IN THE COURT OF COMMON PLEAS OF HURON COUNTY, OHIO

Bellevue City School District Board of Education Plaintiff(s)	:	Case No. CVC 2010 0727
vs.	:	Judge Roger E. Binette *(Sitting by assignment)*
	:	**JUDGMENT ENTRY**
William D. Martin, Jr., et al. Defendant(s)	:	JOURNALIZED 03-02-2012 VOL. 623 PG. 401

This matter is before this Court on an appeal from a decision of the Ohio Unemployment Review Commission ("Commission") granting William D. Martin ("Martin") unemployment benefits after his administrative suspension and subsequent termination as Superintendent of the Bellevue City School System Board of Education ("Bellevue BOE".) This Court has reviewed and carefully considered the briefs of the parties and the entire record, including the transcript of testimony (both before the Commission and the Hearing Officer at the termination proceeding).

This Court's review of the Commission's decision is limited to determining whether it is "unlawful, unreasonable or against the manifest weight of the evidence." R. C. 4141.282 (H); *Tzangas, Plakas and Mannos v. Ohio Bur. Of Emp. Services* (1995), 73 Ohio St. 3d 694, 696; *Geretz v. Ohio Dept. of Job & Family Services* 114 Ohio St. 3d 89, 2007-Ohio-2941, ¶ 10. A reviewing Court cannot usurp the function of the tier of fact by substituting its judgment for the Commission's. *Simon v. Lake Geauga Printing Co.* (1982), 69 Ohio St. 2d 41, 45. The decision of purely factual questions is within the Commission's purview. *Id*; *Brown-Brockmeyer v. Roach* (1947), 148 Ohio St. 511, 518.

The essential question posited for review here is whether the Bellevue BOE had "just cause" for terminating Martin. Thus, this Court's role is to determine whether the Commission's decision that there was not "just cause" for termination was unlawful, unreasonable or against the manifest weight of the evidence.

"Just cause" has been defined as "that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act." *Irvine v. Unemployment Comp. Bd. of Rev.* (1985), 19 Ohio St. 3d 17, 19. It is well established that "fault" is essential to the unique chemistry of a just cause termination. *Tzangas*, supra at 698. "The critical issue us not whether an employee has technically violated some company rule, but rather whether the employee, by his (or her) actions, demonstrated an unreasonable disregard for the employer's best interests. *Kiikka v. Ohio Bur. Of Emp. Serv.* (1985), 21 Ohio App. 3d 168, 169; *Binger v. Whirlpool Corp.* (1996), 110 Ohio App. 3d 583, 590.

This Court has already resolved the issue of whether Martin was terminated with "just cause" in his appeal of his termination in Case No. CVH 2010-290. This Court incorporates, as if fully rewritten here, that decision (a copy of which is attached hereto.)

In the appeal of Martin's termination case, this Court specifically found that the Bellevue BOE had "just cause" for terminating Martin. Even though that case was analyzed pursuant to R.C. §3319.16 and the case law interpreting that statute, the lynch pin of that analysis and decision came down to determining whether there was "just cause" for Martin's termination. This Court, ipso facto, resolved that issue in Case No. CVH 2010-290. It would be incongruous to find here that the Bellevue BOE did not have "just cause" to terminate Martin.

Before engaging in further analysis, this Court has several observations. While great deference is paid to the Commission's fact finding role, two of the reasons which undergird such deference are lacking in this case. It is long and

well established that reviewing Courts afford deference to trial courts or administrative hearing boards like the Commission. The hallmark reason for such deference is that the finder of fact has the unique opportunity of seeing the witnesses testify live. The Hearing Officer, Trial Judge or Jury is in a special position to examine mannerisms, speech, body language, etc. that is not, and cannot be, captured in a transcript. A witnesses' response, approach, attitude and manner of handling cross-examination is often critical to the assessment of credibility. The reason deference is accorded to the fact finder's determination of the facts is because only the fact finder can observe the witness and is therefore uniquely positioned to assess credibility. Here, this hearing was done telephonically. This is not intended to criticize the procedures of an overburdened Commission, particularly during tough economic times. But, this Court has to seriously question, going forward, the deference given the Commission's fact finding function when the hearings are being done by telephone (i.e.. not able to view the demeanor of the witnesses, etc..).

