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Franklin County Legal Journal
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CATHERINE M. DUSMAN, Plaintiff v.
The BOARD OF DIRECTORS OF 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 – Mandamus No. 2013-2085

JURY TRIAL DEMANDED

HOLDING: The contract entered on September 26, 2007 is the only contract between Plaintiff and Defendant ("the Contract"). Under the Contract, Plaintiff is entitled to a 2% salary raise for the 2009-2010 school year, and salary raises of 3% for school years 2010-2011, 2014-2015, 2016-2017, and 2018-2019. Plaintiff is not entitled to a salary raise for the 2013-2014 school year. Finally, Plaintiff did not fail to mitigate her damages in rejecting Defendant's prior offer of back pay, although she is not entitled to any additional interest on that payment.

HEADNOTES

Standard of Review of Motion for Summary Judgment

1 When a party seeks summary judgment, a court shall enter judgment whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense that could be established by additional discovery. A motion for summary judgment is based on an evidentiary record that entitles the moving party to a judgment as a matter of law. In considering the merits of a motion for summary judgment, a court, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Finally, the court may grant summary judgment only when the right to such judgment is clear and free from doubt. Gallagher v. GEICO Indemnity Co., 201 A.2d 131, 136-37 (Pa. 2019) (citations and internal quotation marks omitted).

2. The Court must give the non-moving party "the benefit of all reasonable inferences." Pennsylvania Gas & Water Co. v. Nenna & Frain, Inc., 467 A.2d 330, 333 (Pa. Super. 1983) (citations omitted).

3. "If there is evidence that would allow a fact-finder to render a verdict in favor of the non-moving party, then summary judgment should be denied." Rourke v. Pennsylvania Nat. Mut. Cas. Ins. Co., 116 A.3d 87, 96 (Pa. Super. Ct. 2015) (internal citations omitted in original) (citations omitted).

Pleadings

4. "The idea of pleadings is actually to convey notice of the intended grounds for suit, not require the opponent to guess at their substance." Schweikert v. St. Luke's Hosp. of Bethlehem, 886 A.2d 265, 270 (Pa. Super. 2005) (citation omitted).

Contracts – Grounds for action

5. "A breach of contract action involves (1) the existence of a contract, (2) a breach of a duty imposed by the contract, and (3) damages." Sullivan v. Chartwell Inv. Partners, LP, 873 A.2d 710, 716 (Pa. Super. Ct. 2005) (citation omitted).

Contracts – Intention of parties

6. [It is] well-established that under the law of contracts, in interpreting an agreement, the court must ascertain the intent of the parties. In the cases of a written contract, the intent of the parties is the writing itself. If left undefined, the words of a contract are to be given their ordinary meaning. When the terms of a contract are clear and unambiguous, the intent of the parties is to be ascertained from the document itself. When, however, an ambiguity exists, parol evidence is admissible to explain or clarify or resolve the ambiguity, irrespective of whether the ambiguity is patent, created by the language of the instrument, or latent, created by extrinsic or collateral circumstances. Leneau v. Co-eXprise, Inc., 102 A.3d 423, 429-30 (Pa. Super. Ct. 2014) (citations omitted).

Contracts – Ambiguity

7. Contractual language is ambiguous if it is reasonably susceptible of different constructions and capable of being understood in more than one sense. This is not a question in a vacuum. Rather, contractual terms are ambiguous if they are subject to more than one reasonable interpretation when applied to a particular set of facts. We will not, however, distort the meaning of the language or resort to a strained contrivance in order to find an ambiguity. Leneau, 102 A.3d at 430 (quoting Madison Const. Co. v. Harleysville Mut. Ins. Co., 735 A.2d 100, 106 (Pa. 1999) (internal citations and quotation marks omitted).

8. Generally, "[u]nder the rule of *contra proferentem*, any ambiguous language in a contract is construed against the drafter and in favor of the other party if the latter's interpretation is reasonable." Sun Co., Inc. (R&M) v. Pennsylvania Turnpike Comm'n, 708 A.2d 875, 878-79 (Pa. Commw. Ct. 1998) (citing Restatement (Second) of Contracts § 206; State Pub. Sch. Building Auth. v. Quandel, 858 A.2d 1136, 1144 (Pa. Commw. Ct. 1991)).

Contracts – Construction

9. Contracts must be construed, "whenever possible, in a manner that effectuates all of the clauses being considered. It is fundamental that one part of a contract cannot be so interpreted as to annul another part and that writings which comprise an agreement must be interpreted as a whole." Leneau, 102 A.3d at 430 (internal citations and quotation marks omitted).

10. Regardless of any ambiguity, the Court may always consider the parties' "course of performance" when construing a contract. Pennsylvania Engineering Corp. v. McGraw-Edison Co., 459 A.2d 329, 332 (Pa. 1983) (citing Atlantic Richfield Co. v. Razumic, 390 A.2d 736, 741 n.6 (Pa. 1978); Restatement (Second) of Contracts § 202(4) and Comment a. (1981)).

11. "'Course of performance' is a sequence of conduct between the parties subsequent to formation of the contract during performance of the terms of the contract." J.W.S. Delavau, Inc. v. Eastern Am. Transport & Warehousing, Inc., 810 A.2d 672, 683-83 (Pa. Super. Ct. 2002) (citation omitted).

Equitable Estoppel

12. [Equitable estoppel is the] doctrine that prevents one from doing an act differently than the manner in which another was induced by word or deed to expect[] . . . . [E]quitable estoppel recognizes that an informal promise implied by one's words, deeds or representations which leads another to rely justifiably thereon to his own injury or detriment, may be enforced in equity. Novelty Knitting Mills, Inc. v. Siskind, 457 A.2d 502, 503 (Pa. 1983) (citations omitted).

13. The doctrine has two essential elements: inducement and justifiable reliance on that inducement. Novelty Knitting Mills, Inc., 457 A.2d at 503.

14. "The inducement may be words or conduct and the acts that are induced may be by commission or forbearance provided that a change in condition results causing disadvantage to the one induced." Novelty Knitting Mills, Inc., 457 A.2d at 503-04 (citations omitted).

15. Equitable estoppel requires "clear, precise and unequivocal evidence." Novelty Knitting Mills, Inc., 457 A.2d at 504 (quoting Blofsen v. Cutaiar, 333 A.2d 842, 844 (Pa. 1975)).

Costs – American rule; necessity of contractual or statutory authorization or grounds in equity

16. "Generally, Pennsylvania adheres to the 'American Rule,' which states that litigants are responsible for their own litigation costs and may not recover them from an adverse party 'unless there is express statutory authorization, a clear agreement of the parties, or some other established exception.'" In re Farnese, 17 A.3d 357, 370 (Pa. 2011) (quoting Trizechahn Gateway LLC v. Titus, 976 A.2d 474, 482-83 (Pa. 2009) and citing Commonwealth, Dept't Envtl. Prot. V. Bethenergy Mines, Inc., 758 A.2d 1168, 1173 (Pa. 2000)).

Standard of Review of Motion for Partial Summary Judgment

17. The court's standard of review of a partial summary judgment motion is the same as for summary judgment motions. *See* Murray v. Janssen Pharm., Inc., 180 A.3d 1235, 1248 (Pa. Super. Ct. 2018).

Damages – Duty to mitigate

18. "The term 'duty to mitigate' damages has been interpreted to mean that 'damages which the plaintiff might have avoided with reasonable effort without undue risk, expense, or humiliation are either not caused by the defendant's wrong or need not have been, and therefore, are not to be charged against him.'" Toyota Indus. Trucks U.S.A., Inc. v. Citizens Nat. Bank of Evans City, 611 F.2d 465, 471 (3d Cir. 1979) (applying Pennsylvania law) (quoting 11 Williston on Contracts, § 1353 at 274 (3d ed. 1968)).

19. "When mitigation is appropriate, the test to be applied to the plaintiff's conduct is whether the conduct taken in response to the defendant's breach was reasonable." Toyota Indus. Trucks U.S.A., Inc., 611 F.2d at 471 (citing Krauss v. Greenbarg, 137 F.2d 569, 573 (3d Cir. 1943) (applying Pennsylvania law), *cert. denied*, 320 U.S. 791 (1943)).

