

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4687-08T3

THOMAS G. DUNN, JR.,

Plaintiff-Respondent,

v.

ELIZABETH BOARD OF EDUCATION,
RAFAEL FAJARDO, ARMANDO DA SILVA,
PASTOR RAUL BURGOS, CARLOS CEDENO,
FRANCISCO GONZALEZ, JEREMIAH L. GRACE,
MADINAH A. HAWKINS, KATHY L. MOORE,
AND EDWARD WHELAN,

Defendants-Appellants.

Submitted May 10, 2010 – Decided May 25, 2010

Before Judges Reisner and Yannotti.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Docket No. L-3911-06.

McCarter & English, L.L.P., attorneys for appellants (Francis A. Kirk, of counsel and on the brief).

Mendes & Mount, L.L.P., attorneys for respondent (John M. Deitch, on the brief).

PER CURIAM

Defendants, the Elizabeth Board of Education and the individual board members (collectively the Board), appeal from

an April 20, 2009 final judgment in favor of plaintiff Thomas Dunn.

To summarize, Dunn served as the superintendent of the Elizabeth School District until 2005. When the Board indicated that it intended not to renew his contract and wanted to buy out Dunn's tenure rights to the alternate position of assistant superintendent, the parties negotiated an agreement under which Dunn would take administrative leave during his last contract year as superintendent, after which he would serve as assistant superintendent for two years and then retire from the school district. The parties also agreed that Dunn would be compensated for his unused sick and vacation leave. When Dunn retired, a dispute arose as to the method of calculating payment for the unused sick leave.

The contract provided that Dunn would be compensated "at his last Superintendent of School per diem rate in accordance with the District's sick leave policy." The Board contended that Dunn should be compensated in accordance with the method set forth in the Elizabeth Education Association's (EEA) collective bargaining agreement, which by its terms applied to teachers but not to superintendents or assistant superintendents. If the EEA agreement applied, Dunn would be paid \$75 for each unused sick day. Dunn argued that he was

entitled to be compensated at the per diem rate of his superintendent salary, which was \$833.05.

Based primarily on her evaluation of witness credibility, the trial court found that the terms of the contract should be interpreted as allowing payment at the per diem rate of Dunn's salary as superintendent. Because the judge's interpretation of the contract is consistent with applicable law and is supported by substantial credible evidence in the record, we affirm. See Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974).

I

This is the most pertinent evidence introduced at the trial. After working in the Elizabeth school system for a number of years, Dunn became school superintendent in 1991. In 2001, Dunn entered into a five year employment contract with the Board ending in June 2006. At the end of the contract term, the Board could either renew Dunn's contract as superintendent or end his employment in the position. The Board was statutorily required to give Dunn one year's notice prior to the expiration of his contract if it decided against renewing.

Based on his past service with the school district, Dunn had achieved tenure in several positions, including assistant superintendent, director, supervisor and teacher. If his

contract as superintendent was not renewed, he would return to the assistant superintendent position which he held immediately prior to becoming superintendent.

On May 13, 2005, Dunn received notice that the Board was not going to renew his contract. The next day, Dunn met with Bob Murray, who served as counsel for Dunn as superintendent and the labor attorney for the Board. Murray informed Dunn that the Board was willing to negotiate an agreement in which Dunn could amicably leave his position as superintendent. Dunn testified that he believed it was unnecessary to have an attorney represent him in the negotiations with Murray because Murray told him that "I'll make sure that nothing happens to you." However, Dunn further testified that he was unaware that Murray would be acting against his interests and would only be representing the Board's interests in the negotiation.

During the course of the meeting, Dunn and Murray established the parameters of the separation agreement. The Board wanted to secure Dunn's resignation before the expiration of his contract so that it could appoint another candidate. Dunn proposed going on paid sick leave on July 1, 2005, at which time he would continue on sick leave until he had used up all of his allotted sick days. Murray rejected that proposal. Murray testified that when it became clear that Dunn did not intend to

retire, the idea of a sabbatical administrative leave emerged. The Board indicated that it was receptive to Dunn taking administrative leave for the duration of his contract as superintendent, but that a firm date needed to be established by which Dunn would retire from the school system.

