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Designated by Order of the Court for the publication of court and other legal notices, the Franklin County Legal Journal (USPS 378-950), 100 Lincoln Way East, Chambersburg, Franklin County, PA 17201–2291, contains reports of cases decided by the various divisions of the Franklin County Branch of the Court of Common Pleas of the 39th Judicial District of Pennsylvania and selected cases from other counties.

Catherine M. Dusman , Plaintiff v. . The Board of Directors of the Chambersburg Area School District and The Chambersburg Area School District , Defendants

Court of Common Pleas of the 39th Judicial District of Pennsylvania, Franklin County Branch, Civil Action No. 2013-2085

HEADNOTES

Application to Vacate Automatic Supersedeas

1. School districts, being political subdivisions, are entitled to an automatic supersedeas upon the taking of an appeal pursuant to Pa. R. App. P. 1736(a)(1). However, the automatic supersedeas is not absolute and a trial court has authority to order that the supersedeas be lifted pursuant to Pa. R.A.P. 1736(b) and 1732(a).

2. To prevail on an application to vacate supersedeas the moving party must establish: (1) she is likely to prevail on the merits; (2) she will suffer irreparable injury without the requested relief; and (3) the removal of the automatic supersedeas will not substantially harm other interested parties or adversely affect the public interest. Solano v. Pennsylvania Bd. of Prob. & Parole, 884 A.2d 943, 944 (Pa. Commw. Ct. 2005).

3. As a matter of law, Plaintiff's right to relief is clear, i.e., she is likely to prevail in her mandamus action on the merits.

4. "Averments in a pleading to which a responsive pleading is required are admitted when not denied specifically or by necessary implication. A general denial or a demand for proof, except as provided by subdivisions (c) and (e) of this rule, shall have the effect of an admission." Pa. R. Civ. P. 1029(b). Furthermore, "[a] statement by a party that after reasonable investigation the party is without knowledge or information sufficient to form a belief as to the truth of an averment shall have the effect of a denial." Pa. R. Civ. P. 1029(c). However, reliance on Pa.R.C.P. 1029(c) does not excuse a failure to admit or deny a factual allegation when it is clear that the pleader must know whether a particular allegation is true or false. Pa. R. Civ. P. 1029(c) note (citing Cercone v. Cercone, 386 A.2d 1, 5 (Pa. Super. Ct. 1978)). Additionally, where a party avers "the documents speak for themselves" in its Answer, the response will be deemed an admission. Aimco Imports. Ltd. v. Indus. Valley Bank & Trust Co., 435 A.2d 884, 886 (Pa. Super. Ct. 1981).

5. Defendants' admissions in their Answer to Amended Complaint amount to established facts sufficient to demonstrate that the 2007 contract or 2009 contract governs the conditions of employment for Plaintiff as assistant superintendent at CASD.

6. Prior to the 2012 amendment of the Public School Code, 24 P.S. § 10-1077(a) provided two avenues for setting the length of the term for an assistant superintendent at a school district. The term could coincide with the Superintendent's term or it could be set by contract for a term of three to five years fixed by a majority vote of the board of school directors. 24 Pa. Stat. § 10-1077(a).

7. School boards are statutorily required at a regular meeting at least 150 days prior to the expiration of the assistant superintendent's term of office to notify the assistant superintendent whether it intends to retain her for a term of three to five years or that other candidates will be considered. 24 Pa. Stat. § 10-1077(b).

8. In the event that the board fails to take such action at a regular meeting of the board of school directors occurring at least one hundred fifty (150) days prior to the expiration date

of the term of office of the assistant district superintendent, she shall continue in office for a further term of similar length to that which he is serving. 24 Pa. Stat. § 10-1077(b).

9. The undisputed facts of the case indicate that the 2007 contract or the 2009 contract govern the terms and conditions of Plaintiff's employment at CASD and that Plaintiff's employment as assistant superintendent at CASD was terminated in contravention of both contracts and in violation of 24 P.S. § 10-1077.

10. Defendants chose to set Plaintiff's term as assistant superintendent by contract rather than in accord with the superintendent's term. On August 22, 2005 Plaintiff was appointed by the Board as assistant superintendent for a term of four years from August 23, 2005 to August 22, 2009. On September 26, 2007 Plaintiff and Defendants agreed in the 2007 contract to set Plaintiff's term from August 1, 2004 to July 31, 2008. No action was taken by the Board 150 days prior to the July 31, 2008 expiration of Plaintiff's initial contract. Thus, if the 2007 contract controls, it automatically renewed on August 31, 2008 and continued until July 31, 2012 pursuant to 24 P.S. § 10-1077(b) and under the terms of the contract itself. Therefore, if the 2007 contract governs, Plaintiff is likely to prevail in her mandamus action on the merits as her contract runs until July 31, 2016.

11. Plaintiff is also entitled to reinstatement if the 2009 contract controls the term of her employment. Although Defendants deny that the 2009 contract was ever signed and executed by the parties, if it is eventually found that the 2009 contract was in fact executed it would supersede the terms of the 2007 contract. Nonetheless, Plaintiff would still be entitled to reinstatement as assistant superintendent as the 2009 contract sets Plaintiff's four year term of employment from July 1, 2009 to June 30, 2013. Since the Board notified Plaintiff of its intent not to retain her as assistant superintendent less than 150 days prior to the June 30, 2013 end date in violation of 24 P.S. § 10-1077, the termination of employment is ineffective. As a result, the 2009 contract would have automatically renewed on July 1, 2013 and continue until June 30, 2017 pursuant to 24 P.S. § 10-1077(b) and to the terms of the contract itself.