20. "Reasonable conduct 'is to be determined from all the facts and circumstances of each case, and must be judged in the light of one viewing the situation at the time the problem was presented.'" Toyota Indus. Trucks U.S.A., Inc., 611 F.2d at 471 (quoting In re Kellett Aircraft Corp., 186 F.2d 197, 198 (3d Cir. 1951)). *See* Schnabel Associates, Inc. v. T & M Interiors, Inc., 507 A.2d 1241, 1243 (Pa. Super. Ct. 1986) (citing Toyota Indus. Trucks U.S.A., Inc., 611 F.2d 465, for said proposition).

Interest – Contracts

21. The Court finds that Plaintiff is entitled to prejudgment interest of the legal rate of six percent (6%) on the damages owed to her. Somerset Cmty. Hosp. v. Allan B. Mitchell & Associates, Inc., 685 A.2d 141, 148 (Pa. Super. Ct. 1996) ("It is well established that in contract cases, prejudgment interest is awardable as of right.") (citing Thomas H. Ross Inc. v. Seigfreid, 592 A.2d 1353, 1359 (Pa. Super. Ct. 1991)). *See* 41 P.S. § 202 (legal rate of interest); 42 Pa.C.S. § 8101 (interest on judgments).

Appearances:

J. McDowell Sharpe, Esquire, *Counsel for Plaintiff*

Michael I. Levin, Esquire, *Counsel for Defendants*

Paul J. Cianci, Esquire, *Counsel for Defendants*

OPINION OF COURT

Before Meyers, P.J.

Before the Court is the *Motion for Partial Summary Judgment* ("*PSJ*") of Defendants, the Board of Directors of Chambersburg Area School District and the Chambersburg Area School District (collectively, "CASD"), and the *Motion for Summary Judgment* ("*MSJ*") of Plaintiff, Catherine Dusman ("Dusman"), both filed on September 9, 2019. The parties agree, and we find, that the contract entered on September 26, 2007 is the only contract between them (the "Contract"). *Compare MSJ* ¶¶ 14-17 *with* CASD's *Answer to MSJ* ¶¶ 14-17. But the parties disagree on whether CASD was required under the Contract to pay Dusman minimum annual salary raises. Additionally, the parties disagree on whether Dusman failed to mitigate her damages by rejecting CASD's prior offer of back pay.

We hold, *inter alia*, as follows. The ending term of the Contract is July 31, 2020, unless the Board notified Dusman of non-renewal at least one hundred fifth (150) days prior to the expiration date of the then-current term of office. Dusman is entitled to a 2% salary raise for the 2009-2010 school year, and salary raises of 3% for school years 2010-2011, 2014-2015, 2016-2017, and 2018-2019. Dusman is not entitled to a salary raise for the 2013-2014 school year. Finally, Dusman did not fail to mitigate her damages in rejecting CASD's prior offer of back pay, although she is not entitled to any additional interest on that payment.

PROCEDURAL & FACTUAL HISTORY

On April 28, 2014, the Court granted Dusman's *Motion for Peremptory Judgment* ordering[1] CASD to reinstate her as assistant superintendent for another term, which the Commonwealth Court affirmed in *Dusman I*.[2] On February 29, 2016, Dusman filed a *Second Amended*

1 Issued by then-President Judge, now-Senior Judge, Douglas W. Herman. The undersigned was reassigned this case on February 7, 2018.

2 *Dusman I* being Dusman v. Bd. of Directors of Chambersburg Area Sch. Dist., 113 A.3d 362 (Pa. Commw. Ct. 2015). *See* Dusman v. Bd. of Directors of Chambersburg Area Sch. Dist. and Chambersburg Area Sch. Dist., 123 A.3d 354,

Complaint in Mandamus that incorporated the first fifteen averments in her *Amended Complaint in Mandamus*, including the existence of the Contract (¶ 5, 10), and averred that CASD, unlawfully, violated the Contract by reducing her salary and benefits. *Second Amended Complaint* ¶ 16-17. Dusman requested damages, including, among other things, back salary, payment of all benefits lost due to CASD failing to treat Dusman pursuant to the terms of the Contract and as an assistant superintendent, and "the amount of compounded back salary to which Plaintiff is entitled under the Contract from 2009 to the present[.]." *Id*. *ad damnum* clause.

CASD's April 4, 2016 Offer of Back Pay

By letter dated April 4, 2016 sent to Dusman's Counsel, CASD offered, and enclosed, a check payable to Dusman in the amount of $19,821.63 ($34,845.09 gross) "to cover Ms. Dusman's back pay due to her reinstatement." *PSJ*, Exhibit 6. The letter provided the breakdown of the payment as follows:

For 13-14 SY, her pay as Asst. Super. was	$116,413.80
For that SY, she was paid	$96,431.97
Thus, she is owed	$19,981.83
For 14-15 SY, we add a 5% increase	$5,820.65
For 15-16 SY, we add another 5% increase	$6,110.33
Interest at 6%	$2,932.28
Total gross payment	**$34,845.09**

> Next, you can see in the check stub that her leave has been adjusted to add 14 days of sick time and 4.5 days of personal time.
>
> . . . .
>
> We do not and will not consider Ms. Dusman's acceptance of the enclosed payment as a release of her claims against the School District.

Id. Dusman's Counsel rejected CASD's offer by letter dated April 29, 2016, stating, in part:

356 (Pa. Commw. Ct. 2015) (describing mandamus action as *Dusman I*).

> Instead of playing games (perhaps for public relations purposes), which to date have just made your client look more inept, please encourage the district to comply with outstanding discovery, instead of trying to resolve things with a lack of forthrightness.
>
> Given the CASD lack of forthrightness, I have voided the tendered check and will return it under the hard copy of this letter.

PSJ, Exhibit 7. The $19,821.63 check payable to Dusman was attached and voided. *Id*.

The Contract

The Contract, which the Commonwealth Court in *Dusman I* found to be valid, 113 A.3d at 372, and which the parties agree now is the only one between them, pertinently provides:

> WHEREAS, District and Assistant Superintendent believe that a written employment contract is necessary to describe specifically their relationship and to serve as the basis of effective communication between them as they fulfill their governance and administrative functions in the operation of the educational program of the schools;
>
> . . . .
>
> 4. EVALUATION AND GOAL SETTING. It is agreed by the parties hereto that there shall be an annual evaluation meeting between the District Superintendent and Assistant Superintendent. The evaluation of Assistant Superintendent's job performance and discussion of goals for the ensuing years shall be discussed at that meeting. The time and date of the annual meeting shall be agreed to by Superintendent and Assistant Superintendent.
>
> 5. COMPENSATION AND FRINGE BENEFITS. For services rendered for the 2007-08 school year under this Agreement, the District shall compensate Assistant Superintendent at the annual rate (the "Base Salary") of $104,000 to be apportioned on a pro rata basis, payable in biweekly installments in accordance with the policy of the District governing payment to Professional Employees.
>
> In addition to the foregoing salary, Assistant Superintendent shall receive the fringe benefits set

forth in Appendix "A,"

. . . .

Upon continued satisfactory performance, Assistant Superintendent is entitled to annual salary increases of not less than three percent (3%) or more than five percent (5%) of the current salary. . . . Said increase shall be related to meeting stated goals as outlined and expressed in Assistant Superintendent's written evaluation. Unless her performance has been evaluated as unsatisfactory, on July 1, 2007, Assistant Superintendent shall receive an annual salary increase and may receive a performance bonus as referred to above, which shall be in effect from July 1, 2007 through July 31, 2008 (the "Annual Increase").

The District shall not reduce Assistant Superintendent's annual base salary below the amount of the Assistant Superintendent's 2007-2008 base salary.

Adjustments to the Base Salary shall be deemed to be amendments to this Employment Contract, which shall otherwise remain in full force and effect.

. . . .

7. REAPPOINTMENT AND TERMINATION.

. . . .

c. The District shall notify Assistant Superintendent no later than one hundred and fifty (150) days prior to the expiration date of this Agreement of the District's intent not to reappoint Assistant Superintendent. Should Assistant 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.

. . . .

12. APPLICABLE LAWS. It is the intention of the parties hereto that the terms and conditions of this Agreement shall be consistent and in full compliance with the provisions of the School Code and the laws of Pennsylvania and

any amendments thereto and that this Agreement shall be construed accordingly.

. . . .

14. AMENDMENTS. The parties hereto shall fulfill all aspects of this Agreement; provided, however, that any exception thereto shall only become effective by virtue of mutual written consent of the parties hereto.