Murray testified that because of a strained relationship with the incoming superintendent, Dunn was concerned about his ability to utilize his sick leave. The two negotiated an agreement whereby Dunn would be entitled to liberally use his sick leave upon returning to the assistant superintendent position.

On May 16, 2005, the parties executed an addendum to Dunn's 2000 employment contract, memorializing the agreement Dunn had negotiated with Murray. Under the terms of the agreement, Dunn agreed to take a sabbatical leave of absence during his last contract year as superintendent. Once his contract expired on June 30, 2006, Dunn would return to an assistant superintendent position through June 30, 2008, at which time he would resign from the position and "hold no further position of employment, in any capacity, with the Board subsequent to June 30, 2008." The contract provided that Dunn would receive a salary of \$180,000 in the assistant superintendent position. Ordinarily, the salary for an assistant superintendent would have been

approximately \$135,000. The 2005 agreement also provided in pertinent part:

6. At the time of the termination of his employment, or death, any unused accrued sick days as of June 30, 2008, shall be paid to Mr. Dunn, or his estate, at his last Superintendent of School per diem rate in accordance with the District's sick leave policy.

7. At the time of termination of his employment on June 30, 2008, Mr. Dunn shall be paid for any unused accrued vacation days at his last per diem rate of pay as Superintendent of Schools. If Mr. Dunn dies before payment is completed under this Agreement, payment for any accumulated vacation shall be made to his estate, consistent with the terms of this Addendum.

[Emphasis added.]

Those terms differed significantly from the provisions regarding payment for unused vacation and sick leave in Dunn's 2000 employment contract:

A. In the event that the Superintendent has unused accumulated vacation leave at the time his employment with the District terminates, he shall be paid at the rate of 1/240th of his then current annual salary [for] each day of unused accumulated vacation leave, up to a maximum of 44.

B. Sick Leave. The Superintendent shall be allowed thirteen (13) days sick leave annually. The unused portion of such leave, at the end of the any year, shall be cumulative. The unused sick days shall be subject to the unused sick leave policy established for the teachers represented by the E.E.A. which provides ten dollars (\$10.00) per day for fifty percent (50%) of the unused sick days.

[Emphasis added.]

Complying with the terms of the 2005 addendum, Dunn went on sabbatical leave and eventually returned to the assistant superintendent position. Dunn resigned from the position on August 31, 2006, alleging that the Board had created a hostile work environment. On September 12, 2006, Dunn wrote to the Board requesting payment for his unused sick and vacation leave at "my last superintendent of school per diem rate." Dunn also sought reimbursement for "certain costs incurred in connection with school business and to correct certain improperly docked sick days."¹ The Board did not respond to the request for payment.

At the trial, Dunn testified that throughout the negotiations with Murray, he demanded to be compensated for his sick and vacation days as a condition of signing the addendum. He explained that he agreed to the addendum because

I could live with the terms and conditions that were contained in the Agreement, that I would get full compensation for my sick and vacation days, and I would have two years of employment, at \$180,000. And I realized that, you know, [] the votes were not there for me to continue as Superintendent.

¹ During the litigation, the parties stipulated that Dunn had accumulated 377.5 sick days and 200.03 vacation days and agreed that the only issue before the court was the manner of calculating Dunn's payment for his unused sick days.

Dunn testified that in the absence of the addendum, when his superintendent contract expired, he was entitled to return to an assistant superintendent position, where he could only be terminated with cause. In that position, he would continue to accrue credits towards his pension and longevity salary increases, continue to accumulate sick and vacation days, and receive better medical and dental benefits than those he was entitled to as a retiree. Dunn explained that while his 2000 employment contract required that payment for unused sick days be calculated in accordance with the EEA agreement, the addendum did not contain the same reference because "there had to be an incentive for me to give up lifetime tenure as an Assistant Superintendent."