Moreover, here Martin was the only witness, and, at the conclusion of the Hearing Officer's questioning, the Hearing Officer announced the time for the hearing was up and if Martin was to be cross-examined, the Hearing would have to be rescheduled. The parties opted to submit a disc of the entire 1,074 page(s) transcript [1] of the hearing relating to Martin's termination and the hearing before the Commission was not rescheduled.

The point of this discussion is not to criticize the Commission or to indicate that the Commission's fact finding is not afforded proper deference here; but to highlight that this Court places greater weight, in the overall determination of facts, in the report and analysis of Referee Victor Kademenos ("Referee") who not only heard four days of testimony and first hand observed the witnesses testimony in person, but who also wrote an extensive decision. Here, the Hearing Officer's reasoning consists of a mere two paragraphs.

This Court is absolutely convinced the Bellevue BOE had "just cause" to terminate Martin. The Commission employed the wrong standard in concluding Martin's conduct did not rise to the level of sexual harassment. The critical question is whether Martin's conduct violated Bellevue BOE's policy. The issue is not whether Martin's conduct met some standard articulated by the Federal Courts. This Court previously found that Martin's conduct was more than just crude, unprofessional and inappropriate. This Court expressly held in Case No. CVH 2010-290 that Martin's conduct violated the Bellevue BOE's policy and that the following specific conduct was offensive under that policy:

a) laughing, touching Carrie Sanchez's leg and repeating "That's right, do me first[2];
b) staring at female principals bust lines;
c) walking into a principals' meeting, putting his arms around Luanna Coppus and saying "here's by hottie honey";
d) announcing at a Christmas party in the company of numerous school administrators that the party was "as much fun as being inside a prom queen's thighs on prom night";
e) acting in such a way that the female principals had a pact with each other never to leave the other alone in a room with Martin.

This Court is therefore compelled to find that the Commission's decision is unlawful, unreasonable and against the manifest weight of the evidence. The Referee found that factually the incidents occurred. He, like the Commission,

[1] This Court reviewed that entire transcript.
[2] This Court takes exception to the statement in ODJFS' Brief on P.5 that "the record is devoid of any evidence that there was ever any physical conduct of a sexual nature."

found that since the legal consequences did not result in sexual harassment as defined by the Federal Courts, Martin should not be terminated. But the Bellevue BOE policy us not the Federal Court's sexual harassment standard. The Bellevue BOE policy is not as narrow. The Bellevue BOE is best able to interpret its policy. 623 403

Moreover, this Court again points out that this case involves the Superintendent of a public school system. Furthermore, Martin's conduct was inimical to the Management Philosophy and Mission Statement of the Bellevue BOE (as found in Case No. CVH 2010-290.) This Court can only conclude that to an ordinary intelligent person that Bellevue BOE was justified in terminating Martin, *Irvine*, supra. Martin by his own actions demonstrated an unreasonable disregard for Bellevue BOE's best interests. *Kiikka*, supra; *Binger*, supra. Any other conclusion is not merited by the law or evidence in this case. Clearly, the Bellevue BOE had "just cause" to terminate Martin.

This Court, like the Commission, did consider the fact that prior to June 9, 2009, no one complained about any of these incidents. Nevertheless, it did not prevent this Court from concluding there was "just cause" for termination. Again, the Referee specifically found that Martin did engage in this conduct/make these statements. The record of the proceedings shows that the witnesses had rational explanations for not reporting these incidents. Not the least of which was fear of reprisal; the Compliance Officer, Darrell Hykes ("Hykes"), was Martin's right-hand assistant, friend and roommate; and Martin was the Superintendent. Further, Hykes was terminated along with Martin. To conclude that because these incidents weren't reported earlier is an impediment to termination is not justified.