15. ENTIRE AGREEMENT. This Agreement and exhibits hereto are incorporated by reference contain the entire Agreement between the parties hereto except as otherwise stated herein and supersedes all other agreements and representations, written or oral, on the subject matter hereof, including any statements in referenced exhibits or attachments that may be in[3]

MSJ, Exhibit A. CASD prepared the Contract. *Factual Appendix in Support of MSJ*, Selected Deposition Excerpts from Billy R. Hodge, Jr., CASD Administrator, p. 16, 21.

Dusman received salary increases for all relevant school year periods as follows:

2009-2010	2010-2011	2011-2012	2012-2013	2013-2014	2014-2015	2015-2016	2016-2017	2017-2018	2018-2019	2019-2020
0%	0%	3.5%	3%	0%	0%	5%	0%	6%	2.6%	1.5%

MSJ, *Answer to MSJ* ⁋⁋ 24, 26, 29, 31, 33, 36, 38, 40, 42, 46, 48.

2009-2010

On July 28, 2009, Dusman received a year-end evaluation for the 2008-2009 school year by then-CASD Superintendent Joseph Padasak. The evaluation stated that Dusman would receive a "4% salary increase for satisfactory performance and 2% bonus" for the following school year. *Factual Appendix in Support of MSJ*, Dusman Affidavit ¶ 10 & Exhibit 3. However, on August 12, 2009, Dusman, wrote a memo to Superintendent Padasak and Hodge, among others, stating:

> Due to the economic times and the need for cutbacks in the district, I believe that it is my moral and ethical obligation to follow the same pay "agreement" as the superintendent of schools.
>
> I appreciate very much the pay raise of 6% for the job I have performed . . . .

3 Section 15 of the Contract ends just as we reproduced.

> That being stated, I expect no increase in my pay for the 2009-2010 school year.

MSJ, Exhibit L. Dusman did not receive a raise for the 2009-2010 school year. Superintendent Padasak received a raise of 2%. *MSJ*, *Answer to MSJ* ¶ 23; *MSJ*, Exhibit M.

2013-2014

On June 27, 2013, Superintendent Padasak gave Dusman an unsatisfactory performance evaluation for her 2012-2013 school year performance. *MSJ*, *Answer to MSJ* ¶ 34; *MSJ*, Exhibit O. Then, on July 23, 2013, CASD Human Resources notified Dusman that "[b]ased on your job performance during the 2012-2013 school year and in accordance with the Act 93 Agreement, the Superintendent is awarding you a salary increase of 0.0%." *MSJ*, Exhibit N (emphasis removed). Dusman did not receive a raise for the 2013-2014 school year.

2019-2020

Dusman "met the annual goals[]" for the 2018-2019 school year. *Factual Appendix*, Dusman Affidavit, Exhibit 2. On July 2, 2019, Dusman emailed current-CASD Superintendent Dion Betts. Her email read, in pertinent part:

> Subject: Raise for 2019-20 school year
>
> Dear Dr. Betts,
>
> It is the time of year when End of Year evaluations occur and ultimately, discussions and decisions about performance raises are solidified. As I understand it, the ACT 93 group will receive a 1.5% raise for the 2019-20 school year, pending board approval in August.
>
> In addition, the community is also experiencing a somewhat significant, but necessary tax increase so that the CASD is able to focus on the mission of impacting each and every child academically, socially and emotionally.
>
> Regardless of the terms of my contract, I am requesting that nothing greater than a 1.5% raise be recommended for me for the upcoming school year. I want to continue to be an individual who prides herself on fairness, equity and what is in the best interest of the organization. I appreciate your consideration of my request.

Id. The next day, Superintendent Betts emailed the Board, including current Board President and Director, Alexander C. Sharpe. *Factual Appendix*, Alexander C. Sharpe Affidavit, Exhibit A. Superintendent Betts wrote, in part:

> To keep in line with Act 93 average raises and given the recent tax increase both Cathy and Tammy receive 1.5 salary increases. While Cathy's contract indicates a minimum of 3 percent increase, she would like to give back to the community in this manner.

Id. Dusman received a 1.5% salary increase for 2019-2020.

On October 11, 2019, after both parties filed their respective summary judgment motions, Dusman emailed CASD's Human Resources Director and In-House Legal Counsel, Karen Gokay. Dusman wrote:

> Subject: Information Request
>
> Karen,
>
> I am requesting all dates since 2007 of any Unsatisfactory Evaluations in my personnel file. Also, I am requesting copies of all Unsatisfactory Evaluations since 2007.
>
> I have copies of all Satisfactory/Exemplary Evaluations so I do not need them.[4]

Factual Appendix, Dusman Affidavit, Exhibit 1. A few days later, Ms. Gokay provided Dusman only with a copy of her evaluation for the 2012-2013 school year. *Id*., Dusman Affidavit ¶ 5.

The Court held oral argument on the parties' cross summary judgment motions on December 5, 2019. The parties provided us with supplemental letters containing argument on December 10, 2019, which we made part of the record on January 7, 2020.

DISCUSSION & ANALYSIS

The Court's standard of review governing motions for summary judgment is as follows:

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4 We note that the only "Satisfactory/Exemplary Evaluations" entered on the record, if so considered, are the 2008-2009 school year evaluation from July 28, 2009 and the CASD website statement for the 2018-2019 school year that Dusman "met the annual goals." The only other performance evaluation, whether satisfactory, unsatisfactory, or otherwise, is the unsatisfactory performance evaluation for the 2012-2013 school year. Notably, an evaluation applies to a raise for the next school year (*e.g.*, a satisfactory evaluation for Year 1 applies to Year 2's salary).

That leaves, by our count, for the years in which Dusman seeks a salary raise, **four (4) school years** with no evaluation: **(1)** 2009-2010 evaluation (for potential 2010-2011 salary raise); **(2)** 2013-2014 evaluation (for 2014-2015); **(3)** 2015-2016 (for 2016-2017); and **(4)** 2017-2018 (for 2018-2019).

> When a party seeks summary judgment, a court shall enter judgment whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense that could be established by additional discovery. A motion for summary judgment is based on an evidentiary record that entitles the moving party to a judgment as a matter of law. In considering the merits of a motion for summary judgment, a court, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Finally, the court may grant summary judgment only when the right to such judgment is clear and free from doubt.

Gallagher v. GEICO Indemnity Co., 201 A.2d 131, 136-37 (Pa. 2019) (citations and internal quotation marks omitted). Additionally, we must give the non-moving party "the benefit of all reasonable inferences." Pennsylvania Gas & Water Co. v. Nenna & Frain, Inc., 467 A.2d 330, 333 (citations omitted). Lastly, "[i]f there is evidence that would allow a fact-finder to render a verdict in favor of the non-moving party, then summary judgment should be denied." Rourke v. Pennsylvania Nat. Mut. Cas. Ins. Co., 116 A.3d 87, 96 (Pa. Super. Ct. 2015) (internal citations omitted in original) (citations omitted).

We will first address whether Dusman is entitled to minimum annual salary raises before addressing whether she failed to mitigate her damages by rejecting CASD's offer of back pay.

I. DUSMAN'S MOTION FOR SUMMARY JUDGMENT

The issue before us is whether CASD breached the Contract when it did not give Dusman certain minimum annual salary raises.

A. Pleading breach of contract cause of action

Preliminarily, CASD argues that Dusman failed to properly plead a cause of action for breach of contract. *Memorandum of Law in Opposition to MSJ* at 3. "The idea of pleadings is actually to convey notice of the intended grounds for suit, not require the opponent to guess at their substance." Schweikert v. St. Luke's Hosp. of Bethlehem, 886 A.2d 265, 270 (Pa. Super. 2005) (citation omitted). "A breach of contract action involves (1) the existence of a contract, (2) a breach of a duty imposed by the contract, and (3) damages." Sullivan v. Chartwell Inv. Partners, LP, 873 A.2d 710, 716 (Pa. Super. Ct. 2005) (citation omitted).

We find that Dusman satisfies such pleading standard. First,

paragraph five of Dusman's *Second Amended Complaint* avers that CASD and Dusman entered into the Contract, which the Commonwealth Court in *Dusman I* subsequently found to be valid. 113 A.3d at 372. Second, paragraph 16 of the Dusman's complaint alleges that when CASD "reduced [Dusman's] salary and benefits" CASD "violat[ed]" the Contract. Third, the *ad damnum* clause in Dusman's complaint state damages for CASD's actions that includes, among others, damages for "back salary to which Plaintiff is entitled under [the] Contract from 2009 to present[.]" *Id*. ¶ (g). Therefore, we find that Dusman has properly plead a breach of contract cause of action.