12. The the Board's March 14, 2013 notification to Plaintiff of its intention to terminate her employment on August 26, 2013 was in contravention of the contracts and indisputably in violation of 24 P.S. § 10-1077, and therefore, under either the 2007 contract or the 2009 contract Plaintiff is likely to prevail on the merits.

13. The statutory requirement, under 24 Pa. Stat. § 10-1077(a), that a majority vote approve the contract for assistant superintendent is not mandatory where it was the fault of the school board and not the employee for failure to comply with the statute. <u>Mullen v. Bd. of Sch. Directors of DuBois Area Sch. Dist.</u>, 259 A.2d 877, 880 (Pa. 1969). Any noncompliance with the statute fell solely on the Board. The Board's failure to approve the 2007 contract or the 2009 contract has no bearing on the validity and enforceability of the contracts.

14. The Board's 2009 resolution to renew Plaintiff's employment for a term of four years from August 23, 2009 to August 22, 2013 does not invalidate or replace the existing 2007 or 2009 contract.

15. "[A] contract is created where there is mutual assent to the terms of a contract by the parties with the capacity to contract." <u>Shovel Transfer & Storage, Inc. v. Pennsylvania Liquor Control Bd.</u>, 739 A.2d 133, 136 (Pa. 1999).

16. Since Plaintiff did not take part in the negotiations, the 2009 resolution is not a contract and it cannot displace the effect of the 2007 contract or 2009 contract. A unilateral alteration by the Board to the negotiated terms, rights, and obligations contracted to by Plaintiff and Defendants defeats the very essence of contract formation in the first place and belies the constructs of the Public School Code of 1949.

17. Where there is no enforceable agreement between the parties because the agreement is not supported by consideration, the doctrine of promissory estoppel is invoked to avoid injustice by making enforceable a promise made by one party to the other when the promisee

relies on the promise and therefore changes his position to his own detriment. Crouse v. Cyclops Indus., 745 A.2d 606, 610 (Pa. 2000).

18. There is no evidence that Plaintiff made any promise that she would serve as assistant superintendent for the term of employment set out in the 2009 resolution. The fact that Plaintiff applied for a commission for a term identical to that in the 2009 resolution does not amount to a promise to Defendants that she agreed to that term of employment. A commission to serve as assistant superintendent and the accompanying Oath of Office signed by Plaintiff is certainly not an employment contract nor does it supersede any preexisting employment contracts. Any detrimental reliance by Defendants on the term set forth in the commission, including removal of the position of assistant superintendent and realignment of its employee positions, is of their own making and cannot be depended on to establish promissory estoppel. "The burden of complying with the statute rests with the school board; should they fail to conduct their business as required, the consequences ought to lie at their door, not at the door of their victims." Mullen, 259 A.2d at 880.

19. "Laches is an equitable doctrine that bars relief when a complaining party is guilty of want of due diligence in failing to promptly institute an action to the prejudice of another." Stilp v. Hafer, 718 A.2d 290, 292 (Pa. 1998).

20. The Plaintiff was notified on March 14, 2013 that her position would be terminated in August, 2013 pursuant to the 2013 resolution. Plaintiff filed a Writ of Summons on May 23, 2013. The basis for Plaintiff's mandamus action is the 2013 resolution that was decided by the Board on March 13, 2013. Plaintiff's Writ of Summons was filed just over two months after the Board's decision. Therefore, the doctrine of laches is not a viable defense in this action.

21. It is unclear from the record at present whether the 2007 contract or the 2009 contract controls the terms of Plaintiff's employment. However, Plaintiff's right to reinstatement is clear under either contract.

22. Generally, irreparable harm is present when it is established that in the absence of injunctive relief a plaintiff will suffer harm that cannot be compensated by damages. Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc., 828 A.2d 995, 1001 (Pa. 2003).

23. Deprivation of a statutory right or "[f]ailure to comply with a statute is sufficiently injurious to constitute irreparable harm." Wyland v. W. Shore Sch. Dist., 52 A.3d 572, 583 (Pa. Commw. Ct. 2012).

24. Under either contract the Board's action in making a decision on March 13, 2013 to terminate Plaintiff's employment on August 22, 2013 is in direct contravention of a statute, i.e., 24 Pa. Stat. § 10-1077. Therefore, as long as the supersedeas is in operation Defendants are in incessant violation of a statute. Thus, Plaintiff will suffer irreparable harm per se absent the vacation of the supersedeas that is currently in effect.

25. The removal of the supersedeas will not substantially harm Defendants or the public interest.

26. CASD's acts of reorganizing its staff, and in effect, terminating Plaintiff's employment violates 24 P.S. § 10-1077 whether the 2007 contract governs or the 2009 contract governs. Defendants' own actions put them in the position they now lie and any resultant injury from lifting the supersedeas is self-inflicted.

27. The very nature of Defendants' violation of the statute constitutes ongoing injury to the public. "When the Legislature declares certain conduct to be unlawful it is tantamount in law to calling it injurious to the public. For one to continue such unlawful conduct constitutes irreparable injury." Pennsylvania Pub. Util. Comm'n v. Israel, 52 A.2d 317, 321 (Pa. 1947).

Appearances:

J. McDowell Sharpe, Esq., *Counsel for Catherine M. Dusman*

Michael I. Levin, Esq., *Counsel for The Board of Directors of the Chambersburg Area School District and The Chambersburg Area School District*

OPINION

Before Herman, P.J.

