PSBA Judicial Advocacy Report:
Status of court cases in which PSBA has brought suit on behalf of members or is participating as *Amicus Curiae*

Submitted by: Stuart L. Knade, Chief Counsel and Michael I. Levin, PSBA General Counsel

Case Name	Issues	Court SD Counsel (PSBA Counsel)	PSBA Position(s)	Case History/Status
Westmoreland I.U. 7 Classroom Assistants Education support Personnel Assn v. Westmoreland I.U.7	Whether an arbitrator had authority under a collective bargaining agreement to reinstate a classroom aide who was terminated for illegally using a prescription morphine patch in school resulting in her passing out in a restroom.	Pennsylvania Supreme Court 381 WAL 2009 John Ranker (Emily Leader & Sean Fields)	Government employers cannot negotiate away their power to terminate employees for misconduct that strikes at a core function of the agency, and therefore in such cases a collective bargaining agreement cannot be construed to empower an arbitrator to reinstate an employee found guilty of such misconduct. Accordingly, an arbitration award doing so cannot be drawn from the essence of the agreement.	In an unpublished opinion, the Commonwealth Court upheld the Common Pleas Court's decision vacating the arbitrator's award reinstating the employee without back pay, on grounds consistent with the PSBA position. Oral argument on the union's appeal to the Pa. Supreme Court occurred Sept. 11, 2006. On December 27, 2007, the Supreme Court reversed, ruling that the "core function" exception was too broad to be an appropriate check on arbitrators authority, and should be replaced by a public policy exception of unclear contours in Pa. The court ordered the case remanded to the trial court for further briefing on what the parameters of a public policy exception should be, and how it might apply to this case, after which further appeals are likely. On remand, the Court of Common Pleas ruled in favor of the employee and upheld the arbitrator's decision, concluding that since the misconduct

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				was not among the crimes listed in the School Code provision mandating dismissal, reinstatement was not subject to the "public policy exception" to the essence test now favored by the Pennsylvania Supreme Court. Oral argument on the IU's appeal to Commonwealth Court took place May 4, 2009. Decision consistent with the PSBA position was issued July 8, 2009, holding the arbitrator's reinstatement of a classroom assistant violated the public policy against possession or being under the influence of a controlled substance while supervising and working with children in a classroom setting. The union again filed a petition for allowance of appeal to the Supreme Court, which on November 25, 2009 issued an order holding that petition in abeyance until disposition of similar issues in *Philadelphia Housing Authority v. AFSCME* (see next listed case).

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Philadelphia Housing Authority v. AFSCME	Whether an arbitrator had the authority to reinstate an employee who sexually harassed another employee.	Pennsylvania Supreme Court 15 EAP 2009 PHA counsel Arlene Angelo (Sean Fields)	An arbitrator's reinstatement of a known sexual harasser is contrary to the public policy of eliminating sexual harassment from the workplace.	The trial court denied PHA's petition to vacate the arbitrator's reinstatement of an employee terminated for sexual harassment. On appeal Commonwealth Court reversed the trial court. The Pennsylvania Supreme vacated the Commonwealth Court's decision and remanded with instructions to apply to "public policy" exception adopted by the Supreme Court in the *Westmoreland I.U.* case. Applying the "public policy" exception Commonwealth Court reversed the trial court. The case is back before the Pa. Supreme Court. Briefs were filed on Sept. 9, 2009, and oral argument took place October 21, 2009. Awaiting decision.

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Layshock v. Hermitage School District	Whether the school district violated a student's First Amendment rights by suspending him for creating, outside school, a defamatory MySpace profile purporting to be that of his school principal, which led to in-school disruption when other students attempted to view the profile from school and circulated information about it.	U.S. Court of Appeals for the Third Circuit 07-4465 & 07-4555 (on appeal from the U.S. District Court for the Western District of PA) Tony Sanchez (Sean Fields)	The First Amendment does not prevent school discipline of a student for engaging in conduct intended to promote disrespect for school officials and thereby undermine those officials' ability to carry out their duties. The reaction of school officials to such conduct is a foreseeable aspect of resulting disruption of the learning environment, for which the student may be held responsible and which may be considered in the First Amendment analysis.	After initially denying a preliminary injunction sought by the student with the assistance of the ACLU, the District Court granted summary judgment in favor of the student and against the school district on the central issue. After the parties agreed to a stipulation on damages, the District Court issued a final order clearing the way for immediate appeal to the Third Circuit. Briefs have been filed. Oral argument took place on December 10, 2008. Decision issued February 4, 2010, adverse to the PSBA and SD position. However, the same day a separate panel of the court issued a decision in a highly similar case taking the opposite stance (J.S. vs. Blue Mountain SD). En banc re-argument in both cases took place June 3, 2010. Awaiting decision.