B. Minimum annual salary raises

To determine whether Dusman is entitled to certain minimum annual salary raises, we consider the Contract, our relevant standards for contract interpretation and construction, and the parties' arguments. For the reasons that follow, we find that Dusman is entitled to 3% raises for 2010-2011, 2014-2015, 2016-2017, and 2018-2019; no raise for 2013-2014; and a 2% raise for 2009-2010.

1. The Contract

The relevant sections of the Contract on this issue are:

> 4. EVALUATION AND GOAL SETTING. It is agreed by the parties hereto that there shall be an annual evaluation meeting between the District Superintendent and Assistant Superintendent. The evaluation of Assistant Superintendent's job performance and discussion of goals for the ensuing years shall be discussed at that meeting. The time and date of the annual meeting shall be agreed to by Superintendent and Assistant Superintendent.
>
> 5. COMPENSATION AND FRINGE BENEFITS.
>
> . . . .
>
> Upon continued satisfactory performance, Assistant Superintendent is entitled to annual salary increases of not less than three percent (3%) or more than five percent (5%) of the current salary. . . . Said increase shall be related to meeting stated goals as outlined and expressed in Assistant Superintendent's written evaluation. Unless her performance has been evaluated as unsatisfactory, on July 1, 2007, Assistant Superintendent shall receive an annual salary increase and may receive a performance bonus as referred to

above, which shall be in effect from July 1, 2007 through July 31, 2008 (the "Annual Increase").

. . . .

13. APPLICABLE LAWS. It is the intention of the parties hereto that the terms and conditions of this Agreement shall be consistent and in full compliance with the provisions of the School Code and the laws of Pennsylvania and any amendments thereto and that this Agreement shall be construed accordingly.

14. AMENDMENTS. The parties hereto shall fulfill all aspects of this Agreement; provided, however, that any exception thereto shall only become effective by virtue of mutual written consent of the parties hereto.

MSJ, Exhibit A.

2. Standards governing interpretation and construction of the Contract

We interpret and construct the Contract by the following standards. First, it is:

> well-established that under the law of contracts, in interpreting an agreement, the court must ascertain the intent of the parties. In the cases of a written contract, the intent of the parties is the writing itself. If left undefined, the words of a contract are to be given their ordinary meaning. When the terms of a contract are clear and unambiguous, the intent of the parties is to be ascertained from the document itself. When, however, an ambiguity exists, parol evidence is admissible to explain or clarify or resolve the ambiguity, irrespective of whether the ambiguity is patent, created by the language of the instrument, or latent, created by extrinsic or collateral circumstances.

Leneau v. Co-eXprise, Inc., 102 A.3d 423, 429-30 (Pa. Super. Ct. 2014) (citations omitted).

Second, with respect to "ambiguity" in the context of contract interpretation:

> Contractual language is ambiguous if it is reasonably susceptible of different constructions and capable of being understood in more than one sense. This is not a question in a vacuum. Rather, contractual terms are ambiguous if they

> are subject to more than one reasonable interpretation when applied to a particular set of facts. We will not, however, distort the meaning of the language or resort to a strained contrivance in order to find an ambiguity.

Id. at 430 (quoting Madison Const. Co. v. Harleysville Mut. Ins. Co., 735 A.2d 100, 106 (Pa. 1999) (internal citations and quotation marks omitted). Moreover, generally, "[u]nder the rule of *contra proferentem*, any ambiguous language in a contract is construed against the drafter and in favor of the other party if the latter's interpretation is reasonable." Sun Co., Inc. (R&M) v. Pennsylvania Turnpike Comm'n, 708 A.2d 875, 878-79 (Pa. Commw. Ct. 1998) (citing Restatement (Second) of Contracts § 206; State Pub. Sch. Building Auth. v. Quandel, 858 A.2d 1136, 1144 (Pa. Commw. Ct. 1991)).

Third, contractual clauses must be construed:

> whenever possible, in a manner that effectuates all of the clauses being considered. It is fundamental that one part of a contract cannot be so interpreted as to annul another part and that writings which comprise an agreement must be interpreted as a whole.

Leneau, 102 A.3d at 430 (internal citations and quotation marks omitted).

Finally, regardless of any ambiguity, we may always consider the parties' "course of performance"[5] when construing a contract. Pennsylvania Engineering Corp. v. McGraw-Edison Co., 459 A.2d 329, 332 (Pa. 1983) (citing Atlantic Richfield Co. v. Razumic, 390 A.2d 736, 741 n.6 (Pa. 1978); Restatement (Second) of Contracts § 202(4) and Comment a. (1981)[6]).

3. The Parties' Argument

We summarize the parties' arguments.

Dusman's Argument

Dusman argues CASD, whether by the Board or Superintendent, had

5 "'Course of performance' is a sequence of conduct between the parties subsequent to formation of the contract during performance of the terms of the contract." J.W.S. Delavau, Inc. v. Eastern Am. Transport & Warehousing, Inc., 810 A.2d 672, 683-83 (Pa. Super. Ct. 2002) (citation omitted).

6 Subsection (4) of Section 202, Rules in Aid of Interpretation, of Restatement (Second) of Contracts provides:

> Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement.

Restatement (Second) of Contracts § 202(4). Comment a. thereto, the scope of special rules, further states:

> The rules in this Section are applicable to all manifestations of intention and all transactions. The rules are general in character, and serve merely as guides in the process of interpretation. **They do not depend upon any determination that there is an ambiguity, but are used in determining what meanings are reasonably possible as well as in choosing among possible meanings.**

Id., Comment a. (emphasis added).

a duty under the Contract or law[7] to annually assess Dusman's performance. Therefore, because CASD had this duty, Dusman reasons, CASD had the burden of proving that Dusman's performance was unsatisfactory. Moreover, Dusman argues that CASD has this burden because CASD is the party who can discharge it more easily, due CASD's duty to annually assess Dusman's performance. Dusman cites several cases for support of this proposition.[8] Thus, with CASD offering no evidence that Dusman's performance was unsatisfactory, besides the 2012-2013 unsatisfactory evaluation, Dusman concludes that she is entitled to certain minimum annual salary raises.

CASD's Argument

CASD contends that Dusman improperly places a burden of proof on CASD. Specifically, that CASD has no burden to show that CASD did *not* breach a duty imposed by the Contract in failing to give Dusman certain minimum annual salary raises. While acknowledging the principle that burden of proof shifting is appropriate in certain cases, CASD rejects Dusman's assertion that such shifting is appropriate here. With respect to Malickson, one of the authorities relied on by Dusman, CASD argues that it was the employer's termination of the employee that made out the employee's *prima facie* case for breach of contract. Thus, absent such a *prima facie* showing, CASD does not have the burden of proving that it did not breach the Contract. CASD also argues that it does not have a "peculiar means of knowledge," quoting Wigmore, as to whether a breach occurred. Rather, CASD argues that Dusman knew and had the opportunity to establish whether a breach occurred by establishing evidence by discovery

7 Under the Public School Code of 1949 (the "School Code"), beginning July 1, 2012, a school board must:

> (b) [C]onduct a formal written performance assessment of the district superintendent and assistant district superintendent annually. A time frame for the assessment shall be included in the contract.
>
> (b.1) [P]ost the mutually agreed to objective performance standards contained in the contract on the school district's publicly accessible Internet website. Upon completion of the annual performance assessment, the board of school directors shall post the date of the assessment and whether or not the district superintendent and assistant district superintendent have met the agreed-to objective performance standards on the school district's publicly accessible Internet website.

