

AMERICAN ARBITRATION ASSOCIATION
Employment Arbitration Tribunal

In the Matter of the Arbitration between
RICHARD PERRY,

Claimant,

AAA No. 54 166 00070 13

v.

Arbitrator: Peter D. Houk

PORTAGE PUBLIC SCHOOLS BOARD
OF EDUCATION,

Respondent.

AWARD OF ARBITRATOR

THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the personnel manual or employment agreement entered into by the above-named parties, and having been duly sworn and having duly heard the proofs and allegations of the Parties, do hereby AWARD as follows:

This matter is before the Arbitrator after Richard Perry, the Superintendent of Portage Schools (Claimant) resigned under protest following an investigation of an alleged affair with the district's human resources director, whom he had hired earlier in the year. The parties have asked the Arbitrator to determine whether the employment contract between former Superintendent Richard Perry and the Respondent Portage Board of Education (Board) was breached.

The Board has asserted that the contract was breached in several different ways. The specification of charges state in specific detail how the Board believes the contract was breached and will not be repeated here in detail. Suffice it to say that the charges involve three primary concerns. First, the alleged sexual relationship with the district's human resources director. Second, Doctor Perry's participation in

an attempt to start up a charter school while employed by the Board. Third Dr. Perry was dishonest in dealing with the Board and violated enumerated Board policies. Finally, his participation in and use of district resources for the support of the International Baccalaureate Program.

Claimant's contract with the Board provides that:

The Board is entitled to terminate the Superintendent's employment during the term of this contract when it determines that the Superintendent has engaged in any act of moral turpitude, misconduct, dishonesty, fraud, insubordination, incompetency, or if the Superintendent materially breaches the terms of this contract, or for any other reason that is not arbitrary or capricious.

MISCONDUCT

The Affair

Without question Claimant engaged in an extramarital affair with the human relations director that he hired. The principals both acknowledged the affair and claimed that the physical relationship began in July of 2012 in Cancun, Mexico while they were both attending an International Baccalaureate conference. It bears note that the Human Resources Director, Patricia Kozee, Ph.D. was hired by Claimant in the summer of 2011 as a consultant and shortly thereafter was hired as the interim human resources director. Claimant was acquainted with Dr. Kozee from their graduate school program, about ten years earlier.

Claimant asserts that "the Portage Public Schools has no policy regarding nepotism or intimate relationships. Thus by entering into a consensual romantic relationship, Dr. Perry has not violated any policy of the Board." The Arbitrator finds this position untenable for several reasons. The Board correctly argues that the defense of nepotism is immaterial. *Black's Law Dictionary* (9th Ed.) defines "nepotism"

as the “bestowal of official favors on one’s *relatives*, esp. in hiring.” (*Emphasis supplied.*) *Black’s* defines “relative” as a “person connected with another by blood or affinity; a person who is kin with another.” The principals were not related, and in fact Claimant was married to another person.

More importantly Board Policy 2.0 states that “the Superintendent shall not cause or allow any practice, activity, decision, or organizational circumstance which is either unlawful, imprudent or in violation of commonly accepted business, educational, and professional ethics and practices.” Claimant’s conduct clearly violated this standard.

The conduct was imprudent because it exposed the district to liability pursuant to State and Federal statutes prohibiting sexual harassment. School Board President, Robert Michael Snyder, supported Claimant for interim and permanent superintendent and was a self-described “Perry supporter.” He gave Claimant a favorable review in March 2012. Snyder is a health care management consultant. He advises on how to build a high-performing organization. He gave an example of a chief of trauma who was dismissed for similar reasons. He felt the policy was violated because the conduct was in violation of commonly accepted business ethics and practices.

Claimant was confronted in June of 2012 at a Board meeting concerning rumors of a relationship. He vehemently denied them. Snyder accepted his denial, but cautioned him at the time, “that would be a stupid thing to do.” He opined that “it would be a career ender.”

Similarly Tom Zahrt, the former human resources director, testified that “it is not a good idea to have a physical relationship with a direct report for the standard

ideas, the potential for lawsuits, favoritism and problems with appeal in the chain of command.”

Ron Olsen the current Interim Superintendent testified that “as a 'super' you would be expected to confront a subordinate who was carrying on with a report. It is bad judgment if you thought a different rule applied to you.” Mr. Olsen was the former Superintendent of the Sturgis Schools and he said Board Policy 2.0 was violated because the conduct is in violation of commonly accepted business and educational practices .

Eric Ver Huy is an eighth grade teacher and President of the Portage Educational Association. He confronted Claimant with rumors in April or May of an affair. He testified that “if superintendent and human resources director are having an affair it makes his job harder because of reviewing grievances.”

Randy Van Antwerp, Vice President of the Board, testified that he believed Policy 2.0 had been violated because the affair was imprudent because it failed to show moral leadership and exposed the board to liability.

Finally Claimant acknowledged during the hearing regarding his affair that, “I think it was very poor judgment.”

The Arbitrator finds by a preponderance of the evidence that there was an affair between Doctor Perry and Doctor Kozee and that regardless of when it commenced it was a violation Policy 2.0. It was imprudent in that it exposed the Portage Public School District to potential liability for sexual harassment claims and because it was in violation of commonly accepted business ethics and educational practices.