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Trib Total Media, Inc., v. Highlands School District	Whether a school district violated the Sunshine Act by holding an executive session attended by its solicitor and the owners and representatives of a shopping center to discuss whether the school district would consent to reopen a property tax assessment appeal. Particularly, whether the attendance of the opposing party in the litigation being discussed was necessary to carry out the purpose of the meeting and was consistent with the purposes of Sunshine Act's exception allowing executive sessions to discuss litigation.	Pennsylvania Commonwealth Court 1588 CD 2009 Pa. Supreme Ct. 568 WAL 2009 Ira Weiss & Alan Lubelski (Katherine Fitz-Patrick)	School boards routinely convene executive sessions to discuss sensitive issues, which if discussed in public, could harm a person's reputation, security or property rights or jeopardize a school district's ability to negotiate. A narrow interpretation of the litigation exception that confines the purpose of the exception to the protection of the attorney-client privilege and excludes non-members will affect the ability of public school entities to discuss sensitive matters in private meetings and to negotiate disputes. School boards must be able to invite non-members to attend executive sessions in order to solicit the specific information needed to make an informed decision and discuss possible resolution of the dispute.	On September 17, 2009, the Court of Common Pleas of Allegheny County (Honorable Joseph M. James) granted the school district's Motion for Judgment on the Pleadings. Trib Total Media appealed to the Commonwealth Court of Pennsylvania. Briefs have been filed, and oral argument took place April 19, 2010. Decision issued August 5, 2010, adverse to the school district and PSBA position. The district's petition for rehearing en banc was denied September 24, 2010, and the school district filed petition for allowance of appeal on October 25, 2010. Awaiting disposition.

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Hetherington, et al. v. Rogers, et al. (North Schuylkill SD)	Whether a board of school directors can be removed pursuant to Section 318 of the School Code for refusing or neglecting to perform a mandatory duty because the board failed for two years to hire a qualified permanent superintendent, and instead appointed the district solicitor as acting superintendent while seeking a mandate waiver from PDE that would allow the solicitor to be appointed as superintendent despite present lack of the usual qualifications.	Pennsylvania Commonwealth Court 1430 CD 2009 1448 CD 2009 1490 CD 2009 Pa. Supreme Ct. 778 MAL 2010 782 MAL 2010 Michael Kristofco & Victor Stabile (Stuart Knade)	Without taking position about whether this particular set of facts meets the standard for removal under Section 318, PSBA argues that removal of an elected school director is not permitted under this provision unless there has been a knowing and conscious failure to perform an explicitly mandated duty under the School Code. The standard cannot be permitted to erode to allow a court to remove elected officials based on the court's opinion of the wisdom or reasonableness of a school board's choice among permissible courses of action or the board's efficiency in pursuing the chosen course.	On June 23, 2009, Schuylkill County Court of Common Pleas granted a petition filed a citizens group seeking removal of elected board members, and ordered removal from office of eight members (the ninth had been recently appointed to a vacancy). In a subsequent order the court appointed four replacements, each winners in the primary appearing sure to be elected in November. The court declined to appoint directors to fill the remaining four vacancies. The ousted board members appealed to Commonwealth Court. The trial court, Commonwealth Court (single judge) and Supreme Court have rejected petitions of the ousted board members to restore the automatic supersedeas of the removal order. Briefs were filed and oral argument in Commonwealth Court took place on March 15, 2010 before a three judge panel. On September 27, 2010 a panel of the Commonwealth issued a decision contrary to the PSBA

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				position, upholding the trial court removal order. The ousted board members have filed petitions for allowance of appeal in the Pa. Supreme Court. Awaiting disposition.
Wayne Moving & Storage of NJ, Inc. v. School District of Philadelphia	Whether a subcontractor may directly sue a school district directly on a theory of "unjust enrichment," bypassing a comprehensive written contractual structure, in order to obtain additional compensation for unanticipated costs of performing the originally agreed work.	U.S. Court of Appeals for the Third Circuit 09-3890 (on appeal from the U.S. District Court for the Eastern District) Carl Solano & Miles Shore (Stuart Knade)	"Unjust enrichment" equitable theory may not be used to enable a subcontractor to bypass comprehensive written contractual structures, which limit remedies against the owner for additional compensation for unanticipated costs of performing the originally agreed work exceeding what the subcontractor and prime contractor had agreed to in writing. Allowing this would damage fair competition and contractual risk allocation in government contracting, and would nullify the requirement of School Code Section 508 that contract modifications must be approved by majority vote of the school board.	District court granted summary judgment in favor of the plaintiff on a basis contrary to the PSBA and SD position. SD appealed to the Third Circuit, and briefs have been filed. After oral argument on September 14, 2010, the court issued a decision in favor of the school district, consistent with the PSBA positions. On December 28, 2010, the court denied Wayne Moving's petition for reargument. Further appeal seems unlikely.