24 P.S. § 10-1073.1(b)-(b.1). Thus, Dusman argues CASD had a duty to annually assess her under subsection (b).

8 Gen. Elec. Corp. v. Commonwealth, Human Res. Comm'n., 365 A.2d 649, 656-57 (Pa. 1976) (plurality opinion) (adopted as controlling by Winn v. Trans World Airlines, Inc., 484 A.2d 392 (Pa. 1984)) (holding that employer, in sexual discrimination practices context, has burden of demonstrating justification for policy that produces discriminatory impact because employer "has far easier access" to facts showing relative qualifications of employees than employee); Barrett v. Otis Elevator Co., 246 A.2d 668, 673 (Pa. 1968) (holding, in worker's compensation context, that employer has burden of showing availability of any type of work for employee because, in part, "[i]f the existence or non-existence of a fact can be demonstrated by one party to a controversy much more easily than by the other party, the burden of proof may be placed on that party who can discharge it most easily"); O'Neill v. Metropolitan Life Ins. Co., 26 A.2d 898, 903 (Pa. 1942) ("'It is often said that the burden is upon the party having in form the affirmative allegation. But this is not an invariable test, nor even always a significant circumstance; the burden is often on one who has a negative assertion to prove; a common instance is that of a promisee alleging non-performance of a contract.'") (quoting Wigmore on Evidence, 3d ed., vol. 9, § 2486, p. 274)); Malickson v. Louis J. Bergdoll Motor Co., 53 Pa. Super. 185, 191 (1913) (holding that burden of proof shifted to defendant-employer once plaintiff-employee proved existence of contract and discharge under employment term); Gosha v. City of Philadelphia, 30 Pa. D & C. 3d 190, 209 (Phila. Co. 1982) (holding burden of proof on defendant to show plaintiff's contributory negligence once plaintiff rebutted presumption of same).

or depositions. CASD contends Dusman's attempt to establish this fact by Dusman's informal October 2019 correspondence with CASD's Human Resources Director is insufficient because such request was "conducted in connection with pending litigation but outside the parameters of the long-closed discovery deadline[.]" *Memorandum of Law in Opposition to MSJ* at 5. Finally, CASD argues that Dusman is not entitled to any pay raises subsequent to her 2012-2013 unsatisfactory evaluation. CASD reasons that the effect of this unsatisfactory evaluation is that it relieves CASD from any future duty to pay Dusman salary raises because the unsatisfactory evaluation necessarily means that Dusman has not had "continued satisfactory performance" as required in Section 5 of the Contract.

4. Court's analysis

We find that we do not agree with either party's argument in its entirety. We stake out our findings.

(i) Duty to assess

First, we find that CASD had the duty to annually assess Dusman's performance, both before and after the enactment of Section 10-1073.1 of the School Code. As for before, we find unambiguous the language in Section 4 of the Contract that states that "there shall be an annual evaluation between the District Superintendent and Assistant Superintendent. . . . of Assistant Superintendent's job performance." That is, one, that there will be an annual evaluation of the Assistant Superintendent's job performance, and, two, that the evaluation will be done by the District Superintendent.

As for after the enactment of Section 10-1073.1, we find that CASD still, whether by the District Superintendent or the Board, had the duty to annually assess Dusman's performance. Section 13 of the Contract unambiguously states "[i]t is the intention of the parties hereto that the terms and conditions of this Agreement shall be consistent and in full compliance with the provisions of the School Code and the laws of Pennsylvania[.]" Further, Section 13 provides that "this Agreement shall be construed accordingly." That is, one, that it is the parties' intent that the Contract be "consistent and in full compliance" with applicable law, including the School Code. And, two, that the Contract "be construed accordingly[]" to such law.

Here, Section 10-1073.1(b) requires a school board to "conduct a formal written performance assessment of . . . assistant district superintendent annually." Subsection (b.1) further provides that "[u]pon completion of the annual performance assessment, the board of school

directors shall post the date of the assessment and whether or not the district superintendent and assistant district superintendent have met the agreed-to objective performance standards on the school district's publicly accessible Internet website." Thus, construing the Contract to be "consistent and in full compliance" with Section 10-1073.1 means that CASD, through its Board, had a duty to annually assess Dusman's performance and to "post . . . whether or not the . . . assistant district superintendent ha[s] met the agreed-to objective performance standards on the school district's publicly accessible Internet website." § 10-1073.1(b)(1). That is, in fact, what CASD did, at least for Dusman's 2018-2019 school year performance, a "course of performance" by the parties that supports our construction. *See Factual Appendix*, Dusman Affidavit, Exhibit 2.

Thus, because CASD had a duty to annually assess Dusman's performance, both before (via District Superintendent) and after (via Board) the enactment of Section 10-1073.1, we need not decide whether, under the Contract, the District Superintendent had a concurring, continuing, duty to assess following the enactment of Section 10-1073.1.

(ii) The Contract

Next, we analyze Section 5. Section 5 contains several different clauses, which we must construe, "whenever possible, in a manner that effectuates" them all. Leneau, 102 A.3d at 430 (internal citations and quotation marks omitted). The conditional clause "[u]nless her performance has been evaluated as unsatisfactory, on July 1, 2007, Assistant Superintendent shall receive an annual salary increase . . . as referred to above" is unambiguous. That is, if Dusman's performance has not been evaluated as unsatisfactory, then she "shall receive an annual increase . . . as referred to above." We find that the language "referred to above" refers to the amount of the "annual increase." This amount is described in the "above" introductory clause that reads, in part, "Assistant Superintendent is entitled to annual salary increases of not less than three percent (3%) or more than five percent (5%) of the current salary[.]" So read, the meaning of the conditional clause then is that if Dusman's performance has not been evaluated as unsatisfactory, then she "shall receive an annual increase" of "not less than three percent (3%) or more than five percent (5%)" of her current salary.

However, so as not to "annul [any] another part" of Section 5, we must consider the meaning of the remaining language. Leneau, 102 A.3d at 430 (internal citations and quotation marks omitted). In particular, the meaning of the phrase "evaluated as unsatisfactory" in the conditional clause. In addition, the meaning of what we will refer to as the supportive clause in Section 5, which states "[s]aid increase shall be related to meeting

stated goals as outlined and expressed in Assistant Superintendent's written evaluation." And last, the meaning of the prefatory phrase of the introductory clause that reads "[u]pon continued satisfactory performance," which is set off by a comma.

We find that the language "evaluated as unsatisfactory" in the conditional clause clearly refers to the annual assessment of Dusman by CASD, an assessment required by Section 4 of the Contract and Section 10-1073.1(b) of the School Code and which is the duty of CASD's.[9] We also find that the supportive clause further clarifies that the evaluation on which Dusman's salary raises are to be based on relates to her "meeting stated goals as outlined and expressed in Assistant Superintendent's written evaluation." This supportive clause, too, is a reference to Dusman's annual assessment.

That notwithstanding, we find that the supportive clause creates an apparent conflict in terms of what standard Dusman is held to in order to receive a salary raise. In other words, it creates an ambiguity. An ambiguity is when contractual language is "reasonably susceptible of different constructions and capable of being understood in more than one sense." Leneau, 102 A.3d at 430 (quoting Madison Const. Co., 735 A.2d at 106). Whether language is ambiguous is not an exercise in the abstract; rather, it is whether the "terms are . . . subject to more than one reasonable interpretation when applied to a particular set of facts." Id.

The ambiguity here is whether a salary raise is conditioned on, on one hand, the higher standard in the supportive clause of "meeting stated goals as outlined and expressed in Assistant Superintendent's written evaluation[]" or, on the other hand, the lower standard in the conditional clause of being *not* "unsatisfactory." While the distinction between the two standards is fine, the distinction is material when applied to the facts before us. That is, Dusman argues that the absence of an evaluation for a given school year means that her performance for that school year was not "unsatisfactory." Therefore, under the reading of the conditional clause, which we expressed before, she is entitled to a salary raise. CASD, however, argues that Dusman must show that her performance for a given school year is not "unsatisfactory." In other words, that she "met[] stated goals as outlined and expressed in . . . the written evaluation[,]" as stated in the supportive clause. Absent such a showing, or other evidence on the issue, CASD concludes, Dusman cannot claim to have been *not* "evaluated as unsatisfactory" for a given school year. Thus, in that case, Dusman is not entitled to a salary raise.

Neither parole evidence nor the "course of performance" of the

9 This is because of the reasons stated in section (i) of our analysis, above.

parties helps resolve this ambiguity. *See* Leneau, 102 A.3d at 430 (citations omitted) (parole evidence); Pennsylvania Engineering Corp., 459 A.2d at 332 (citations omitted) ("course of performance"). Parole evidence does not help because there is none that we are aware of that bears on the issue. And the "course of performance" of the parties provides us some, limited, guidance on the issue.[10]

Thus, we resort to the general rule of *contra proferentem*, the rule that "any ambiguous language in a contract is construed against the drafter and in favor of the other party if the latter's interpretation is reasonable." Sun Co., Inc. (R&M), 708 A.2d at 878-79 (citations omitted). Here, the drafter is CASD. *Factual Appendix in Support of MSJ*, Selected Deposition Excerpts from Billy R. Hodge, Jr., CASD Administrator, p. 16, 21. Dusman's interpretation is as follows— the absence of an evaluation for a given school year means that her performance for that school year was not "unsatisfactory," and is therefore, entitled to a minimum salary raise of 3%. We find Dusman's interpretation to be reasonable. Therefore, we adopt it to resolve this ambiguity.