Dunn acknowledged that if the court accepted his position that he was entitled to payment at the per diem rate of his highest salary, then the words, "in accordance with the District's sick leave policy," would be rendered meaningless. However, he stated that Murray told him that those words had to be included in the agreement, but that they were, in fact, meaningless.

Murray testified that he was uncertain as to whether he drafted Dunn's 2000 employment contract, but that he was certain that someone at his law firm drafted the agreement. Murray was

also uncertain of who prepared the initial draft of the addendum. He testified that he later found his handwritten notes of the beginning of the draft addendum. He also could not remember certain details regarding the negotiations, including the substance of his initial conversation with Dunn in reference to ending Dunn's employment with the Board and the specific sequence of how the issues developed over the course of the weekend. Murray could not specifically recall whether he discussed with Dunn how he would be compensated for his unused sick and vacation days. Murray stated that during the negotiations, Dunn expressed concern about his "ability to actually take sick days when I would return as assistant superintendent." Murray also testified that although Dunn gave up his right to lifetime tenure as an assistant superintendent, he negotiated an agreement in which he received a better wage package than the compensation to which he would have otherwise been entitled.

He testified that the parties agreed that Dunn would be compensated for his unused sick days in accordance with the Board's policy. Murray testified that at the time the agreement was negotiated, the policy was set forth in EEA's collective bargaining agreement. The EEA is the entity that negotiates on behalf of the teachers and other personnel in the school

district. Although the EEA agreement explicitly provides that it does not apply to superintendents and assistant superintendents among others, Murray contended that there were several individuals in such positions who were compensated for unused sick days in accordance with the EEA agreement.

Under the terms of the collective bargaining agreement at the time of the negotiations, Dunn would be entitled to compensation for 50% of his unused sick days at a rate of \$10 per day. The EEA agreement classified employees into three categories: teachers, secretaries, and other support staff. The rate of compensation for unused sick days was determined by the number of unused sick days and the category to which the employee belonged, with teachers receiving the highest rate. The collective bargaining agreement was being renegotiated with the Association when the addendum was executed. Under the collective bargaining agreement in effect when Dunn retired, the maximum rate payable for unused sick days was \$75 per day.

Murray testified that despite the absence of any language indicating that the superintendent should be compensated at the same rate as teachers, it had been the Board's policy to do so. He explained that all professional staff members receive the rate of sick leave compensation set forth for teachers, which is the "professional certified rate." Murray also testified that

the teacher's rate was the rate Dunn himself had used to calculate an outgoing assistant superintendent's compensation for unused sick leave. He noted that no exceptions were made to the sick leave policy and that there was no reason to believe that Dunn had a different understanding of the terms of the addendum as it related to sick leave. Murray testified that during his tenure as the Board's attorney he was unaware of any instances in which the Board compensated an employee for unused sick days using a formula other than the one set forth in the EEA agreement.

Murray contended that the term "superintendent per diem rate" as used in paragraph seven of the addendum referred to Dunn's salary during his last year as superintendent divided by 240, the number of workdays during a year; whereas, "superintendent per diem rate" as used in paragraph six referred to the rate used for teachers in the EEA. He insisted that while Dunn's 2000 contract explicitly referred to the EEA policy, the more general term "[d]istrict's sick leave policy" in the 2005 addendum was intended to incorporate the policy set forth in the EEA agreement.

Harold Kennedy, who served as Interim Board Secretary and Business Administrator during the relevant period, conceded that Dunn's contract and his rights and obligations were not governed

by the EEA collective bargaining agreement. He confirmed that in negotiating a contract with a superintendent, the Board was free to negotiate with respect to the employee's salary, benefits, and leave, including sick and vacation time. Kennedy testified that when an employee ends employment with the Board, compensation for unused sick days would either be determined by the terms of the employee's contract or, in the absence of a provision, then the policy set forth in the EEA.