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PSEA v. Pennsylvania Office of Open Records [At invitation of the Governors Office of General Counsel, PSBA joined the amicus brief of the Department of General Services, Dept. of Conservation and Natural Resources, Office of the Budget, Office of General Counsel, and the Pennsylvania State Association of Township Supervisors.	Whether there is a constitutional right to privacy in one's home address which requires implementation of a balancing test to determine whether the Right to Know Law requires or permits release of such information?	Pennsylvania Commonwealth Court 396 MD 2009 Pa. Supreme Ct. 59 MAP 2010 Joshua Harmon (Emily Leader)	Before home addresses of public employees can be released under the RTKL, the Pennsylvania Constitution requires a balancing test weighing an individual's interest in the privacy of home addresses against the public's interest in disclosure of information about government.	In July 2009, PSEA filed a petition for review in the Commonwealth Court and won a preliminary injunction forbidding release of home addresses of school employees until further order. Briefing on preliminary objections in the Commonwealth Court was completed in December 2009, and oral argument took place March 17, 2010. Concurrently, similar briefs were filed in December 2009 on appeal of the preliminary injunction order to the Supreme Court, which affirmed that order on August 17, 2010. On September 24, 2010 Commonwealth Court issued a decision dismissing the case for lack of jurisdiction, but offering dicta criticizing the arguments against release of home addresses. PSEA filed notice of appeal to the Supreme Court, which on November 1, 2010, stayed the Commonwealth Court's decision and order, effectively restoring the injunction barring release of home addresses. Briefing

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				in the Supreme Court is underway.
Telly, et al. v. Pennridge School District, et al. & Labs, et al. v. Central Bucks School District, et al.	Whether a court may invalidate a school board's exercise of its authority under the Local Tax Collection Law to set compensation for elected tax collectors, based on the court's view that the compensation was not reasonable.	Pennsylvania Commonwealth Court 2142 CD 2009 Pa. Supreme Ct. 447 MAL 2010 453 MAL 2010 Howard Kelin & Jeff Garton (Stuart Knade)	As long as a school board's determination pursuant to the Local Tax Collection Law to set compensation for elected tax collectors is based on a rational thought process, the courts have no authority to second guess that determination merely on the basis of disagreement about the reasonableness of the result. The law empowers school boards to use compensation schemes to push tax collectors to modernize their ways of doing business, and local taxpayers should not be required to subsidize quaint 19th century ways of doing business.	In October 2009, the Bucks County Court of Common Pleas issued a decision adverse to the school districts and to the PSBA position, enjoining the implementation of the new compensation plans approved by the respective school boards, and requiring previous compensation schedules to remain in place. School districts appealed to Commonwealth Court. Briefs have been filed, and oral argument took place before a three judge panel on March 15, 2010. On May 24, 2010, the Court issued a decision in favor of the school districts and consistent with the PSBA position. The tax collectors and intervenor New Britain Township have since filed petitions for allowance of appeal (allocator) in the Pa. Supreme Court to which the school districts responded on July 6, 2010. Awaiting disposition of petition for allowance of appeal.

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State Employees' Retirement System v. Office of Open Records, PG Publishing Co. d/b/a the Pittsburgh Post Gazette and Mauriello NOTE: One of two separate but related cases.	Whether the Right- to-Know Law permits Commonwealth and Local Agencies to charge for staff time costs incurred in fulfilling requests, e.g., prorated hourly salary of staff? Whether OOR's "Fee Structure" is an unpromulgated regulation and must be declared a nullity? Whether SERS policy, as written and applied, was proper under the RTKL and whether the fees charged were reasonable?	Pennsylvania Commonwealth Court 152 CD 2010 Catherine Nolan for SERS (Emily Leader)	The provision of the law allowing agencies to charge reasonable fees for costs necessarily incurred for fulfilling public records requests permits imposition of fees for the costs of staff time. OOR's Fee Structure is an unpromulgated regulation and it should be declared a nullity. If it is a guideline only, then it includes an erroneous interpretation of the RTKL which directly impacted the decision in this case. SERS policy is reasonable and the fees it charged were reasonable and appropriate. They are comparable to fees charged in many other states for similar services.	SERS imposed fees for staff time necessary to compile information from various databases in response to the newspaper's RTKL request. Newspapers objected and on appeal to OOR, OOR ruled that such fees were not permissible. SERS appealed to Commonwealth Court. Briefing has been completed and the court has ordered the case to be submitted on briefs only, without oral argument. On November 4, 2010, the Court issued a decision upholding the OOR determination, on the basis of its factual conclusion that SERS could have answered the request without having to do the things it charged the fee for, and thus was not permitted to charge fees for things SERS did not have to do. The ruling did not address the core issues of interest to PSBA. SERS has declined to appeal further. Case over.