This case involves an action in mandamus wherein Catherine M. Dusman ("Plaintiff") seeks reinstatement of her position as assistant superintendent at Chambersburg Area School District ("CASD") after her removal by the Board of Directors of Chambersburg Area School District ("the Board").[1] On April 28, 2014 we issued an Order and Opinion granting peremptory judgment in favor of Plaintiff, reinstating her to the position of assistant superintendent at CASD. On May 8, 2014 Defendants filed an appeal of that decision which now operates as a supersedeas in favor of Defendants until the appellate process is complete. Plaintiff requests this Court to vacate the supersedeas so that she can be immediately reinstated to assistant superintendent at CASD. For the reasons that follow we will vacate the supersedeas.

FACTUAL HISTORY

On August 22, 2005 at a school board meeting Plaintiff, Catherine M. Dusman was appointed by the Board as assistant superintendent for Elementary Services for a term of four years from August 23, 2005 to August 22, 2009. On August 25, 2005 Plaintiff completed an Application for Commission of Assistant Superintendent for a term from August 23, 2005 to August 23, 2009, however Plaintiff did not sign the oath of office. On September 26, 2007 Plaintiff and Defendants agreed to a written contract ("2007 contract") that included a four year term as assistant superintendent from August 1, 2004 to July 31, 2008, terms different than what was approved at the August 22, 2005 board meeting. Pursuant to 24 P.S. § 10-1077 the contract provided for automatic renewal unless Defendants gave Plaintiff 150 day notice of its intent not to renew.

> The District shall notify Assistant Superintendent no later than one hundred fifty (15) days prior to the expiration date of this Agreement of the District's intent not to reappoint

1 Chambersburg Area School District and the Board of Directors of Chambersburg Area School District are collectively referred to as "Defendants" throughout this Opinion.

> Assistant Superintendent. Should Assistant Superintendent not be so notified, said Assistant Superintendent shall be appointed for a term of years not less than the length of the expiring term and the terms and conditions of this Agreement shall be incorporated in a Successor Agreement, unless mutually agreed otherwise by the Board and Assistant Superintendent.

(Am. Compl. Ex. A). The Board did not act within 150 days of July 31, 2008, the expiration of the contract. On March 25, 2009 the Board did act when it approved a renewal of Plaintiff's employment for a term of four years from August 23, 2009 to August 22, 2013 by way of a resolution ("2009 resolution") signed by the president of the Board. However, this resolution was not signed or negotiated by Plaintiff. (Answers to Req. for Admis. ¶ 6). Plaintiff asserts that a written contract executed in 2009 ("2009 contract") exists setting Plaintiff's term of employment from July 1, 2009 to June 30, 2013. (Am. Compl. Ex. C). The record does contain a contract provided by Plaintiff with those terms of employment, however the contract is not signed by either party.[2] Defendants claim that no contract was ever signed after the 2009 resolution.[3] The 2009 contract contains the same 150 day notice of termination requirement that is contained within the 2007 contract. On October 1, 2012 Plaintiff completed an Application for Commission which provided for a term from August 23, 2009 to August 22, 2013 and Plaintiff signed the attached Oath of Office. On October 24, 2012 the Pennsylvania Department of Education issued a commission to Plaintiff to serve as assistant superintendent from August 23, 2009 to August 22, 2013. On March 13, 2013 the Board passed a resolution ("2013 resolution") approving the abolition of the position of assistant superintendent and notified Plaintiff on March 14, 2013 that CASD did not intend to retain her as assistant superintendent for an additional four years after the expiration of her contract and would instead appoint her as Director of Early Childhood Education, effective August 26, 2013. The Board action on March 13, 2013 is the basis of this mandamus action.

PROCEDURAL HISTORY

Plaintiff commenced this action by filing a Praecipe for Writ of Summons on May 23, 2013 followed by a Complaint in Mandamus on June 3, 2013. Defendants filed Preliminary Objections on June 20, 2013. On July 2, 2013 Plaintiff filed an Amended Complaint to which Defendants

2 Plaintiff attached to her Amended Complaint a blank copy of the 2009 contract that she claims was signed by both parties. (Compl. Ex. C).

3 (Memo of Law in Opposition to Pl.'s Application to Vacate Automatic Supersedeas at 3). Also, in their Amended Answer Defendants state that "[a]fter reasonable investigation, Defendants are without knowledge sufficient to form a belief as to the truth of said averments and strict proof thereof at trial is demanded." (Answer to Am. Compl. ¶ 8, 9).

again filed Preliminary Objections. We overruled Defendants' Preliminary Objections in our Opinion and Order on January 8, 2014. Defendants filed an Answer to Amended Complaint with New Matter on January 24, 2014 to which Plaintiff filed a Reply to New Matter on February 6, 2014. Plaintiff filed a Motion for Peremptory Judgment on February 27, 2014 and brief in support on March 31, 2014 seeking immediate reinstatement to her position as assistant superintendent. Defendants filed a Response to Plaintiff's Motion for Peremptory Judgment along with a brief in support on March 25, 2014. On April 2, 2014 Defendants filed a Petition for Leave to File an Amended Answer with New Matter. On April 30, 2014 Plaintiff filed a Response Opposing Defendant's Petition to File Amended Answer. On April 28, 2014 we issued our Order and Opinion granting Plaintiff's Motion for Peremptory Judgment ("Peremptory Judgment Opinion"). Appellant timely appealed that decision on May 8, 2014. Pursuant to Pa. R.A.P. 1736(b) Defendants' appeal operated as an automatic supersedeas in favor of Defendants. Plaintiff filed an Application to Vacate Automatic Supersedeas on May 22, 2014. Defendants filed a response to Plaintiff's application along with a memorandum of law on June 6, 2014. Plaintiff's application is now before this Court.