Moral Turpitude

Counsel for the Board acknowledges that neither Michigan case law or statute defines the term “moral turpitude.” Counsel offers *Black’s Law Dictionary* (9th Ed.), as a resource. Under Michigan law, in ascertaining the meaning of a contract, the court gives the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument. *51382 Gratiot Ave. Holdings, LLC v. Chesterfield Development Co., LLC*, 835 F Supp 2d 384 (ED Mich, 2011). *Merriam-Webster* defines moral turpitude “as an act or behavior that gravely violates the moral sentiment or accepted moral standards of the community; esp : sexual immorality. Considering the judgment of the United States Senate on such diverse indiscretions as those committed by President Clinton and Senators Vitter, and Craig; and the testimony of KRESA Superintendent Ron Fuller that under circumstances where men and women are working in close conditions such conduct is not unusual in the education field, the Arbitrator cannot reach the conclusion that the conduct reached the level of “moral turpitude.”

Other Policy Violations

Amongst other specified policy violations the Board has charged Claimant with violating these specific policies.

Policy 2.0. The Superintendent shall not “[e]ndanger the organization’s public image or credibility, particularly in ways that would hinder its accomplishment of ends.” Significant time was spent debating whether conduct which Claimant viewed as private “endanger(ed) the organization’s public image or credibility.” Claimant avers that any damage was caused by leaks from the board, and rumors spread by a

friend of his wife who worked in school administration, not his own indiscretion¹. This novel argument fails. Initially, one is struck by the audaciousness of the argument that it is not his fault that his wife's friend would be offended by his conduct and share her concerns with others. While his conduct may not amount to "moral turpitude" the Board President, current Interim Superintendent and others found that the conduct is in violation of commonly accepted business and educational practices. When conduct that violates commonly accepted business and educational practices is discovered it is reasonable to expect that it will be unfavorably reported on. Such conduct "endangers the organizations public image." Claimant has violated this policy.

Policy 2.8. "The Superintendent shall not engage in or allow any practices which result in a conflict of interest detrimental to the interests of the organization."

It is clear that Dr. Perry permitted Dr. Kozee to engage in conduct that was detrimental to the interest of the District, and engaged in such conduct himself. Both Administrators were engaged in trying to found a charter school in Grand Rapids. There is nothing about this enterprise that was beneficial to the District. At least part of the project was performed using District equipment. Further proofs demonstrated that from at least August of 2012, after the acknowledged commencement of the affair, Dr. Kozee was actively involved with Way Point Academy, which had no relationship to the District. The defense proffered, "everyone in education moon lights" rings hollow when one considers the involvement of these two top administrators in the International Baccalaureate Program, an activity supported for the Claimant by the Board, as part of the curriculum for the Portage Schools. The

¹ It bears note that private individuals reported the alleged affair in March or April to the Board Vice President and that the President of the Portage Educational Association had heard rumors in April well before any Board investigation or Claimant's allegedly telling his wife of the affair in July.

most logical conclusion to be drawn is that both were embarking on a private school enterprise at the expense of the District. Indeed, Claimant acknowledged that he was planning a soft landing after the Board began its investigation.

Additional "Standards of Conduct for the Superintendent" are set forth in Policy

3.12. Superintendent Evaluation - Personal Qualities and Attributes

7.1. *"Maintains high ethical standards, honesty, and integrity in all personal and professional matters eliciting respect from the community."* President Snyder concluded that claimant "just lied about the affair and had no integrity, and did not elicit respect from community. This conclusion was echoed by Interim Superintendent Olson who said, "When you do consulting work you need to tell the board." This was not done by either of these administrators. The Arbitrator like President Snyder, concludes that Claimant was dishonest with the Board when queried about his relationship with Dr. Kozee in the spring and early summer of 2012. While it is true that there is no direct evidence of a physical relationship there is ample circumstantial evidence to suggest that.

7.2 *"Leads by example, exhibiting strong character, good judgment, decisiveness, and high expectations for (her) himself and others."* President Snyder and Interim Superintendent Olson said the affair exhibited poor judgment. Importantly Claimant testified on cross examination "I think it was very poor judgment." He further testified on cross that, "What VanAntwerp saw (a ten second embrace in Dr. Kozee's parking lot on the lunch hour) would bother me too." Even assuming that Claimant told the truth about when the physical relationship commenced, and the Arbitrator rejects that assumption, the flaw in Claimant's judgment is too enormous to excuse. He was warned by both the President and Vice President of the Board, the President of the teacher's union, and finally by the entire board against such a relationship prior to the date he alleges the physical relationship commenced. Unquestionably this standard has been violated.

This Arbitration was commenced by Claimant, Richard Perry, pursuant to his contract provision that permitted him to resolve any disputes over a discharge by

filing for arbitration with the AAA. The Respondent Board recognizes that in such disputes while it is the respondent it bears the burden of proof by a preponderance of the evidence. As noted in the beginning of this award Claimant's contract provides that he may be discharged for "...any act of moral turpitude, misconduct, dishonesty, fraud, insubordination, incompetency, or if the Superintendent materially breaches the terms of this contract, or for any other reason that is not arbitrary or capricious." Earlier in this Award the Arbitrator has found that the Claimant's conduct constituted: misconduct, endangered the organizations public image, and failed to exercise good Judgment. Anyone of these findings would suffice to sustain his discharge. Each has been met by the preponderance of evidence standard. A discharge based on anyone of these grounds cannot be said to be arbitrary or capricious since they are founded in fact and placed the organization at risk in multiple ways.

Claimant's grievance is denied and his discharge is sustained.

The administrative fees of the American Arbitration Association totaling \$4,050.00, and the compensation and expenses of the arbitrator totaling \$12,153.01, shall be borne as incurred.

This Award is in full settlement of all claims submitted to this Arbitration. All claims not expressly granted herein are hereby, denied.

6.19.13

Date



Peter D. Houk

I, Peter D. Houk, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument which is my Award.

6.19.13

Date



Peter D. Houk