Finally, this Court, in the appeal of Martin's termination also previously addressed the other conclusion of the Commission that "just cause" for termination did not exist because Martin was not given an opportunity to correct his deficiencies. In the previous case, this Court not only found that Martin engaged in repeated, inappropriate conduct, which created an offensive work environment. There is nothing in the law or Martin's contract that precludes termination without weighing other sanctions/engaging in progressive discipline. See this Court's discuss in Case No. CVH 2010-290; *Elsass v. St. Mary's School District Board of Educ.* 2011-Ohio-1870, ¶ 34-36.

This Court has had a number of unemployment appeals and in the spectrum of cases reviewed, "just cause" has been found on much less evidence than in this case. It would be manifestly unjust to uphold the finding of the Commission in this case. This Court is well aware of the standard of review. This Court is absolutely convinced the Bellevue BOE had "just cause" for terminating Martin.

Based on the foregoing, the decision of the Commission must, accordingly, be reversed.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that, based on the foregoing, the decision of the Ohio Unemployment Review Commission, granting Defendant William D. Martin unemployment benefits is hereby **REVERSED.**

IT IS SO ORDERED

RETB 2/29/12

JUDGE ROGER E. BINETTE
(Sitting by Assignment)

"The Huron County Clerk Of Courts is ORDERED to enter this Judgment Entry on its journals, and shall serve upon all parties not in default for failure to appear Notice of this Judgment Entry and its date of entry upon the journal. Within 3 days of journalizing this Judgment Entry, the Clerk shall serve the parties. Civ. R. 58(B) & 5(B)"

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Daniel Mason/ Michael J. Loughman/ Asleigh Elcesser
Dennis L. Pergram
Eric A. Baum
Judge Roger Binette

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IN THE COURT OF COMMON PLEAS OF HURON COUNTY, OHIO

William D. Martin, Jr. Plaintiff(s)	:	Case No. CVH 2010 290
	:	Judge Roger E. Binette *(Sitting by assignment)*
vs.	:	
Board of Education of the Bellevue City School District Defendant(s)	::::	**JUDGMENT ENTRY**

This matter is before this Court on appeal pursuant to R.C. §3319.16. Plaintiff William D. Martin, Jr. ("Plaintiff" / "Martin") appeals the decision of the Board of Education of the Bellevue City School District ("Defendant" / "Board") terminating his contract as Superintendent of the District.

This Court has thoroughly and carefully reviewed the record, including, but not limited to, the entire transcript of proceedings; *Plaintiff's Brief on the Merits* (filed October 14, 2010), *Defendant's Brief on the Merits* (filed December 7, 2010), *Plaintiff's Reply Brief* (filed December 17, 2010), and applicable law.

On or about September 2, 2010, the parties filed a *Stipulation As To The Record* advising this Court that neither party desired to, nor would, seek to supplement the record or submit any additional evidence. This Court does not deem any additional hearings advisable. Thus, the matter is before this Court on the record and transcript filed as well as the briefs.

This Court **FINDS** and **HOLDS**:

1. Plaintiff entered into a contract to serve as Superintendent of the Bellevue City School District for the term of August 1, 2008 to July 31, 2011. However, on July 9, 2009, Plaintiff was served with written notice of intent to conduct a *Loudermill* Pre-termination hearing. That notice outlined a series of allegations serving the basis for termination. On July 16, 2009, Defendant unanimously passed a Resolution of intent to consider termination on the grounds of gross inefficiency, willful and persistent violations of Board policy and other good and just cause. The Resolution enumerated the allegations and suspended Plaintiff without pay;

2. Plaintiff exercised his right under R.C. §3319.16 for a hearing before a Referee. Victor Kademenos ("Referee") was appointed pursuant to R.C. §3319.161 as the Referee. The hearing was conducted over four (4) days- September 28, 29 and 30 and October 14, 2009. Twenty (20) witnesses testified and the transcript consists of 1,074 pages. The Referee thereafter issued a sixteen (16) page decision / recommendation ("*Referee's Decision*");