However, Kennedy also testified that even if an employee was not covered by the EEA, payment for unused sick days would be made in accordance with the EEA agreement. He characterized the Board's method of calculating payment for unused sick leave as a "practice" rather than a policy. But, he admitted that the Board was free to alter or modify any existing practice during its contract negotiations with an employee. He admitted that while there were several different bargaining units in the school district, some of which had agreements governing unused sick days, none of those units represented superintendents or assistant superintendents.

The trial judge issued a letter opinion on February 27, 2009 finding in favor of Dunn. After thoroughly summarizing the trial testimony, the judge concluded, "[t]he testimony of Mr. Murray was replete with memory lapses. Mr. Kennedy had no

knowledge of the negotiations in this case. The Court finds plaintiff's testimony about the intent of paragraph[s] [six] and [seven] more persuasive than defendant's version." In addition to his inability to recall many of the details regarding his negotiations with Dunn, the judge found that Murray was not a credible witness because he had an interest in testifying favorably for the Board to maintain his at-will employment.

The judge rejected the Board's argument that Dunn's compensation for his unused sick leave should be calculated in accordance with the EEA collective bargaining agreement because that agreement did not govern superintendents and assistant superintendents; the EEA was not the sole bargaining unit in the school district; and although paragraphs six and seven contained parallel language regarding Dunn's "last per diem rate as Superintendent of School," neither clause specifically referenced the EEA agreement. The judge further found that despite Murray's uncertainty as to who drafted the addendum, there was no evidence to suggest that Dunn's representatives drafted the agreement. The judge inferred that a member of Murray's law firm drafted the agreement, based on Murray's handwritten notes of the agreement, and the fact that a final copy of the addendum was sent to Dunn with a cover letter from a member of Murray's firm. Relying on principles of contract

construction, the judge concluded that Dunn "was promised, at least inferentially by Mr. Murray, unused accrued sick and vacation days at the per diem rate of \$833.05."

On April 20, 2009, the trial court entered final judgment against the Board in the amount of \$314,476.37, as compensation for Dunn's 377.5 unused sick days at \$833.05 per day; \$166,859 as compensation for his 200.3 unused vacation days at \$833.05 per day; \$47,181.40 in prejudgment interest and \$1,182.34 in taxed costs. The Board only appealed the judgment as it relates to the rate of compensation for the sick days.

II

On this appeal, the Board raises the following points for our consideration:

POINT I: THE RULING VIOLATED CONTRACT CONSTRUCTION PRINCIPLES BY RENDERING WORDS MEANINGLESS.

POINT II: THE RULING IGNORED UNCONTROVERTED TESTIMONY AS TO CONSISTENT PAST PRACTICES CONCERNING SICK PAY.

POINT III: FINDINGS OF FACT BASED ON ALLEGED BIAS SHOULD NOT HAVE BEEN RESOLVED IN FAVOR OF EITHER PARTY.

POINT IV: APPELLANT'S POSITION AND POLICY IS THE PREVAILING VIEW OF SCHOOL DISTRICTS IN NEW JERSEY.

Having reviewed the record, we conclude that all of these arguments are without sufficient merit to warrant discussion in

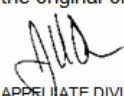
a written opinion. R. 2:11-3(e)(1)(E). We affirm substantially for the reasons stated in the trial judge's thorough written opinion. We add the following comments.

As Dunn credibly testified, in agreeing to give up his tenured position as assistant superintendent, he was ceding his right to work for at least another seven years at an annual salary of approximately \$135,000. He was thus giving up the right to earn at least \$945,000. He was also giving up the right to earn a larger pension based on a longer period of service. It is unlikely that he would have agreed to give up those large guaranteed benefits without a significant payment from the Board.

Further, if the Board intended to limit Dunn to the sick leave formula provided in the EEA contract, one would have expected the Board to insist on including that specific language, as provided in Dunn's 2000 contract. Instead, Murray included the more vague and general language about "the District's sick leave policy" and assured Dunn that it was meaningless boilerplate. We find no error in the judge holding the Board to its specific agreement to compensate Dunn for his accrued sick leave at his per diem rate based on his superintendent's salary.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION