

STATE OF RHODE ISLAND
AND
PROVIDENCE PLANTATIONS

COMMISSIONER OF EDUCATION

PAUL PERRINO

V.

PROVIDENCE SCHOOL BOARD

DECISION

Held: The Providence School Board has proven that there was good and just cause for its termination of Mr. Perrino. By a preponderance of the evidence the School Board has established that Mr. Perrino accessed pornography utilizing the computer and internet access provided to him at the school, that he falsely reported that he was sick on four days in early December of 2005 and that he failed to leave written material for a substitute during this period of absence.

Date: December 1, 2008

Travel of the Case

On September 8, 2006 Paul Perrino, through his attorney, filed a written appeal with Commissioner Peter McWalters from the decision of the Providence School Board terminating him from his tenured teaching position. Mr. Perrino taught physical education at Cooley Health and Science High School. The undersigned was designated to hear and decide this matter and sent a written acknowledgment to the parties on September 8, 2006. The matter was heard on a series of fifteen (15) agreed-upon hearing dates, ending on April 3, 2008. Thereafter, the parties filed written memoranda summarizing their positions and arguments on July 11, 2008.

Jurisdiction for the Commissioner to decide this dispute arises under R.I.G.L. 16-13-4 since Mr. Perrino held the position of a tenured teacher in the school system.

Issues

Was the Providence School Board's termination of Paul Perrino supported by reliable evidence of good and just cause?

Does the failure of the Providence School Department to ensure that a filtering System was in place to prevent access to obscene and/or pornographic material from school computers preclude it from disciplining Mr. Perrino?

Does the fact that an anonymous letter from "Cooley High Students" was the source of initial allegations against Mr. Perrino indicate that someone working in close proximity to him was "out to get him" and could have fabricated the evidence against him in this matter?

Findings of Relevant Facts

- Paul Perrino was employed as a health and physical education teacher in the Providence School System from 1980 until December 19, 2005. During the 2005-2006 school year he was assigned to teach at the Cooley Health, Science, and Technology Academy, a high school in Providence. Tr. pp. 28, 420.
- On December 6, 7, 8 and 9 Mr. Perrino reported that he was sick when he was actually well and in Arizona attending a football tournament with family members. He was paid for the "sick" days he falsely reported. Tr. pp. 31, 40-42, 592.

- Mr. Perrino did not leave written materials for a substitute teacher to use during his absences on December 6-9, 2005 despite the requirement¹ in the Providence teachers' contract that he do so. Tr. pp. 42-43, 93-94, 621-638, 1460-1461, 1548-1549².
- On thirteen days between October 27, 2005 and November 30, 2005 Paul Perrino utilized the computer provided at school for his professional use to access obscene and/or pornographic material³ through the internet, in violation of the Internet Acceptable Use Policy adopted by the Providence School Department. PSB Ex.6.⁴
- Mr. Perrino had no prior disciplinary record during eighteen (18) years⁵ of employment with the Providence School Department. Tr. pp. 71-72.
- The Providence School Department's internet filtering system, which would have blocked access from school computers to pornographic material on the internet, was malfunctioning during the period October 27-November 30, 2005. Tr. p. 371.
- The investigation into allegations of misconduct against Mr. Perrino was initiated by an anonymous letter sent to school officials on December 7, 2005. The Director of Human Resources was one of the recipients. The letter was signed by "Cooley High Students" who were not signing their names "for privacy reasons". App. Ex.A; Tr. pp. 28-30.

¹ This requirement is found in Section 8-23 of the collective bargaining agreement entitled "Lesson Plans" and requires that a teacher who anticipates being absent leave or call in the "essential information" with the principal.

² Both of Mr. Perrino's colleagues in the physical education department at Cooley contradicted Mr. Perrino's testimony that it was not necessary for him to leave a lesson plan because a banner or poster of activities was placed on the wall of the gym and constituted a lesson plan. Both of his colleagues testified that Mr. Perrino had left no lesson plans for the period of his absence in December. One of these witnesses was later recalled and testified that Mr. Perrino (as well as the other two gym teachers) had left a "pseudo" substitute folder in the closet of the health room adjacent to the gym. The testimony with respect to these "pseudo sub folders" was that they were "very general" or "generic" lesson plans completed at the beginning of each year for the teachers to "cover" themselves. The American Heritage College Dictionary defines "pseudo" as "false", "deceptive" or "sham". Given the title, description and purpose of these documents, we do not infer that actual production of Mr. Perrino's pseudo sub folder would have established his compliance with Section 8-23 of the teachers' contract.