3. In spite of the Referee finding that: a) some of Plaintiff's behaviors "may be "impolite, could be considered crass or rude, unprofessional" and "not politically correct", b) Plaintiff "might have been lax to some degree in tolerating some of Mr. Hykes' disruptive conduct", and c) "the comments alleged by Mr. Martin were in fact made by Mr. Martin", the Referee found that the Defendant did not meet its burden of proof that Plaintiff engaged in sexual harassment, gross inefficiency, willful and persistent violation of Board regulations, or engaged in any conduct justifying termination for other good and just cause. The Referee concluded Plaintiff's contract could not be terminated;

4. Irrespective of the *Referee's Decision*, by a unanimous Resolution, dated February 19, 2010, Defendant terminated Plaintiff's contract as Superintendent on the grounds of gross inefficiency, willful and persistent violations of Board rules and regulations and other good and just cause. Plaintiff appealed;

5. This matter is governed by R.C. §3319.16 and the case law interpreting it. R.C. §3319.16, as in effect when Defendant took action, provided, in relevant part, as follows:

> The contract of a teacher employed by the board of education of any city, exempted village, local, county, or joint vocational school district may not be terminated except for gross inefficiency or

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immorality; for willful and persistent violations of reasonable regulations of the board of education; or for other good and just cause.

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As used in R.C.§3319.08 to §3319.18, inclusive, "teacher" means all persons licensed to teach who are employed in public schools in Ohio as instructors, principals, supervisors and superintendents. R.C. §3319.09. Moreover, Plaintiff's contract provides that termination will be pursuant to R.C. §3319.16;

6. When there is a hearing before a Referee in a R.C.§3319.16 termination proceeding, the report and recommendation of the Referee must be considered and weighed by the Board of Education. Deference is accorded to the Referee's findings and recommendation because the Referee is in the position of observing the demeanor of the witnesses and weighing their credibility. However, the Board of Education is not bound by the Referee's recommendation. When the Board rejects the Referee's recommendation, the school board should articulate its reasons for doing so. *Graziano v. Board of Education of Amherst Exempted Village School District.* (1987) 32 Ohio St. 3d 289, 293;

7. The decision to terminate a teacher/superintendent's contract consists of two parts: (1) the factual basis for the allegations giving rise to termination, and (2) the judgment as to whether the facts, as found, constitute gross inefficiency, immorality, or good cause as defined by statute. *Aldridge v. Huntington Local School District Board of Education* (1988), 38 Ohio St. 3d 154, 157. The Referee's primary duty is to ascertain facts. The Board of Education 's primary duty is to interpret the significance of the facts. Accordingly, the Referee's findings of fact must be accepted unless they are against the greater weight, or preponderance of the evidence. The school Board has discretion to accept or reject the recommendation of the Referee unless such acceptance or rejection is contrary to law. *Aldridge* syllabus. The Board of Education must indicate whether it rejects the Referee's findings as being against the preponderance of the evidence or accepts the Referee's factual findings but rejects the Referee's recommendation based upon a different interpretation of the significance of those facts. *Id at 158; Oleske v. Hilliard City Schools* (2001) 146 Ohio App. 3d 57, 61-62;

8. On appeal, the Common Pleas Court may reverse an Order of termination made by a Board of Education, only where it finds such Order is not supported by, or is against the weight of, the evidence. *Hale v. Board of Education* (1968), 13 Ohio St. 2d 92, syllabus. Absent a claim that the school Board violated a statutory right or constitutional obligation, a trial court may not substitute its judgment for that of the Board. If substantial and credible evidence is presented to support the charges of the Board, and a fair administrative hearing is had, the Common Pleas Court cannot substitute its judgment for that of the Board of Education. *Kitchen v. Board of Education Fairfield City School District* 2007-Ohio-2846, ¶.17; *Hamilton v. Governing Board Madison-Champaign Education Service, Inc.* 2009-Ohio-1771, ¶.20; *Lanzo v. Campbell City School District Board of Education 2010-Ohio-4779,* ¶.15 and *Elsass v. St. Mary's City School District Board of Education* 2011-Ohio-1870, ¶.43;

9. Defendant made, and the hearing proceeded regarding, the following allegations:

   A. That during the 2008-2009 school year, you had a number of conversations and meetings with the President of the Bellevue Education Association who represents the certificated staff of the School District. During the course of those conversations and meetings you made a number of comments to her that was construed by the individual and individuals present as being of a sexual nature and creating a hostile work environment:

      1) On or about August 4, 2008, in a conversation with the President, you stated that you were committed assisting the President's professional growth by using the following phraseology: I am committed to growing you and your career. Let me fertilize you. Let me spread some fertilizer on you and we'll go along way.

      2) On or about September 24, 2008 in a meeting with administrators and teachers concerning High School That Works program, the President asked if their committee should address the Board about the committee's findings. In reply to her question, you responded in the following manner: I'd like to see it before you present to the Board. I tell you what; you do me first, then the Board.

Upon the President saying what? You did laugh and while touching, her leg stated: That's right, do me first!

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3) After a Labor Management meeting with the Association, on or about October 21, 2008, you requested that the President meet with you in your office later in the week, "all alone, just you and I."

4) On or about November 21, 2008, you called the president at her home at 7:00 p.m. and began the conversation in this manner: Can we talk? When the President said ok, you stated the following: I just need to hear your voice.

5) On or about December 16, 2008, at Labor Management meeting, you made several comments that had sexual connotation about doing things to and with people. While making those comments, you winked at the President of the Association.

6) On or about March 27, 2009, in a luncheon meeting with President, others, Administrator Hykes and yourself, you permitted Mr. Hykes to talk inappropriately and a sexual manner about his trips to Mexico. The nature of the comments made by Mr. Hykes and your laughter to them was described by the participants as "gross!"

7) On or about April 1, 2009, when requested by the President for a job recommendation in another school district, you told her you would, as well as that you would state to the potential employer that the President has "the most piercing brown eyes I've ever seen."

8) That during the 2008-2009 school year, when meeting face to face with the President of the Association, you spoke about the clothes the President was wearing. Further, in these meetings the President observed you staring at her bust line, as well as "eyeing" her from head to toe and toe to head.

9) When requested by the President to speak to her college graduate class on the duties of a School Superintendent, you spoke about checking the winter weather off the weather channel. In the course of your conversations, you spent approximately five minutes talking to the class about the women on the weather channel and how good looking they are.

10) After meeting with the President and a teacher being reassigned, you made a comment to the President about the teacher's looks in the following manner: "I don't think the high school boys will not miss seeing her."

B. That during the 2008-2009 school year, you had a number of conversations and meetings with the Principals employed by the School District. During the course of those conversations and meetings you made a number of comments to them that were construed by the individual and individuals present as being of a sexual nature and creating a hostile work environment:

1) At a principal meeting, early in the school year, you placed your arm around one of female principals and told all the principals present that: "Here is my hottie honey."

2) During the course of the principals meeting with you, either alone or as a group, the principals have observed you, if female, looking at their bust line, as well as eyeing them from toe to head and head to toe.

3) That after a meeting you announced to the principals: "This meeting was as much fun as a warm enema."

4) That at a Christmas gathering of the School district's administrator, you described a meeting that you had attended as: "This meeting was as much fun as the inside of a prom queen's thighs on prom night."

5) That in meetings with the School District's administrators, you have allowed and acquiesced in comments that were inappropriate and sexual made by the Administrative Assistant to the Superintendent, Mr. Hykes.

6) That your actions and comments have created a hostile work environment, as well as a hostile work environment based on sex that is so pervasive that all of the Elementary Principals made a pact during the 2008-2009 school year never to leave one of them alone with you or Mr. Hykes at the Board Office.