Last, we must construe the meaning of the prefatory phrase of the introductory clause, which we emphasize in reproducing below.

> **Upon continued satisfactory performance,** Assistant Superintendent is entitled to annual salary increases of not less than three percent (3%) or more than five percent (5%) of the current salary[.]

MSJ, Exhibit A, § 5 (emphasis added). The phrase "[u]pon continued satisfactory performance[]" is not defined in the Contract. Terms left undefined are "to be given their ordinary meaning." Leneau, 102 A.3d at 429-30. The ordinary meaning of "[u]pon" is "1. up and on; upward so as to get or be on[.]" Random House Webster's Unabridged Dictionary (2nd ed. 1999). And the ordinary meaning of "continued" is "1. lasting or enduring without interruption." Id. "Upon," an adverb and "continued," an adjective, modify the words "satisfactory performance." So read, the prefatory phrase "[u]pon continued satisfactory performance" means upon, or "on," "lasting or enduring [satisfactory performance] without interruption," Assistant

10 This is because there are only two, maybe three, evaluations in the record. Dusman received a positive evaluation for her 2008-2009 school year performance, earning a salary raise (which she turned down). *See Factual Appendix in Support of MSJ*, Dusman Affidavit ¶ 10 & Exhibit 3; *MSJ*, Exhibit L. And she received a negative evaluation for her 2012-2013 school year performance, earning no salary raise. *See MSJ*, Exhibits N, O. Dusman also "met the annual goals" for her 2018-2019 school year performance, earning a salary raise (which she partially turned down). *Factual Appendix*, Dusman Affidavit, Exhibit 2; Sharpe Affidavit, Exhibit A. Our takeaway from this "course of performance" is when Dusman received a positive evaluation, she earned a raise. And when she received a negative evaluation, she did not. But neither case weighs on the ambiguity before us because it does not bear on what the absence of an evaluation for a given school year means.

That notwithstanding, Superintendent Betts did, in July 2019, state his understanding that the Contract "indicates a minimum of 3 percent increase[]" that provides some support for Dusman's interpretation. *Factual Appendix*, Sharpe Affidavit, Exhibit A.

Superintendent is entitled to certain minimum annual salary raises.

This interpretation creates the same ambiguity—whether Dusman's salary raise is conditioned on "meeting stated goals as outlined and expressed in Assistant Superintendent's written evaluation[]" or her job performance being *not* "unsatisfactory" in a given school year—that we just resolved. And for the same reasons that we construed the ambiguity against the drafter, CASD, we do the same now. Additionally, we find that the intent of the parties was for Dusman's performance, and potential salary raises, to be in the context of individual years. *See* § 4 ("there shall be an annual evaluation"); § 5 ("entitled to annual salary increases") ("shall receive an annual salary increase"). Indeed, we found that CASD had the duty to annually assess. *See* Section (i) analysis. And the parties did act in such individual year contexts. *See* fn. 10 of this Opinion, *supra*. Therefore, we are not persuaded that it was the intent of the parties, as CASD argues, that an "unsatisfactory performance" by Dusman in a given school year would cut off the possibility of future salary raises provided she had the requisite performance under the Contract. Thus, we interpret the prefatory phrase and introductory clause of Section 5 to mean that the absence of an evaluation for a given school year means that Dusman's performance for that school year was not "unsatisfactory," and is therefore, entitled to a minimum salary raise of 3%, which is consistent with how we interpreted the conditional clause.

(iii) 2010-2011, 2014-2015, 2016-2017, 2018-2019

Applying our above analyses to the facts before us, we find that Dusman is entitled to a 3% salary raise for school years 2010-2011, 2014-2015, 2016-2017, and 2018-2019. The absence of evaluations for the respective preceding school years (the preceding year being the basis of the following year's potential salary raise) is of no consequence. We determined the intent of the parties to be that the absence of an evaluation for a given school year means that Dusman's performance for that school year was not "unsatisfactory," and is therefore, entitled to a minimum salary raise of 3%.[11] In the preceding school years to 2010-2011, 2014-2015, 2016-2017, and 2018-2019, there was no evaluation. Thus, we find that Dusman's performance is not "unsatisfactory" for those years. Therefore, she is entitled to 3% salary raise for those years.

(iv) 2013-2014

We found CASD to have a duty, whether by its District Superintendent or the Board, to annually assess Dusman's performance. *See* Section (i) of our analysis, *supra*. The Board's duty began on July 1, 2012, pursuant to the enactment of Section 10-1073.1(b) of the School Code. *See*

11 Because we decide the issue on these grounds, we need not decide the parties' competing burden of proof arguments.

fn. 8 of this Opinion, *supra*. We did not then decide whether the District Superintendent had a concurring, continuing, duty to assess following the enactment of Section 10-1073.1, or what the legitimacy of an assessment by the District Superintendent if made after July 1, 2012.

On June 27, 2013, CASD's Superintendent Padasak gave Dusman an unsatisfactory performance evaluation for her 2012-2013 school year performance. *MSJ*, *Answer to MSJ* ⁋ 34; *MSJ*, Exhibit O. There is no evidence in the record whether the Board assessed Dusman for that same time period. In her *Motion for Summary Judgment*, Dusman "waive[d] the right to a 3% raise for the 2013-2014 fiscal year" to avoid a dispute as to a material fact. MSJ ⁋ 35. However, now, in her *Brief in Support of MSJ*, Dusman switches course, and argues that this unsatisfactory evaluation from CASD's Superintendent is "insufficient and ineffective basis to give [Dusman] no salary increase." *Id*. at 14.

On October 11, 2019, Dusman wrote to CASD's Human Resources Director and In-House Legal Counsel, Ms. Gokay, that "I have copies of all Satisfactory/Exemplary Evaluations so I do not need them." *Factual Appendix*, Dusman Affidavit, Exhibit 1.

Dusman also states in her own affidavit, from October 31, 2019, that—

> I am unaware if the Chambersburg Area School District annually posted on its website whether assistant superintendents and superintendents met annual performance goals, but it was posted for the 2018-2019 fiscal year[] . . . .

Factual Appendix in Support of MSJ, Dusman Affidavit ¶ 9.

Here, we view "the record in the light most favorable to the non-moving party," giving that party "the benefit of all reasonable inferences." Gallagher, 201 A.2d at 136-37 (first quotation) (citations and internal quotation marks omitted); Pennsylvania Gas, 467 A.2d at 333 (second quotation) (citations omitted). When "there is evidence that would allow a fact-finder to render a verdict in favor of the non-moving party, then summary judgment should be denied." Rourke, 116 A.3d at 96 (internal citations omitted in original) (citations omitted).

The non-moving party here is CASD. Although there is not an evaluation by the Board *in the record* for Dusman's 2012-2013 school year performance, we find that a "reasonable inference[]" of the District Superintendent's unsatisfactory performance of Dusman for that time period to be that the Board similarly assessed Dusman's performance as unsatisfactory. Dusman herself stated in an email to CASD that she

has "copies of all [her] Satisfactory/Exemplary Evaluations" yet as not entered any into evidence, particularly for the 2012-2013 school year. *Factual Appendix*, Dusman Affidavit, Exhibit 1. Dusman also said that she was "unaware if the Chambersburg Area School District annually posted on its website whether assistant superintendents and superintendents met annual performance goals." *Factual Appendix in Support of MSJ*, Dusman Affidavit ¶ 9. A reasonable inference from her statement, considering the unsatisfactory evaluation that she did receive, is that she did not meet her annual performance goals for the 2012-2013 school year and CASD posted the same its website at the time. Even if the District Superintendent's evaluation was invalid as a matter of law, we find, when viewing "the record in the light most favorable to [CASD] that there is enough "evidence that would allow a fact-finder to render a verdict in favor of [CASD]" on this issue. Therefore, we deny Dusman's motion as to a minimum salary increase for the 2013-2014 school year.

(v) 2009-2010

On July 28, 2009, Dusman received a satisfactory evaluation for her 2008-2009 school year performance by then-CASD Superintendent Padasak.[12] Under the Contract, as we have found, *see* Section (ii) of our analysis, *supra*, Dusman would have been entitled to a minimum 3% salary increase for the following year, 2009-2010, because her performance was, clearly, *not* "unsatisfactory." In fact, the satisfactory evaluation provided that Dusman receive a "4% salary increase for satisfactory performance and 2% bonus" for the following school year. *Factual Appendix in Support of MSJ*, Dusman Affidavit ¶ 10 & Exhibit 3.