³ Although the reason asserted by the School Board was that Mr. Perrino "utilized the computer in (his) classroom for personal and unacceptable purposes", this broad allegation was limited by the next sentence of the School Board's September 7, 2006 letter- "Specifically, over a period of time...you accessed pornographic and obscene materials". The focus of the evidence and the arguments of the parties was therefore limited to this one aspect of Mr. Perrino's use of the computer for personal purposes.

⁴ The major portion of the fifteen volumes of testimony and voluminous exhibits introduced by the School Board provided clear and convincing evidence of Mr. Perrino's use of the health room computer to access pornographic material. These citations are too numerous to list, but the most significant evidence of this fact will be discussed later in this decision.

⁵ The appellant's brief states that Mr. Perrino had a twenty-two year tenure with the Providence School Department. The testimony of the Director of Human Resources was that approximately eighteen years "sounded correct" (pages 71-72). Mr. Perrino testified that he was first employed in Providence in 1980. The point is that Mr. Perrino was a tenured teacher and a long-term employee of the School Department.

Positions of the Parties

The Appellant

In an extensive brief, counsel for Mr. Perrino challenges the reliability and sufficiency of the evidence produced by the School Board that Paul Perrino was the person behind the computer when it was used to access pornographic material on the dates in question. Numerous other persons, including other teachers and students, are argued to have had access to the same computer and the opportunity to “download”⁶ the pornographic images in this record, either when Mr. Perrino unwittingly left the computer in the health room logged on to his user account or when they used his password. It is also suggested that someone who worked in close proximity to Mr. Perrino and who disliked him set out to damage his career and intentionally created a record of access to pornographic material under his user account. The Appellant argues that this same person authored the anonymous letter of complaint which alerted school officials to his false report of illness while in Arizona and prompted an investigation into inappropriate computer usage that would almost surely be attributed to him.

In addition to the question of who was the user(s) involved in the inappropriate use of this school computer (and Mr. Perrino emphatically denies that he was involved), the nature and extent of this activity has been placed in the proper perspective through the analysis of the Appellant’s computer expert. Utilizing superior digital forensic skills and drawing upon a strong academic background in computer science and electrical engineering, the Appellant’s expert witness dispelled the notion that the user typed in pornographic web addresses or “urls”, actually viewed pornographic material on the school’s computer, and/or saved obscene material on the school computer for later use. The vision conjured up of a user viewing pornographic material for substantial periods of time, of “downloading”⁷ and saving pornographic files for future use was completely dispelled by testimony presented from the Appellant’s expert. In contrast to the exhibits prepared by the School Board’s expert, which created an inference that substantial periods of time were spent by the user accessing pornography on twelve dates from October 27-November 30, 2005 (PSB Ex.25), the Appellant’s analysis of this same information on the hard

⁶ Using the definition of download as “to transfer from a server to one’s own computer”- see PSB Ex. 29 and 30.

⁷ The appellant’s expert testified that “downloading” according to present definitions denotes the voluntary action by the computer user, taking material off the Internet and saving it for personal use. When a pornographic file is found only in a temporary internet folder (as they were in this case) it is viewed once and there is no intent to save the material. Appellant’s brief at page 9.

disc (App. Ex.I) showed that the School Board's analysis was incorrect. For most of the dates⁸, the "actual minutes spent on pornographic sites" was substantially less, at most eighty-five (85) minutes, rather than the approximately five hundred (500) minutes depicted in the School Board's Exhibit 25. Of those eighty-five (85) minutes, sixty-five (65) consisted of spam activity and twenty (20) minutes consisted of "a suspicious google event that had no personal identifying link to Paul Perrino" (brief p. 11). The files generated by this limited activity do not prove that the user actually viewed the images that are "cached" to the temporary internet folder. In order to do so, the user would have had to "scroll" down to present the images for viewing on the computer screen. There is no evidence that the user did this and that these images were viewed, by the user or anyone else.

From the outset, representatives of the School Department, and the members of the School Board who voted to terminate Mr. Perrino, operated on a series of incorrect premises and inferences. The Appellant argues that, at the Commissioner's level, these inferences should not be drawn. The members of the School Board inferred that, aside from the three physical education teachers, no one else had access to the computer located in the health room. The full extent of the use of this computer by other teachers and students was not known until the "forensic reality" was revealed during the course of RIDE hearing. The Appellant's expert supported Mr. Perrino's testimony that he often failed to "log off" after using the computer in the health room, enabling other users to engage in activities that have been falsely attributed to him. An example of this clearly occurred on November 15, 2005 when a student, identified as the user "Simplyinluv" traveled to the "My Space" webpage using the P.Perrino account, which had been logged on earlier that morning and using a unique password, visited various sites looking for graphics and images to add to her My.space personal page.