C. That during the 2008-2009 school year, you request that female employees of the Board Office to pirouette in front of him so he could view their clothing and make comment about how the employee looks, as well as talking about an employee's "sexy feet".

D. That the start of the 2008-2009 school year, you requested and the Board of Education approved the hiring of Darrell Hykes to the position of Administrative Assistant to the Superintendent. That you previously worked with Mr. Hykes at your previous School District. In recommending and seeking the employment of Mr. Hykes, you knew or should have known of Mr. Hykes propensity for creating a hostile work environment and a hostile work environment based on sex. Whether you knew or did not know of Mr. Hykes propensity for creating a hostile work environment and hostile work environment based on sex, you failed to properly supervise and discipline Mr. Hykes for his inappropriate behavior and actions as listed herein:

1) The explicit use of vulgar and obscene words by Mr. Hykes in his discussions with administrators, certificated staff and non-certificated staff members, including but not limited to the term Mother F---er.

2) Mr. Hykes' open discussion with administrators, certified staff and non-certified staff of his "sexual activities" while on vacation.

3) The open solicitation of a waitress by Mr. Hykes at a local restaurant with you laughing, while both of you were attending a lunch with other school employees.

4) That Mr. Hykes continually discussed with staff his sex life, his sexual adventures and his girlfriends.

5) That Mr. Martin, as an experienced educational administrator, knew or should have known that his failure to enforce Board policy on creating a hostile work environment and creating a hostile work environment based on sex has diminished for him and position that he holds as Superintendent of Schools. That the conduct described herein was under the circumstances of such a nature that Mr. Martin knew or should have known of the notoriety of such conduct in the school community and the detrimental impact such notoriety would have on Mr. Martin's ability to continue to function effectively as the Superintendent of Schools.

6) That Mr. Martin, as an experienced educational administrator, knew or should have known that his failure to enforce the Board Policies and to supervise and discipline Mr. Hykes created a hostile work environment and a hostile work environment based on sex so as to place the School District at legal risk because of your actions and your failure to take action against Mr. Hykes.

7) That the conduct of Mr. Martin as described above in its totality, in fact, created such notoriety as to seriously undermine the confidence and respect held by Board of Education members, fellow administrators, staff and the citizens of the School District for Mr. Martin working as the Superintendent of Schools for the Bellevue City School District.

8) That the adverse effects of Mr. Martin's conduct or lack thereof, while acting as the Superintendent of Schools has substantially undermined Mr. Martin's ability to continue to function effectively as the Superintendent of Schools for the Bellevue City School District.

9) That the totality of your conduct as described above demonstrates gross inefficiency, persistent violation of reasonable rules and regulations of the Board of Education as well as good and other just cause.

10. After hearing the testimony, the Referee made factual findings and recommended against termination. Since the *Referee's Decision* is sixteen (16) pages in length, this Court will summarize the factual findings. They are as follows:

- Plaintiff had a 20 plus year career as an educator and there is no record of any prior similar complaints or disciplinary action;
- The statement to Carrie Sanchez: "I am committed to growing you and your career. Let me fertilize you, let me spread some fertilize on you, and we'll go a long way" does not give rise to sexual harassment;[1]
- The comment "Tell you what, you do me first and then the Board." Laughing and touching Ms. Sanchez's leg stating "That's right, do me first" was not sexually oriented;
- Requesting a meeting with Sanchez alone in her office did not meet the definition of sexual harassment;
- Calling Ms. Sanchez at 7:00 p.m. on a Friday at her home asking to talk and telling her "I just need to hear your voice" did not constitute sexual harassment;
- There was no evidence presented to support the general specification that Plaintiff made comments with a sexual connotation about doing things to and with people;[2]
- At a luncheon meeting with several present, Plaintiff permitting Hykes to talk inappropriately in a sexual manner and laughing, Martin did not hear it and did not himself engage in any inappropriate sexual discussions;
- In a conversation about a reference, telling Ms. Sanchez she had "the most piercing brown eyes I've ever seen" did not constitute sexual harassment;
- Making comments about clothing Ms. Sanchez wore, staring at her bust line and eyeing her from head to toe was impolite, crude or crass but not severe or pervasive to create an objectively hostile work environment and thus not sexual harassment;
- Commenting at Ms. Sanchez's college graduate class on how good looking the women on the Weather Channel were was not a school function and did not constitute sexual harassment;
- Commenting about a reassigned teacher that "I don't think the high school boys will miss seeing her" had to do with performance and was not made in a sexual manner;
- Ms. Sanchez never made any complaints nor expressed any concern about Martin's conduct. She found most of these actions unprofessional, unnecessary and they made her uncomfortable;