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Judy Sherry v. Radnor Township School District	Whether Radnor Township School District properly denied a Right-to-Know Law (RTKL) request for student discipline records pursuant to the Family Educational Rights and Privacy Act (FERPA) provision restricting the disclosure of "personally identifiable information" from student records to unauthorized persons, and the RTKL provision exempting from public disclosure a record relating to a noncriminal investigation.	Pennsylvania Commonwealth Court 265 CD 2010 Michael Puppio, Jr. & Katherine Meehan (Katherine Fitz-Patrick)	The RTKL cannot be read to allow the release of confidential student information absent parental consent without violating the provisions of FERPA. To allow a requester to use the RTKL, which does not specifically reference public school programs, to trump a specific education statute would undermine the intent of Congress and would force Radnor Township and other school districts into the untenable position of violating an explicit education-related statute, while expanding the RTKL beyond its intended reach.	On August 26, 2009, Judy Sherry submitted a RTKL request to Radnor Township School District for student discipline records relating to violations of the Academic Honor Code. The District denied the request, stating that the records were exempt from disclosure under the noncriminal investigation exception and FERPA. The Office of Open Records (OOR) denied Sherry's appeal based on the same grounds. The Court of Common Pleas of Delaware County denied Sherry's Petition for Review, and Sherry appealed. Briefs have been filed, and oral argument is scheduled for February 7, 2011.

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MacNeal v. Silberstein et al.	Whether the emails of an elected public official that are located on the public official's personal computer are "public records" subject to disclosure under the Right-to-Know Law?	Pennsylvania Commonwealth Court 814 C.D. 2010 Steven Hovis (Sean Fields)	The personal emails of an elected public official that are located on the public official's personal computer are not in the possession or control of the agency. Therefore such emails are not "public records" and are not subject to disclosure under the Right-to-Know Law. Agencies such as first class townships and school districts lack the legal authority to compel an elected public official to disclose emails in the possession of the elected official and agencies are not required to disclose such records under the Law.	OOR issued a final determination ruling that emails sent to a township commissioner's personal email account by the township that were maintained on the commissioner's personal computer were public records in the possession of the township and therefore, the township was required to disclose those records under the Right-to-Know Law. On appeal the trial court reversed OOR's final determination concluding the emails on the commissioner's personal computer are not "public records" subject to disclosure. An appeal is currently pending before Commonwealth Court and briefs have been filed by the parties. Oral argument before a panel of Commonwealth Court took place December 7, 2010. On January 6, 2011, the court issued a decision consistent with the PSBA position.

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Rochester Area Education Assn v. Rochester ASD	Teacher's union filed unfair labor practice complaint with the Pa. Labor Relations Board, asserting that the district's adoption of an on-line learning program to deliver health curriculum instruction constituted unilateral diversion of bargaining unit work, even though teachers still were used to monitor the classes and no teachers were furloughed as a result.	Pa. Labor Relations Board PERA-C-09-411-W Alfred Steff (Michael Levin)	Selection of curriculum is a matter within the exclusive discretion of school boards and not a subject of mandatory bargaining. Increasing the use of emerging instructional technologies, including on-line curricula, is not a matter subject to bargaining, and does not constitute the diversion of bargaining unit work, even if it reduces the need for live teaching of certain curriculum components.	On August 26, 2010, the PLRB hearing examiner rendered a proposed decision and order in favor of the school district and consistent with the PSBA position. The union filed exceptions for review by the full PLRB. PSEA filed an amicus curiae brief in support of the union's exceptions. The union withdrew its exceptions shortly after PSBA sought leave to file an amicus curiae brief. Case over.
Selinsgrove ASD v. Lobar, Inc. et al.	The trial court granted summary judgment against the SD in a suit against a general construction contractor over a defectively installed school building roof, on statute of limitations grounds. Although such limitations normally do not apply to	Pa. Commonwealth Court 2310 CD 2010 Theodore Adler Thomas Clark (Stuart Knade)	Similar to sovereign immunity, the *nullum tempus* doctrine exists to protect the public interest. If it can be waived at all via contract, it must be done expressly, clearly and unambiguously. Ambiguous boilerplate wording of standard AIA forms for construction contracts is not sufficient to waive this important governmental	On Oct. 5, 2010, Court of Common pleas of Snyder County granted summary judgment in favor of defendants, and school district appealed to Commonwealth Court. Briefing is underway.

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	government entities under the "*nullum tempus*" doctrine, the court concluded that a provision of the contract ("applicable statutes of limitations shall commence to run no later than the date of substantial completion") had the effect of waiving that doctrine and also prevented application of the "discovery rule" (delaying the relevant limitations period until the defect was discovered).		attribute. The effect of the nullum tempus doctrine is that there were no statutes of limitation "applicable" to the school district.	