Shortly after the evaluation, however, Dusman wrote to the Superintendent that she believed it to be her "moral and ethical obligation to follow the same pay 'agreement' as the superintendent of schools[]" and that she did not expect a salary raise for the following school year. *MSJ*, Exhibit L. As to this "agreement," Dusman stated in her affidavit that:

> As part of a discussion amongst cabinet-level district employees, which included the superintendent, the assistant superintendents, the business manager, and the human resources director, the cabinet-level employees all had informally agreed to take a zero percent (0%) increase for the 2009-2010 school year.

Factual Appendix in Support of MSJ, Dusman Affidavit ¶ 11. Her understanding of this "agreement" is memorialized in the memorandum she sent to CASD on August 12, 2009. *See MSJ*, Exhibit L. Dusman goes on say in her affidavit that:

12 We note this evaluation was before Section 10-1073.1 was enacted and in effect. 24 P.S. § 10-1073.1.

> Had I known that the superintendent and other cabinet-level administrators would not have taken a zero percent (0%) increase as discussed, I would have never expected to take a zero.

Id. Dusman did not receive a raise for the 2009-2010 school year while Superintendent Padasak received a 2% raise. *MSJ*, *Answer to MSJ* ¶ 23; *MSJ*, Exhibit M.

In her *Motion for Summary Judgment*, Dusman states that "[f]or purposes of summary judgment, she is willing to accept the 2% increase rather than her contractual guarantee[.]" *MSJ* ¶ 25. We find that Dusman is entitled to this 2% increase for 2009-2010 under the doctrine of equitable estoppel. As explained by the Pennsylvania Supreme Court, equitable estoppel is the:

> doctrine that prevents one from doing an act differently than the manner in which another was induced by word or deed to expect[] . . . . [E]quitable estoppel recognizes that an informal promise implied by one's words, deeds or representations which leads another to rely justifiably thereon to his own injury or detriment, may be enforced in equity.

Novelty Knitting Mills, Inc. v. Siskind, 457 A.2d 502, 503 (Pa. 1983) (citations omitted). The doctrine has two essential elements: inducement and justifiable reliance on that inducement. Id. "The inducement may be words or conduct and the acts that are induced may be by commission or forbearance provided that a change in condition results causing disadvantage to the one induced." Id. at 503-04 (citations omitted). Equitable estoppel requires "clear, precise and unequivocal evidence." Id. at 504 (quoting Blofsen v. Cutaiar, 333 A.2d 842, 844 (Pa. 1975)).

Here, the inducement is the alleged "agreement" among cabinet-level individuals, including Superintendent Padasak, that they would take a zero percent (0%) salary raise for the 2009-2010 school year. This "agreement" was to Dusman's disadvantage, as she was slated for a 6% salary raise. *Factual Appendix in Support of MSJ*, Dusman Affidavit, Exhibit 3. Based on this "agreement," Dusman sent a memorandum to Superintendent Padasak saying she believed it to be her "moral and ethical obligation to follow the same pay 'agreement' as the superintendent of schools[]" and that she did not expect a salary raise for the following school year. *MSJ*, Exhibit L. Superintendent Padasak, however, evidently did not join in this "agreement," as he received a 2% salary raise that year. Given the nature of what Dusman was foregoing (a 6% salary raise) and that the "agreement" ostensibly involved all cabinet-level individual, we

find Dusman's reliance to be justifiable. Therefore, we find that Dusman is entitled to a 2% salary raise for 2009-2010.

C. Contract end term

In *Dusman I*, the Commonwealth Court stated "[t]he start of Dusman's contract, however, is not at issue-the end date is." 113 A.3d 362 at 372.We find that the Contract ends on July 31, 2020, unless the Board notified Dusman of non-renewal at least one hundred fift[y] (150) days prior to the expiration date of the then-current term of office. *See MSJ*, *Answer to MSJ* ¶ 18.

D. Costs of suit

Dusman prayed that she be awarded costs of suit in her *Motion for Summary Judgment*, but does not provide us any written argument in her brief in support thereof. "Generally, Pennsylvania adheres to the 'American Rule,' which states that litigants are responsible for their own litigation costs and may not recover them from an adverse party 'unless there is express statutory authorization, a clear agreement of the parties, or some other established exception.'" In re Farnese, 17 A.3d 357, 370 (Pa. 2011) (quoting Trizechahn Gateway LLC v. Titus, 976 A.2d 474, 482-83 (Pa. 2009) and citing Commonwealth, Dept't Envtl. Prot. V. Bethenergy Mines, Inc., 758 A.2d 1168, 1173 (Pa. 2000)). The parties do not have any agreement as to the shifting of costs and Dusman has not provided us in her motion or brief any express statutory authorization that authorizes such shift. Neither are we aware of any express statutory authorization or any other established exception that warrants the shifting of costs here. We note that in Dusman's prayer of relief in her complaint, she cites to 42 Pa.C.S. § 2503, for attorney's fees as determined to be appropriate, and prays for any other damages warranted by the evidence, including those pursuant to 42 Pa.C.S. § 8303. We do not find under either prayer that awarding Dusman the costs of suit above the damages that she will receive pursuant to our findings that she is entitled to certain salary raises is warranted. Neither has Dusman argued so. Therefore, we deny Dusman's motion that she be awarded costs of suit.

II. CASD'S PARTIAL SUMMARY JUDGMENT MOTION

In its *Partial Summary Judgment Motion*, CASD argues that "if there is ever an adjudication in this case that judgment should be entered in Ms. Dusman's favor for damages or other monetary relief, the amount of judgment should be reduced by the amount of money that CASD paid

to Ms. Dusman on April 4, 2016." *PSJ* at 13. Alternatively, CASD argues, that "if the Court determines that judgment should not be so reduced, then the judgment should not include any interest or other relief attributable to CASD paying back pay to Ms. Dusman attributable to her reinstatement for the period April 4, 2016 to the date of payment." *Id*.

Our standard of review of a partial summary judgment motion is the same as we articulated before for summary judgment motions. *See* Murray v. Janssen Pharm., Inc., 180 A.3d 1235, 1248 (Pa. Super. Ct. 2018).

By letter dated April 4, 2016 sent to Dusman's Counsel, CASD offered, and enclosed, a check payable to Dusman in the amount of $19,821.63 ($34,845.09 gross) "to cover Ms. Dusman's back pay due to her reinstatement." *PSJ*, Exhibit 6. Dusman's Counsel rejected this offer on April 29, 2016 in a return letter. Counsel stated, in part:

> Instead of playing games (perhaps for public relations purposes), which to date have just made your client look more inept, please encourage the district to comply with outstanding discovery, instead of trying to resolve things with a lack of forthrightness.
>
> Given the CASD lack of forthrightness, I have voided the tendered check and will return it under the hard copy of this letter.

PSJ, Exhibit 7. The $19,821.63 check payable to Dusman was attached and voided. *Id*.

A. CASD's primary argument

CASD argues in its *Partial Summary Judgment Motion* that Dusman had a duty to mitigate her damages and that her rejection of $19,821.63 payment "constitutes a *per se* failure to the extent of the monies CASD tried to pay." *PSJ* at 12 (citations omitted). CASD cites to several appellate court cases in support of the proposition that a plaintiff has a duty to mitigate her damages. While we agree that these cases hold that a plaintiff has such a duty, we do not find them supportive of the proposition CASD sets forth here (*i.e.*, that Dusman's rejection of the payment was a *per se* failure of duty to mitigate).[13] Although Circle Bolt & Nut. Co. Inc. and Stultz involve

13 None of CASD's cited cases support the proposition that an employee's rejection of an offer of back pay during pending, contested litigation, is a *per se* failure to mitigate. Mader v. Duquesne Light Co., 199 A.3d 1258, 1261, 1267 (Pa. Super. Ct. 2018) (holding that record did not "support jury's failure to award [plaintiff] damages for past lost earning capacity" following near-fatal electrocution), *appeal granted*, No. No. 502 WAL 2018, 2019 WL 3811545 (Pa. Aug. 14, 2019); Circle Bolt & Nut. Co. Inc. v. Pennsylvania Human Relations Comm'n, 954 A.2d 1265, 1271 (holding that former employee adequately mitigated her damages by searching various sources to find employment and applying for numerous jobs); Stultz v. Reese Bros., Inc., 835 A.2d 754, 764 (Pa. Super. Ct. 2003) (holding that employer failed to "demonstrate that substantially comparable work was available and the plaintiff failed to exercise reasonable due diligence in seeking alternative employment[]"); Forest City Grant Liberty Associates v. Genro II,

employers alleging plaintiff-employees failed to mitigate damages, the failure to mitigate concerned the employee "fail[ing] to exercise reasonable diligence in seeking comparable or equivalent employment[,]" which is inapposite to the circumstances here because CASD continued to employ Dusman. Stultz, 835 A.2d at 764. *See* Circle Bolt & Nut. Co. Inc., 954 A.2d at 1271 (describing employees' efforts to obtain same).