All of the images from the student's My Space activity were taken out of context and posted alongside pornographic images in a series of exhibits (PSB Ex. 9-12) labeled a "sampling" of the types of pornographic material that were located under the P.Perrino account and submitted by the technology director of the School Department. The inference intended and drawn was that Mr. Perrino, a high school teacher, was interested in pornography depicting school age students. What the record at this level demonstrates is that the extent of

⁸ On two of the dates, October 27 and October 28, the Appellant's expert found that none of the activity involving pornographic images happened during the time period stated in PSB Ex. 25.

“pornographic” activity is far more limited than indicated by the “collage” crafted by the technology director and that it was unconnected to the images of students found in the P.Perrino account. Those pornographic images which were “cached” onto the computer’s hard drive had their origin in unsolicited material from the internet. If the Providence School Department had complied with federal regulations requiring that it maintain internet filtering software, such images would have been blocked before being displayed by the web browser. The record shows that many times the material was accessed during early morning periods when Mr. Perrino’s schedule would have placed him on “parking lot duty” outside of school or later in the day when students were scheduled to be in the health room for class. Given the factors that would render the evidence against Mr. Perrino unreliable, the conclusion that he utilized the school computer to access and/or view pornography is not supported and surely undermines the notion that there is sufficient good and just cause to support his termination.

Although Mr. Perrino has admitted that he falsely reported that he was unable to work due to illness on the dates stated in his termination notice, he disputes the assertion that he failed to leave lesson plans for this period of absence. Gym activities were planned by each of the three physical education teachers at Cooley at the beginning of the school year. A basic lesson plan describing these activities was created by each of the three teachers, placed in a “pseudo sub folder” and left in the gymnasium so that it would be available. One of Mr. Perrino’s colleagues confirmed in her testimony that he had left a “pseudo sub folder” for the 2005-2006 school year in a manila folder in the closet in the health room. She testified that during his absence in early December of 2005 there was sufficient information for the substitute and his colleagues to proceed with his class.

Based on the record, the decision of the School Board to terminate Paul Perrino was not supported by good and just cause, was arbitrary and unfair and should be reversed. The Appellant submits that the discipline imposed for his misuse of sick time should be proportionate to the few days misappropriated in light of his lack of any prior disciplinary record.

Providence School Board

Counsel for the School Board argues that there is substantial evidence of good and just cause to support Mr. Perrino’s termination. First, Mr. Perrino admitted that he lied and falsely reported that he was sick when he was in Tucson, Arizona for a football tournament with his

stepson. Secondly, despite the fact that he knew he was going to be absent for several days, he did not leave lesson plans for a substitute teacher, as required by the teachers' contract. When Mr. Perrino testified on the subject of lesson plans in this hearing, counsel for the School Board points out, he claimed that lesson plans were not necessary. Mr. Perrino described in his testimony a so-called "banner" on the wall of the gym that dictated the students' activities in physical education with sufficient specificity, he claimed, for a substitute to follow. However, neither of the other two physical education teachers at Cooley corroborated Mr. Perrino's testimony about this "banner". However, one of his colleagues did testify, after initially testifying that Mr. Perrino did not leave lesson plans during his early December absence, that she had subsequently come across a "pseudo lesson plan" that he had left in the closet of the health classroom. She testified that she had forgotten about the pseudo lesson plan when first questioned on this subject. Mr. Perrino, as well as the other two physical education teachers, according to this testimony, had created a generic lesson plan at the beginning of the school year and placed it in a closet in the classroom. The School Board submits that the "pseudo lesson plan", if it had been presented into evidence and made available for review by the hearing officer, would not have constituted the type of written material designed to enable a substitute teacher to proceed from the point where the prior lesson had left off. Counsel submits that a general outline created at the beginning of the year could not have related to activities on a particular day or specifically to the period in December when Mr. Perrino was absent. This is not a situation in which a teacher failed to leave a lesson plan on a day of unanticipated absence- Mr. Perrino clearly knew that he was going to be out of state for several school days. His failure to leave lesson plans, coupled with his misrepresentation that he was sick and entitled to paid sick leave, constitutes sufficient good and just cause for his termination, submits counsel for the School Board.

