineligible for unemployment compensation benefits because Claimant had a pattern of tardiness and absenteeism, which rose to a level of misconduct. Claimant subsequently appealed the Board's decision to the Commonwealth Court of Pennsylvania which reversed the Board and determined the Claimant to be eligible for unemployment compensation.

DISCUSSION

Section 402(e) of the Unemployment Compensation Law provides that an employee is ineligible for compensation for any week in which his unemployment is due to his discharge from work for willful misconduct connected with his work. 43 P.S. § 802(e). Absenteeism, taken alone, does not generally amount to willful misconduct. *Vargas v. Unemployment Comp. Bd. of Rev.*, 486 A.2d 1050, 1051 (Pa. Commw. Ct. 1985). An additional element, such as the lack of good cause for an absence, is necessary. *Runkle v. Unemployment Comp. Bd. of Rev*., 521 A.2d 530, 531 (Pa. Commw, Ct. 1987). An absence due to illness constitutes good cause and does not constitute willful misconduct. *Runkle*, 521 A.2d at 531. However, excessive absenteeism may, in some circumstances, constitute willful misconduct. *Grand Sport Auto Body v. Unemployment Compensation Board of Review*, 55 A.3d 186, 190 (Pa. Commw. Ct. 2012) (en banc).

In its analysis, the Commonwealth Court relied heavily on its 2012 decision in *Grand Sport Auto Body*. In *Grand Sport Auto Body*, the Court held that the claimant was properly

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denied unemployment compensation benefits because his history of absenteeism and tardiness rose to the level of willful misconduct despite the fact that the claimant's last absence before discharge was justified. The Court placed significant weight on the fact that the Board in *Grand Sport Auto Body* did not find that the employer discharged the claimant for his final absence, which was excused. Rather, it found that the claimant was discharged in that case based on his history of absenteeism and tardiness. The Court contrasted the facts of the instant case from that of *Grand Sport Auto Body*, noting that in the instant case, there did not seem to be a pattern of unexcused tardiness and absenteeism *after* the Clamant received a written warning in November 2019, but *prior* to the Claimant's last scheduled day of work in December of 2019, which he missed due to illness. There was also testimony from the LCCC Director of Human Resources confirming that the basis for Claimant's termination was his December 2019 absence. Accordingly, the Court determined that because it was the December 2019 event that precipitated Claimant's termination rather than Claimant's excessive absenteeism, Claimant should not be denied unemployment compensation benefits under Section 402(e) of the Unemployment Compensation Law. Accordingly, the Commonwealth Court reversed the decision of the Board.

PRACTICAL ADVICE

Although the employer in this matter previously warned the employee concerning his pattern of absenteeism, its decision to terminate the employee for an absence caused by illness led to the conclusion that the employee had not engaged in willful misconduct for purposes of unemployment compensation eligibility. Given the employee's history of absenteeism and receipt of prior warnings, had the employer relied upon an absence of the employee precipitated by reasons other than illness, the discharge likely could have been characterized as employee misconduct.

COMMUNICATIONS RELATED TO A SCHOOL DISTRICT'S INVESTIGATION INTO COMPLAINTS ABOUT LIBRARY BOOKS ARE NOT PUBLIC RECORDS

Foster v. Pennridge School District, AP 2023-0931 (July 5, 2023). The Office of Open Records determined that a school district properly redacted and withheld certain email chains discussing the school district's investigation into complaints concerning resource materials available in the school district's student library pursuant to the non-criminal exception of the Pennsylvania Right-to-Know Law.

BACKGROUND

In March 2023, an individual ("Requester") submitted a request for records ("Request") to the Pennridge School District ("District") pursuant to the Pennsylvania Right-to-Know Law ("RTKL") seeking communications sent from or to any District school board members ("Board") over a five-month timeframe about five specific books.

The District partially denied the Request, providing, *inter alia*, two redacted email chains and withholding five email chains pursuant to the noncriminal investigation exception set forth in Section 708(b)(17) of the RTKL, 65 P.S. § 67.708(b)(17). The Requester appealed to the Office of Open Records ("OOR"). The OOR denied the appeal, finding that the District had legislatively authorized fact-finding powers to conduct official inquiries into complaints about the propriety of library material and that the District met its burden of proving that responsive records were related to a noncriminal investigation.

DISCUSSION

Section 708(b)(17) of the RTKL exempts from disclosure a record of an agency relating to a noncriminal investigation,

including: complaints submitted to an agency, investigative materials, notes, correspondence and reports, and a record that, if disclosed, would reveal the institution, progress, or result of an agency investigation. 65 P.S. §§ 67.708(b)(17)(i)-(ii), (vi)(A). In order for this exemption to apply, a school district must demonstrate that "a systematic or searching inquiry, a detailed examination, or an official probe" was conducted regarding a noncriminal matter. Further, the inquiry, examination, or probe must be conducted as part of a school district's official duties. Importantly, an official probe only applies to noncriminal investigations conducted by school districts acting within their legislatively granted fact-finding and investigative powers.

First, the OOR found that the District engaged in a searching inquiry regarding a noncriminal matter because, as demonstrated by the District's affidavit and exemption log, the withheld emails related to complaints concerning books, addressed the steps taken and particular areas for consideration and evaluation, provided updates on the progress of the investigation, and discussed how to proceed.

Next the OOR concluded that the investigation of the complaints was conducted as part of the District's official duties because the District had adopted polices pursuant to the School Code authorizing such investigations. Specifically, the School Code empowers school boards to establish, equip, furnish, and maintain libraries and authorizes school boards to adopt reasonable rules and regulations regarding the management of its school affairs. 24 P.S. §§ 5-502, 5-510. The OOR found that, pursuant to this authority, the Board had adopted a policy concerning its resource materials and a policy concerning public complaints, which permitted investigations into such complaints. Accordingly, the OOR concluded that the District's investigation into the complaints was part of its official duties.

Based on the foregoing, the OOR concluded that the evidence established that the District had legislatively authorized fact-finding powers to conduct official inquiries into complaints about its library books and that the District met its burden of proving that it conducted such an investigation and that the responsive emails were related to this noncriminal investigation. Accordingly, the OOR denied Requester's appeal.

PRACTICAL ADVICE

This case confirms that school districts can conduct investigations into complaints about its library books and, if it has the proper policies and procedures in place, communications and other records related to such investigations are not public records under the RTKL. However, it is essential that such policies and procedures exist. For example, in *Nowicki v. Council Rock School District*, AP 2022-2108, a requester sought, among other things, emails sent by a community member related to the school district's review of allegedly inappropriate material contained in district library books. The school district denied access to five email records, arguing that they relate to a noncriminal investigation. The OOR rejected this argument because the school district failed to identify any laws authorizing or procedures describing an official investigation. Accordingly, school districts should work with their solicitors and administration to ensure that they have adopted policies and procedures to conduct such investigations.

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The range of services called for in our representation of public bodies is quite broad. Included in that range are: public and school financing, including the issuance of bonded indebtedness; labor, employment, and personnel issues; public bidding and contracting; school construction and renovation; taxation, including real estate, earned income, and Act 511; pupil services and discipline; zoning and land use; and litigation and appellate court work. For more information, please contact us at info@tuckerlaw.com.

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