DISCUSSION

On April 28, 2014 we granted peremptory judgment for Plaintiff and ordered Defendants to immediately reinstate Plaintiff to her position as assistant superintendent at CASD. However, Defendants appealed that decision on May 8, 2014. Pa. R.A.P. 1736(b) provides that

> Unless otherwise ordered pursuant to this chapter the taking of an appeal by any party specified in Subdivision (a) of this rule shall operate as a supersedeas in favor of such party, which supersedeas shall continue through any proceedings in the United States Supreme Court.

A political subdivision, e.g., a school district, is entitled to an automatic supersedeas upon the taking of an appeal. Pa. R. App. P. 1736(a)(1). However, the automatic supersedeas is not absolute and this Court has authority to order that a supersedeas be lifted pursuant to Pa. R.A.P. 1736(b). Sch. Dist. of Borough of Aliquippa v. Pennsylvania State Ed. Ass'n, 381 A.2d 1005, 1006 (Pa. Commw. Ct. 1977) (the phrase "[u]nless otherwise ordered . . ." under Pa. R.A.P. 1736(b) implies the Court has authority to vacate a supersedeas). A party may make application to the Court "for approval or modification of the terms of any supersedeas." Pa. R. App. P. 1732(a). Instantly, Defendants' appeal of our Peremptory Judgment Decision currently operates as a supersedeas and will remain as such absent

an express order by this Court vacating the supersedeas. Plaintiff made application to this Court on May 22, 2014 to vacate the supersedeas. We must now decide whether the automatic supersedeas should be lifted.

To prevail on an application to vacate supersedeas the moving party must establish: (1) she is likely to prevail on the merits; (2) she will suffer irreparable injury without the requested relief; and (3) the removal of the automatic supersedeas will not substantially harm other interested parties or adversely affect the public interest. Solano v. Pennsylvania Bd. of Prob. & Parole, 884 A.2d 943, 944 (Pa. Commw. Ct. 2005).

The Merits

As we explained in our Peremptory Judgment Opinion Plaintiff's right to relief as a matter of law is clear. In other words, she is likely to prevail in her mandamus action on the merits. As we noted in that Opinion, Defendants' admissions in their Answer to Amended Complaint amount to established facts sufficient to demonstrate that the 2007 contract or 2009 contract governs the conditions of employment for Plaintiff as assistant superintendent at CASD. "Averments in a pleading to which a responsive pleading is required are admitted when not denied specifically or by necessary implication. A general denial or a demand for proof, except as provided by subdivisions (c) and (e) of this rule, shall have the effect of an admission." Pa. R. Civ. P. 1029(b). Furthermore, "[a] statement by a party that after reasonable investigation the party is without knowledge or information sufficient to form a belief as to the truth of an averment shall have the effect of a denial." Pa. R. Civ. P. 1029(c). However, reliance on Pa.R.C.P. 1029(c) does not excuse a failure to admit or deny a factual allegation when it is clear that the pleader must know whether a particular allegation is true or false. Pa. R. Civ. P. 1029(c) note (citing Cercone v. Cercone, 386 A.2d 1, 5 (Pa. Super. Ct. 1978)). Additionally, where a party avers "the documents speak for themselves" in its Answer, the response will be deemed an admission. Aimco Imports. Ltd. v. Indus. Valley Bank & Trust Co., 435 A.2d 884, 886 (Pa. Super. Ct. 1981). We now turn to the Amended Complaint and the Answer to Amended Complaint.

Paragraph 5 of the Amended Complaint states:

> As a result of such board action, on or about September 27, 2007, Cathy entered a written contract with CASD with a commencement date of August 1, 2004 and a term through July 31, 2008. This contract contains an integration clause superseding all prior oral and written agreements and representations. A true and correct copy of that contract

> is attached hereto as Exhibit A and hereby incorporated by reference.

Am. Compl. ¶ 5. In their Answer Defendants aver:

> No response to the averments of paragraph 5 of the Amended Complaint is necessary in that the document speaks for itself.

Answer to Am. Compl. ¶ 5. We interpret this response as an admission as to the authenticity of the 2007 contract, the provisions within the contract, and that the contract was entered into by both parties.

Paragraph 8 of the Amended Complaint states:

> Because of the board action, as well as board and administrative policy, on information and belief, the CASD solicitor prepared a new contract, which Cathy approved, aligning her contract term to the same date range as every other administrator in CASD from July 1 until June 30. The contract was to be effective from July 1, 2009 for four years ending June 30, 2013. A true and correct copy of that contract . . . is attached hereto . . . The 2009 Contract does reflect the contractual terms, including a change in payment terms, under which she and CASD have operated since July 1, 2009, although she has never seen a copy signed by CASD.

Am. Compl. ¶ 8. In their Answer Defendants aver:

> Proof of the averments of paragraph 8 of the Amended Complaint is demanded. After reasonable investigation, Defendants are without knowledge sufficient to form a belief as to the truth of said averments and strict proof thereof at trial is demanded. To the extent that paragraph 8 of the Amended Complaint refers to a document, said document speaks for itself.

Answer to Am. Compl. ¶ 8. This will be deemed an admission as this information would clearly be within the knowledge of Defendants and reliance on Pa. R.C.P. 1029(c) does not excuse a failure to admit or deny this factual allegation. <u>Cercone</u>, 386 A.2d at 5. Furthermore, the averment that "said document speaks for itself" is an admission as to the authenticity. Therefore, Defendants' admit the 2009 contract attached to the Amended Complaint is an authentic copy and consequently, the provisions within the contract are uncontroverted. This admission establishes that the 2009 contract does exist, however it does not confirm whether CASD actually signed the contract. If CASD did sign the 2009 contract then it would

supersede the 2007 contract. Nevertheless, Plaintiff is entitled to relief whether the 2007 contract or 2009 contract controls as discussed below.