There is evidence of additional misconduct by Mr. Perrino which constitutes separate and sufficient good cause, counsel for the School Board argues. Although there was lengthy testimony from both computer experts in this case, the technological intricacies of this case were not as complex as fifteen days of hearing would suggest. Counsel for the School Board points out that both experts agreed upon a number of basic facts. Both experts found that inappropriate material had been accessed under the P.Perrino account on a dozen or so dates from October 27,

2005 to November 30, 2005. The length of time during which this material was viewed on each of these dates became a focus of the Appellant's expert's testimony, whereas the School Board's expert, counsel notes, expressed no opinion on the duration of time the images were actually accessible to the user. Both experts agreed that the inappropriate sites were, for the most part, accessed through spam emails which originated from the personal yahoo email account that Mr. Perrino shares with his wife.

The fact that the pornographic material was accessed by a person first using the P.Perrino school department user account and then Mr. Perrino's personal yahoo email account creates a strong inference that it was Mr. Perrino navigating through the inappropriate material, despite his testimony and arguments to the contrary. In almost every instance in which the inappropriate material was accessed on the school's computer, this pattern was followed. Using the two password-protected accounts, the user clicked on links in spam email to access pornographic material. In some instances, according to the report of the Appellant's own expert, the user navigated beyond the initial page of the website. The images collected in the temporary internet folder may not have been visible without the user scrolling down the page to see the material. The school department submits that it need not prove that the user, Mr. Perrino, actually viewed these images, but only that he accessed them using the school's computer.

The evidence of the above-described computer activity demonstrates that Mr. Perrino utilized the school computer to access material that was profane or obscene and for a use that was clearly not consistent with the educational objectives of the Providence School Department. This violates the Internet Acceptable Use Policy which is applicable to School Department employees and with which Mr. Perrino agreed to comply or risk disciplinary action. Standing alone, this inappropriate computer use constitutes just cause for termination. It was not just that Mr. Perrino utilized the school computer for his own personal use, but that the information he accessed was "sexual in nature". This demonstrates his disregard for the integrity of the Providence School Department, counsel for the Board submits. Coupled with the other two items of cause (misuse of sick leave and failure to leave lesson plans), the School Board takes the position that there is ample good and just cause to support Mr. Perrino's termination. For this reason, counsel for the School Board requests that its decision to terminate Mr. Perrino be upheld.

DECISION

As indicated in our Findings of Fact, the Providence School Board has proven the three factual allegations against Paul Perrino by a preponderance of the evidence. There is undisputed evidence that Mr. Perrino was not entitled to sick leave under the teachers' contract when he went to Arizona in early December and that he misrepresented the reason for his absence from school. The failure to leave lesson plans, or as the contract describes them in Section 8-23, "enough written information for substitute teachers so they can proceed with the subject matter from the point where the teachers left off" is also clearly established in this record. Even in a "hands-on", skill-oriented, physical education context, one would expect that the teacher would leave written materials that could be utilized by a substitute teacher. The evidence here is that Mr. Perrino failed to do so. His contention that an outline of activities on a banner on the gym wall obviated the need for "lesson plans" requires no response. Neither of his colleagues substantiated the existence of the banner he described in his testimony. Both of his colleagues initially testified that Mr. Perrino did not leave a lesson plan for use during his absence in early December of 2005. The belated recollection⁹ of one of these teachers about the existence of a generic lesson plan or "pseudo sub folder" is, we find, insufficient proof of the existence of an actual lesson plan left by Mr. Perrino. The document alleged to have been "found" so long after its existence was brought into issue was not produced at the hearing. Curiously, the "pseudo sub folder" argued to meet the contract's requirements was not mentioned by Mr. Perrino when he testified on this subject. The School Board has carried the burden of proof on this issue.

It is an undisputed fact in this case that the computer in the health room at Cooley High School was utilized to access inappropriate material on more than a dozen dates between October 27 and November 30, 2005¹⁰. PSB Ex. 25 and 32; App. Ex.I. With just a couple of exceptions, the access to pornographic material follows a pattern of entry into the P.Perrino user account

⁹ The testimony was clearly inconsistent with the witnesses' own initial testimony in this case.

¹⁰For the dates of October 27 and October 28, 2005, the Appellant's expert found that none of the activity involving pornographic images happened during the time period stated in PSB Exhibit 25, entitled "Dates and Times that Larger Inappropriate Pictures were Downloaded") He did, however, find evidence of pornographic activity at other times during both of those school days.