"The term 'duty to mitigate' damages has been interpreted to mean that 'damages which the plaintiff might have avoided with reasonable effort without undue risk, expense, or humiliation are either not caused by the defendant's wrong or need not have been, and therefore, are not to be charged against him.'" Toyota Indus. Trucks U.S.A., Inc. v. Citizens Nat. Bank of Evans City, 611 F.2d 465, 471 (3d Cir. 1979) (applying Pennsylvania law) (quoting 11 Williston on Contracts, § 1353 at 274 (3d ed. 1968)). "When mitigation is appropriate, the test to be applied to the plaintiff's conduct is whether the conduct taken in response to the defendant's breach was reasonable." Id. (citing Krauss v. Greenbarg, 137 F.2d 569, 573 (3d Cir. 1943) (applying Pennsylvania law), *cert. denied*, 320 U.S. 791 (1943)). "Reasonable conduct 'is to be determined from all the facts and circumstances of each case, and must be judged in the light of one viewing the situation at the time the problem was presented.'" Id. (quoting In re Kellett Aircraft Corp., 186 F.2d 197, 198 (3d Cir. 1951). *See* Schnabel Associates, Inc. v. T & M Interiors, Inc., 507 A.2d 1241, 1243 (Pa. Super. Ct. 1986) (citing Toyota Indus. Trucks U.S.A., Inc. for said proposition).

Here, we do not find that Dusman rejecting the back pay offer to be unreasonable, even considering the fact that CASD included language in its offer that CASD "do not and will not consider Ms. Dusman's acceptance of the enclosed payment as a release of her claims against the School District." *PSJ*, Exhibit 6. At the time, CASD's offer came just a few months after Dusman filed her *Second Amended Complaint* to which CASD filed an answer to with new matter asserting several affirmative defenses such as, among many others, laches and estoppel. *See Defendants' Answer to Second Amended Complaint with New Matter* ¶ 1-14. Additionally, the parties had not even agreed on which contract the parties were bound by. *PSJ*, Exhibit 7. Moreover, allegedly, a contract that Dusman had rejected from CASD was set to be presented to the Board in the upcoming weeks. *Id*. Considering these circumstances, as well as the history of the parties' litigation, we do not find that Dusman's rejection of the payment to warrant a dollar-by-dollar reduction in her damages. Therefore, we find that Dusman's conduct does not constitute a *per se* failure to mitigate damages, and therefore, reject CASD's claim that Dusman's damages should be reduced dollar-by-dollar

Inc., 652 A.2d 948, 952 (Pa. Super. Ct. 1995) (finding failure to mitigate damages when party failed to ascertain whether certain repairs "were within the parameters of the settlement agreement[]" or not before repairs commenced).

by the amount of payment offered.

B. CASD's alternative argument

Alternatively, CASD argues, that "if the Court determines that judgment should not be so reduced, then the judgment should not include any interest or other relief attributable to CASD paying back pay to Ms. Dusman attributable to her reinstatement for the period April 4, 2016 to the date of payment." *PSJ* at 13. We agree. Although we found that Dusman did not fail to mitigate her damages when she rejected the payment, we do not find additional interest to date on that same payment warranted. Thus, we find that the sum of the $34,845.09 owed to Dusman (net $19,821.63) for the remaining pay withheld during the time of her unlawful removal from the position of assistant superintendent and placed in the position of the Coordinator of the Franklin Virtual Academy to be inclusive of interest, as the same is stated in paragraph b. of the Dusman's prayer of relief in her *Motion for Summary* Judgment. *See also MSJ* at 15 fn. 6.

III. PREJUDGMENT INTEREST

Except as stated above with respect to $34,845.09 amount, we find that Dusman is entitled to prejudgment interest of the legal rate of six percent (6%) on the damages owed to her. Somerset Cmty. Hosp. v. Allan B. Mitchell & Associates, Inc., 685 A.2d 141, 148 (Pa. Super. Ct. 1996) ("It is well established that in contract cases, prejudgment interest is awardable as of right.") (citing Thomas H. Ross Inc. v. Seigfreid, 592 A.2d 1353, 1359 (Pa. Super. Ct. 1991)). *See* 41 P.S. § 202 (legal rate of interest); 42 Pa.C.S. § 8101 (interest on judgments).

CONCLUSION

To sum up, we hold the following. The contract entered on September 26, 2007 is the only contract existing between the parties (the "Contract"). The ending term of the Contract is July 31, 2020, unless the Board notified Dusman of non-renewal at least one hundred fifth (150) days prior to the expiration date of the then-current term of office. Dusman is entitled to a 2% salary raise for the 2009-2010 school year, and salary raises of 3% for school years 2010-2011, 2014-2015, 2016-2017, and 2018-2019. Dusman is not entitled to a salary raise for 2013-2014.

The amount of damages owed to Dusman shall be cumulative and correspond to all school years so affected; what we mean, for example, is that the 2% salary raise for the 2009-2010 school year will affect the 3% salary raise for the 2010-2011 school year in that Dusman's 2010-2011 salary shall be 3% of what her 2009-2010 school year salary is when factoring in the

2% salary raise for that school year. And so on. This includes appropriate adjustments for salaries of school years on which we did not rule on; what we mean, for example, is that Dusman's 3.5% salary raise for the 2011-2012 school year shall be based on what her salary would have been in that school year when factoring in the 2% salary raise for the 2009-2010 school year and the 3% salary raise for 2010-2011 (again, when factoring in the previous year's adjusted salary).

Dusman is entitled to prejudgment interest at the legal rate of six percent (6%) for the amount owed, except for the $34,845.09 owed to Dusman (net $19,821.63) for the remaining pay withheld during the time of her unlawful removal from the position of assistant superintendent and placed in the position of the Coordinator of the Franklin Virtual Academy that is inclusive of interest.

We do not award Dusman costs of suit. An appropriate Order follows.

ORDER OF COURT

AND NOW THIS 26th day of June, 2020, upon review of the *Motion for Partial Summary Judgment* of Defendants and the *Motion for Summary Judgment* of Plaintiff, both filed on September 9, 2019, the record, oral argument, and the applicable law,

THE COURT HEREBY ORDERS that Plaintiff's and Defendants' respective motions are **GRANTED in part** and **DENIED in part**.

(1) The Court **grants** Defendant's motion as to the contract entered on September 26, 2007 being the only contract existing between the parties.

(2) The Court **grants** both parties' motions as to the ending term of this contract being July 31, 2020, unless the Board notified Plaintiff of non-renewal at least one hundred fifth (150) days prior to the expiration date of the then-current term of office.

(3) The Court **grants** Plaintiff's motion as to the 2% salary raise for the 2009-2010 school year, and salary raises of 3% for school years 2010-2011, 2014-2015, 2016-2017, and 2018-2019.

(4) The Court **denies** Plaintiff's motion as to a salary raise for the 2013-2014 school year.

(5) The Court **grants** Plaintiff's motion as to prejudgment interest at the legal rate of six percent (6%) for damages, except for the $34,845.09 owed to Dusman (net $19,821.63) for the remaining pay withheld during the time of her unlawful removal from the position of assistant superintendent and

placed in the position of the Coordinator of the Franklin Virtual Academy that is inclusive of interest. Thus, we **grant** Defendant's alternative argument in its *Partial Summary Judgment Motion*.

(6) The Court **denies** Plaintiff's motion as to the award of costs of suit.

(7) The damages Plaintiff is owed shall be calculated as articulated in, and consistent with, the conclusion of our Opinion.

This Order is pursuant to the attached Opinion.

Pursuant to Pa.R.C.P. 236, the Prothonotary shall give written notice of the entry of this Order, including a copy of this Order, to each party, and shall note in the docket the giving of such notice and the time and manner thereof.