Paragraph 9 of the Amended Complaint avers:

> Cathy does not have a signed copy of the 2009 Contract as that document is in the sole control of CASD and, despite demand, CASD has refused to produce the signed 2009 Contract to either Cathy or her duly authorized counsel, but has instead disavowed its existence. Based upon the existence of the attached 2009 Contract, but the failure of CASD to provide a signed copy, Cathy draws the inference that either the 2009 Contract was lost through misfeasance or malfeasance, as the existence of that contract is contrary to CASD's actions with respect to renewal of her position as assistant superintendent. Despite request on May 10, 2013, Cathy's authorized representative has been denied inspection of her personnel file as guaranteed by 43 P.S. § 1322.

Am. Compl. ¶ 9. In their Answer Defendants aver:

> Proof of the averments of paragraph 9 of the Amended Complaint is demanded. After reasonable investigation, Defendants are without knowledge sufficient to form a belief as to the truth of said averments and strict proof thereof at trial is demanded. To the extent that paragraph 8 of the Amended Complaint refers to a document, said document speaks for itself.

Answer to Am. Compl. ¶ 9. Again, pursuant to Cercone, Defendants' response will be deemed an admission. It is clearly within Defendants' knowledge whether a signed copy of the 2009 contract is within their control and whether they refused to produce it. As such, Defendants effectively admit that they are in control of a signed copy of the 2009 contract.

Paragraph 12 of the Amended Complaint states:

> Cathy has a direct interest in this action inasmuch as the CASD action constituted an involuntary demotion and deprives her of her ability for advancement and promotion, although this Honorable Court's jurisdiction is limited to determining whether CASD correctly acted within 150 days under 24 P.S. § 10-1077.

Am. Compl. ¶ 12. In their Answer Defendants aver:

> Proof of the averments of paragraph 12 of the Amended Complaint is demanded. After reasonable investigation,

> Defendants are without knowledge sufficient to form a belief as to the truth of said averments and strict proof thereof at trial is demanded. To the extent that paragraph 8 of the Amended Complaint refers to a document, said document speaks for itself. To the extent that paragraph 12 of the Amended Complaint contains legal conclusions, no response to the same is required.

Answer to Am. Compl. ¶ 12. Here, Defendants admit that Defendants' actions in removing Plaintiff from the position of assistant superintendent constituted an involuntary adverse employment action. Whether Plaintiff's new position constitutes a demotion is within Defendants' knowledge and so their denial is ineffective. Cercone, 386 A.2d at 5

Finally, paragraph 15 of the Amended Complaint alleges:

> On information and belief, the position of assistant superintendent still exists in CASD, and Cathy's responsibilities merely were reassigned to other persons within CASD so that the Court has the power to reinstate her to the office of assistant superintendent.

Am. Compl. ¶ 15. In their Answer Defendants aver:

> Proof of the averments of paragraph 15 of the Amended Complaint is demanded. After reasonable investigation, Defendants are without knowledge sufficient to form a belief as to the truth of said averments and strict proof thereof at trial is demanded. To the extent that a response may be required, said averments are denied.

Answer to Am. Compl. ¶ 15. Under Cercone, Defendants admit that the position of assistant superintendent still exists at CASD and Plaintiff's responsibilities were reassigned to other employees at CASD. Again, such information would plainly be within the knowledge of Defendants.

The undisputed facts of the case indicate that the 2007 contract or the 2009 contract govern the terms and conditions of Plaintiff's employment at CASD and that Plaintiff's employment as assistant superintendent at CASD was terminated in contravention of both contracts and in violation of 24 P.S. § 10-1077. Prior to the 2012 amendment of the Public School Code,[4] 24 P.S. § 10-1077(a) provided two avenues for setting the length of the term for an assistant superintendent at a school district. The term could coincide with the Superintendent's term or it could be set by contract for a term of three to five years fixed by a majority vote of the board of school directors. 24 Pa. Stat. § 10-1077(a). Furthermore, school boards

4 4 P.S. § 10-1073(e)(1) now requires that an assistant superintendent be employed pursuant to a written contract. This section was not in effect until 2012.

were statutorily required at a regular meeting at least 150 days prior to the expiration of the assistant superintendent's term of office to notify the assistant superintendent whether it intends to retain her for a term of three to five years or that other candidates will be considered. 24 Pa. Stat. § 10-1077(b).[5]

> In the event that the board fails to take such action at a regular meeting of the board of school directors occurring at least one hundred fifty (150) days prior to the expiration date of the term of office of the assistant district superintendent, he shall continue in office for a further term of similar length to that which he is serving.

24 Pa. Stat. § 10-1077(b).

Defendants chose to set Plaintiff's term as assistant superintendent by contract rather than in accord with the superintendent's term. On August 22, 2005 Plaintiff was appointed by the Board as assistant superintendent for a term of four years from August 23, 2005 to August 22, 2009. On September 26, 2007 Plaintiff and Defendants agreed in the 2007 contract to set Plaintiff's term from August 1, 2004 to July 31, 2008. No action was taken by the Board 150 days prior to the July 31, 2008 expiration of Plaintiff's initial contract. Thus, if the 2007 contract controls, it automatically renewed on August 31, 2008 and continued until July 31, 2012 pursuant to 24 P.S. § 10-1077(b) and under the terms of the contract itself. Again, since the Board failed to take any action 150 days prior to July 31, 2012 it would have automatically renewed to a term from August 1, 2012 to July 31, 2016. The Board's March 14, 2013 notification to Plaintiff of its intention to terminate her employment on August 26, 2013 was in contravention of the 2007 contract and indisputably in violation of 24 P.S. § 10-1077. Therefore, if the 2007 contract governs, Plaintiff is likely to prevail in her mandamus action on the merits as her contract runs until July 31, 2016.