(password protected) as well as a log into Mr. Perrino's personal email account, also password-protected. While it is possible (as has been asserted) that Mr. Perrino carelessly left the computer logged on to his personal account during the school day, that others had his password(s), and/or that a person with malicious intent created temporary internet files in his school account to sabotage his teaching career, these are not the conclusions to which the preponderance of evidence leads. Other than a single google search for "Veronica Vanoza" and a collection of images indicating that a student logged on to "My Space" under Mr. Perrino's account, the evidence is that the user was Mr. Perrino.

Mr. Perrino's testimony that he did not log on to the computer in the morning before reporting to "parking lot duty" at 8:15 and that he never used the computer before the school day started was directly contradicted by both computer evidence of his log in to his personal email account between 7:30 a.m. and 8:00 a.m. on virtually every morning under review and the testimony of both of his co-workers who placed him at the computer in the health room on most mornings before school started. Despite his contention that the only time he would use the computer in the health room would be to retrieve information with respect to student locker assignments (Tr. p.544-545), this testimony was inconsistent with computer records and with his own later testimony that he sometimes utilized this computer to check on the status of his bids for items on Ebay (Tr. pp. 556-584). His colleagues recalled that Mr. Perrino utilized the computer in the health room at other times during the school day as well. Although Mr. Perrino testified that both of the other physical education teachers knew his password for his school account, both individuals testified that they did not know it.

Given the inconsistencies and contradictions in just about every aspect of Mr. Perrino's testimony, the veracity of Mr. Perrino's testimony that he never accessed pornographic images from the school computer using his personal email account is in doubt. His denials are insufficient to rebut the substantial evidence that it was he who utilized the school's computer inappropriately over the period in question. The testimony was that pornographic images were collected in the temporary internet files when the user (who we find was Mr. Perrino) opened spam email in his personal email and then "clicked on a link" to the pornographic websites. The websites were, we find, intentionally accessed. This activity constitutes a violation of the Internet Acceptable Use Policy.

The conclusions we draw from proof of Mr. Perrino's violation of the internet use policy vary somewhat from those of the School Board. We do not find, as the Providence School Board did, that Mr. Perrino's personal and inappropriate use of the school's computer also violated his statutory duty to inculcate principles of morality and virtue in students under his charge (R.I.G.L. 16-12-3). There is no evidence that students were involved in or observed Mr. Perrino when he accessed this material¹¹. The School Board has not explained how Mr. Perrino's duty to cultivate principles of morality and virtue in the minds of students was violated by his inappropriate use of the school's computer. We would also note that the Board's decision in this matter does not mention that it drew any conclusions as to Mr. Perrino's ability to function as a role model for students, even though some might have concluded that his ability to do so was compromised by this misconduct.

The Board argues, however, that "just cause was exacerbated" because the information accessed in school was "sexual in nature". We find that the material was not "sexual" in nature, but that it was pornographic.¹² Accessing pornographic material on the school computer violates a policy which is directed at the clearly-anticipated potential for the computer's misuse. The policy is designed to ensure that school equipment will be used for educational purposes and consistently with the conditions of the federal funding provided for its purchase. This was not a mere technical or minor violation of the rule prohibiting personal use of the school computer, but a very serious one. Teachers in the school system are entrusted with and given the responsibility for access to this technology with explicit written understandings. Mr. Perrino violated this trust by using the computer in the precise way he had agreed in writing not to and in a way that brought students closer to pornography than they would otherwise have been. The failure of the School Board to have in place a filtering system to block his access to internet pornography, although of concern, does not excuse Mr. Perrino's conduct.

Taking into account the substantial nature of the violations of the Internet Acceptable Use Policy that occurred from October 27 to November 30, 2005, his misrepresentation with respect to sick leave, and Mr. Perrino's failure to leave lesson plans for a four-day period, we find that

¹¹ The anonymous letter of complaint against Mr. Perrino mentioned the observation of such material by students, but no student witnesses were called to substantiate this hearsay statement.

¹² Any dispute as to the characterization of the images as "pornographic" diminished as many of the pictures were placed into evidence, some with text.

the district has substantiated good and just cause for termination. This is so despite the fact that he had no prior disciplinary history.

The School Board's decision to terminate him is sustained.

Kathleen S. Murray, Esq.
Hearing Officer

Approved:

Peter McWalters
Commissioner of Education

Date: December 1, 2008