Plaintiff is also entitled to reinstatement if the 2009 contract controls the term of her employment. Defendants deny that the 2009 contract was ever signed and executed by the parties. If it is eventually found that the 2009 contract was in fact executed it would supersede the terms of the 2007 contract. Nonetheless, Plaintiff would still be entitled to reinstatement as assistant superintendent. The 2009 contract sets Plaintiff's four year term of employment from July 1, 2009 to June 30, 2013. The Board's March 14, 2013 notification to Plaintiff of its intention to terminate her employment on August 26, 2013 was less than 150 days prior to the expiration of the 2009 contract violating 24 P.S. § 10-1077 and the terms of the 2009 contract.

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5 This subsection of the statute prior to and after the 2012 amendment are identical.

Since the Board notified Plaintiff of its intent not to retain her as assistant superintendent less than 150 days prior to the June 30, 2013 end date in violation of 24 P.S. § 10-1077, the termination of employment is ineffective. As a result, the 2009 contract would have automatically renewed on July 1, 2013 and continue until June 30, 2017 pursuant to 24 P.S. § 10-1077(b) and to the terms of the contract itself. Therefore, under either the 2007 contract or the 2009 contract Plaintiff is likely to prevail on the merits.

Defendants contend that neither contract governs the term of Plaintiff's employment because they were not approved by the Board. The Public School Code provides:

> Assistant district superintendents may serve through the term of the district superintendent, or enter a contract for a term of three to five years at salaries paid by the district, and *fixed by a majority vote of the whole board of school directors* prior to their election.

24 Pa. Stat. § 10-1077(a) (emphasis added). However, the statutory requirement that a majority vote approve the contract for assistant superintendent is not mandatory where it was the fault of the school board and not the employee for failure to comply with the statute. Mullen v. Bd. of Sch. Directors of DuBois Area Sch. Dist., 259 A.2d 877, 880 (Pa. 1969).[6] In Mullen, the Supreme Court held that a contract between a school board and a teacher was valid despite the school board's failure to comply with the Public School Code's requirement that the school board approve the contract by a majority vote. Id. In coming to this conclusion the Supreme Court focused on the fact that failure to comply with the statute was the fault of the school board and the contract between the school district and the teacher was valid. "To hold that the lack of a formal vote recorded in the minutes, the presence or absence of which is entirely within the control of the Board, renders [the] contract null and void, would be to exalt form over substance." Id. To allow any other result would allow the school board the unchecked power to void any contract with a public employee simply by purposely failing to approve the contract. Id. Here, any noncompliance with the statute fell solely on the Board. The 2007 contract was clearly valid as it was signed by the parties and its execution admitted by Defendants. The Board's failure to vote on the 2007 contract cannot invalidate an otherwise enforceable contract. Plaintiff cannot be expected to peruse through the minutes of any Board meetings in an attempt to verify that the Board complied with the mandates of the Public School Code. Id. The same holds true for the 2009 contract, if it is eventually determined that the 2009 contract was executed. Accordingly, the Board's failure to approve

6 Mullen involved a different section of the statute (24 P.S. § 5-508), however the relevant provision is directly applicable to the case at bar.

the 2007 contract or the 2009 contract has no bearing on the validity and enforceability of the contracts.

Defendants claim that the 2009 resolution by the Board controls the term of Plaintiff's employment. On March 25, 2009 pursuant to the 2009 resolution, the Board approved a renewal of Plaintiff's employment for a term of four years from August 23, 2009 to August 22, 2013. This position by Defendants seems to be an inverse argument of their reasoning why the 2007 contract or 2009 contract is not valid, as they essentially argue that since they did approve a renewal of Plaintiff's employment such renewal is valid and controlling. However, Plaintiff did not take part in any negotiations for this proposed term of employment. In order to replace the 2007 contract or the 2009 contract a new contract would be required. "[A] contract is created where there is mutual assent to the terms of a contract by the parties with the capacity to contract." Shovel Transfer & Storage, Inc. v. Pennsylvania Liquor Control Bd., 739 A.2d 133, 136 (Pa. 1999). Since Plaintiff did not take part in the negotiations, the 2009 resolution is not a contract and it cannot displace the effect of the 2007 contract or 2009 contract. A unilateral alteration by the Board to the negotiated terms, rights, and obligations contracted to by Plaintiff and Defendants defeats the very essence of contract formation in the first place and belies the constructs of the Public School Code of 1949. Plaintiff's mere knowledge of the 2009 resolution does not create a contract between herself and Defendants or supersede an existing one. Therefore, the 2009 resolution is not an employment contract and cannot control the terms of Plaintiff's employment.

Defendants further argue that Plaintiff is estopped from denying that her term of employment ended on August 22, 2013 based on the 2009 resolution, Plaintiff's signed Oath of Office as part of her Application for Commission from October 2012, and the fact that the Secretary of Education issued a Commission to Plaintiff for the term of August 23, 2009 to August 22, 2013. Defendants claim these facts "line up as powerfully as the line-up of the moon in front of the sun on a full eclipse." While we appreciate the vivid and dramatic imagery of the moon seamlessly aligning between the earth and the sun to produce the rarity that is a full solar eclipse we fail to observe the facts in such a compelling fashion.

> Where there is no enforceable agreement between the parties because the agreement is not supported by consideration, the doctrine of promissory estoppel is invoked to avoid injustice by making enforceable a promise made by one party to the other when the promisee relies on the promise and therefore changes his position to his own detriment.

Crouse v. Cyclops Indus., 745 A.2d 606, 610 (Pa. 2000). As previously

discussed, Plaintiff took no part in any discussions as to her employment pursuant to the 2009 resolution. Therefore, there was no consideration and the 2007 contract or the 2009 contract govern Plaintiff's employment unless the circumstances demonstrate that Plaintiff made a promise to Defendants to abide by the term of employment that was set forth in the 2009 resolution and Defendants detrimentally relied on that promise. There is no evidence that Plaintiff made any promise that she would serve as assistant superintendent for the term of employment set out in the 2009 resolution. The fact that Plaintiff applied for a commission for a term identical to that in the 2009 resolution does not amount to a promise to Defendants that she agreed to that term of employment. A commission to serve as assistant superintendent and the accompanying Oath of Office signed by Plaintiff is certainly not an employment contract nor does it supersede any preexisting employment contracts. Any detrimental reliance by Defendants on the term set forth in the commission is of their own making. 24 P.S. § 10-1077 requires a contract between a school district and its assistant superintendent for a term between three and five years fixed by a majority vote of the school board. While the 2009 resolution constituted a majority vote by the Board to employ Plaintiff for a term different than the 2007 contract or 2009 contract, the Board failed to construct and enter into a valid contract as mandated by contract law and statute. "The burden of complying with the statute rests with the school board; should they fail to conduct their business as required, the consequences ought to lie at their door, not at the door of their victims." Mullen, 259 A.2d at 880. Any detriment suffered by Defendants as a result of their reliance on Plaintiff's commission, including removal of the position of assistant superintendent and realignment of its employee positions, cannot be depended on to establish promissory estoppel. Furthermore, Defendants seem to assert that the Secretary of Education detrimentally relied on Plaintiff's Application for Commission and Oath of Office by issuing Plaintiff a commission for the term of August 23, 2009 to August 22, 2013. This argument falls flat as the Secretary of Education is not a party to the purported contract that Defendants claim exists by way of the 2009 resolution. The doctrine of promissory estoppel requires the detrimental reliance on the part of a promisee, i.e., Defendants. Any detrimental reliance by the Secretary of Education is irrelevant to this action.

Defendants argue that Plaintiff does not have the legal qualifications to resume her duties as assistant superintendent were she reinstated because she does not currently have the required commission issued by the Pennsylvania Department of Education. Plaintiff's commission expired on August 22, 2013. Her employment was terminated on that date as well. Without an employment contract in place Plaintiff cannot obtain a commission as required by 24 P.S. § 10-1078. This argument is meritless

as Plaintiff can obtain a commission upon reinstatement to her position as assistant superintendent.

Lastly, Defendants contend that Plaintiff's claim is barred by the doctrine of laches because she delayed in filing suit for more than four years. "Laches is an equitable doctrine that bars relief when a complaining party is guilty of want of due diligence in failing to promptly institute an action to the prejudice of another." Stilp v. Hafer, 718 A.2d 290, 292 (Pa. 1998). The Plaintiff was notified on March 14, 2013 that her position would be terminated in August, 2013 pursuant to the 2013 resolution. Plaintiff filed a Writ of Summons on May 23, 2013. The basis for Plaintiff's mandamus action is the 2013 resolution that was decided by the Board on March 13, 2013. Our math tells us that Plaintiff's Writ of Summons was filed just over two months after the Board's decision. Therefore, the doctrine of laches is not a viable defense in this action.

It is unclear from the record at present whether the 2007 contract or the 2009 contract controls the terms of Plaintiff's employment. However, Plaintiff's right to reinstatement is clear under either contract. If the 2007 contract controls, termination of Plaintiff's employment cannot take effect until July 31, 2016 because the 2007 contract would have renewed on August 1, 2012. If the 2009 contract controls, the termination is ineffective because the Board notified Plaintiff of its intent to terminate her employment on March 14, 2013, less than 150 days before the expiration of the contract which would have been June 30, 2013 and therefore her contract renewed until June 30, 2017. As we stated in our Peremptory Judgment Opinion:

> [W]hile there may be issues of material fact as to the effect of the purported 2009 contract on the 2004 contract these facts will only determine the end date of the contract term. These issues do not affect the Court's determination that the District was bound by one contract or another and had failed to provide the required 150 day notice required to terminate either one of those contracts.

Irreparable Harm

Without her immediate reinstatement Plaintiff will suffer irreparable harm. Generally, irreparable harm is present when it is established that in the absence of injunctive relief a plaintiff will suffer harm that cannot be compensated by damages. Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc., 828 A.2d 995, 1001 (Pa. 2003). Deprivation of a statutory right or "[f]ailure to comply with a statute is sufficiently injurious to constitute irreparable harm." Wyland v. W. Shore Sch. Dist., 52 A.3d 572, 583 (Pa.

Commw. Ct. 2012); see also Commonwealth. v. Burns, 663 A.2d 308, 312 (Pa. Commw. Ct. 1995) (accepting the Commonwealth's argument that violation of a statute establishes irreparable harm per se);[7] Pennsylvania Pub. Util. Comm'n v. Israel, 52 A.2d 317, 321 (Pa. 1947) (finding that operation of taxicabs in violation of the law constitutes irreparable injury for purposes of a preliminary injunction). In Wyland, the school district refused to provide transportation to students who were residents of the district in violation of 24 P.S. § 13-1361 which mandates school transportation to resident pupils. 52 A.3d at 583. The Commonwealth Court held that such violation and deprivation of the statutory right constituted irreparable injury for purposes of injunctive relief. Id.

As discussed above, the Public School Code requires school districts to notify the current assistant superintendent at least 150 days prior to the expiration of her contract whether the school board intends on renewing the assistant superintendent's contract. In the event the board fails to do so, the assistant superintendent's term is automatically renewed for the length of time of the previous contract term. 24 Pa. Stat.. § 10-1077(b). As alluded to, there are two possible contracts that govern the terms of Plaintiff's employment as assistant superintendent at CASD, the 2007 contract or the 2009 contract. If the 2007 contract controls, Plaintiff is under contractual employment until July 31, 2016. Plaintiff's contract as assistant superintendent for a term of four years was necessarily entered into pursuant to 24 P.S. § 10-1077(a), and terminating Plaintiff's employment prior to the end date is a violation of that statute. If the 2009 contract governs, the Board failed to notify Plaintiff at least 150 days prior to the end of the contract. Under the 2009 contract Plaintiff's employment would have ended June 30, 2013. The Board made the decision to not renew Plaintiff's contract on March 13, 2013, less than 150 days prior to June 30, 2013 in violation of 24 P.S. § 10-1077(b). Under either contract the Board's action in making a decision on March 13, 2013 to terminate Plaintiff's employment on August 22, 2013 is in direct contravention of a statute, i.e., 24 Pa. Stat. § 10-1077. Therefore, as long as the supersedeas is in operation Defendants are in incessant violation of a statute. Thus, Plaintiff will suffer irreparable harm per se absent the vacation of the supersedeas that is currently in effect.

Harm to Interested Parties or Adverse Effects on the Public Interest

The removal of the supersedeas will not substantially harm Defendants or the public interest. Defendants contend that were we to vacate the automatic supersedeas CASD and the public interest would be

7 The Commonwealth Court acknowledged in Commonwealth. v. TAP Pharm. Products, Inc., 36 A.3d 1197, 1221 (Pa. Commw. Ct. 2011) that it accepted the Attorney General's argument that a violation of a statute amounts to irreparable harm per se. 36 A.3d at 1221.

harmed because the position of assistant superintendent was abolished by CASD as of August 26, 2013 and CASD would have to spend a significant amount of time and money to reorganize staff and employees to recreate the position and it would cause a substantial disruption to the school district. Defendants' position amounts to nothing more than a bootstrap argument grounded in their own wrongdoing. CASD's acts of reorganizing its staff, and in effect, terminating Plaintiff's employment violates 24 P.S. § 10-1077 whether the 2007 contract governs or the 2009 contract governs. Defendants' own actions put them in the position they now lie and any resultant injury from lifting the supersedeas is self-inflicted. It is "readily apparent that the harm perceived by the Board is of its own making." See Solano, 884 A.2d at 945 (dismissing the Board of Probations and Parole's argument that it will suffer harm if the automatic supersedeas is vacated because an inmate would be released from incarceration where the Board created its own harm by failing to exercise its power to keep the inmate imprisoned in the first place).

Defendants also argue that there would be a disruption in the school district that would affect the students who have grown accustomed to the current alignment of faculty, and Plaintiff's current position would need to be filled which would cost public funds. The very nature of Defendants' violation of the statute constitutes ongoing injury to the public. "When the Legislature declares certain conduct to be unlawful it is tantamount in law to calling it injurious to the public. For one to continue such unlawful conduct constitutes irreparable injury." Israel, 52 A.2d at 321. Furthermore, in our estimation the present time would be ideal to reinstate Plaintiff as assistant superintendent. We are now in the summer months of the year when most students are out of school and enjoying summer vacation. Reinstating Plaintiff during the summer months allows for a smooth transition as Plaintiff would be in place far ahead of the start of the 2014-2015 school year. Accordingly, the removal of the supersedeas will not substantially harm Defendants or the public interest.

CONCLUSION

It is not apparent from the record at present whether the 2007 contract or the 2009 contract controls the terms and conditions of Plaintiff's employment. However, one of the two contracts governs and Plaintiff is entitled to reinstatement under either contract. Defendants are in clear violation of the Public School Code and so we are compelled to reinstate Plaintiff as assistant superintendent at CASD to avoid irreparable harm. Furthermore, the removal of the supersedeas will not substantially harm Defendants or the public interest. Accordingly, we will vacate the automatic

supersedeas and issue an order directing Defendants to immediately reinstate Plaintiff to her position as assistant superintendent.

ORDER OF COURT

AND NOW, this 30th day of June 2014, upon review and consideration of the Plaintiffs' Application to Vacate Automatic Supersedeas, the Defendants' answer thereto, the parties' briefs, the law, and the record in this matter,

IT IS HEREBY ORDERED that the Plaintiff's Application to Vacate Automatic Supersedeas is **GRANTED**. The automatic supersedeas currently in effect is hereby lifted pursuant to Pa. R.A.P. 1732(a) and 1736(b).

IT IS FURTHER ORDERED that the Defendants take immediate and appropriate action to reinstate the Plaintiff, Catherine M. Dusman to the position of Assistant Superintendent at the Chambersburg Area School District.

Pursuant to the requirements of Pa. R. Civ. P. 236 (a)(2),(b) and (d), the Prothonotary shall give written notice of the entry of this Order of Court, including a copy of this Opinion and Order of Court, to each party's attorney of record and shall note in the docket the giving of such notice and the time and manner thereof.

Note: Upheld by Commonwealth Court on August 26, 2014