[1] Throughout the Referee's analysis he utilized the standard established by Federal Courts interpreting "sexual harassment." Finding that it was not an unwelcome sexual advance," request for sexual favors; verbal or physical conduct of a sexual nature; the recipient was not subjected to the conduct as a term or condition of employment and it did not interfere with the recipient's work or education performance.

[2] While not at a labor management meeting, the Referee overlooked the testimony of Martin commenting about an employee in the district where he used to work that "she's always had a crush on me. She really wants to have carnal knowledge with me." (Tr. 336, lines 23-25)

- Entering a principal's meeting, putting his arms around Luana Coppus and stating "here is my hottie honey" was unprofessional, rude or crass but not sexual harassment;

- Staring at females' bust lines and eyeing women from head to toe in the course of principal's meetings does not rise to the level of sexual harassment;

- Announcing at the conclusion of a principal's meeting that the meeting "was as much fun as a warm enema" was crass, crude and unprofessional but not directed to anyone and not of a sexual nature;

- At a Christmas party hosted by a school district administrator commenting that the party "was as much fun as the inside of a prom queen's thighs on prom night" was crass, impolite and unprofessional, but not directed to anyone and not sexual harassment.

- With regard to Martin allowing and acquiescing in Hykes' comments that were inappropriate and sexual, Martin was to some degree lax in Hyke's disruptive conduct, but there was no evidence that Martin actually acquiesced in Hyke's comments;[3]

- Regarding an incident involving Evelyn Woodruff, Martin commenting on her outfit and the tattoo on her foot was not sexual harassment;

- "the comments alleged by Mr. Martin were in fact made by Mr. Martin";

- Regarding the hiring, supervision and discipline of Darrell Hykes, Assistant to the Superintendent, there was no evidence Hykes had any previous problems or propensities. Martin did not hire Hykes. Hykes' inappropriate conduct did not occur in Martin's presence and Martin was not apprised of it;

- The allegation Martin improperly hired and failed to supervise Hykes is not established by the evidence;

- The charge of gross inefficiency was not established by the evidence;

- The charge of willful and persistent violation of board policy regarding sexual harassment was not established;

- Termination for good and just cause was not established;

- The Board is not required to give Martin opportunity to correct allegations relating to sexual harassment.

11. Defendant spelled out, in twenty (20) numbered paragraphs, why it rejected the *Referee's Decision*. Defendant cited portions of the transcript, which the Referee did not address, and reached a different conclusion on the facts. Defendant, unanimously by Board resolution, found Martin's actions and conduct were a persistent and willful violation of Board policy, especially policy on sexually harassment. Moreover, Martin's failure to enforce that policy, including himself, constituted gross inefficiency. Furthermore, the totality of Martin's conduct constituted good and just cause for termination;

12. The thrust of Defendant's rejection of the *Referee's Decision* is an interpretation of the Sexual Harassment policy. In short, Defendant reached a different conclusion that Martin's conduct created an "offensive environment" under Board policy ACAA (Exhibit B-5). Thus, there is a divergence in the conclusion whether Martin's conduct created an "offensive environment";

[3] The Referee failed to address allegation B-6, which the Court finds extremely significant. There was actually a pact made between female principals that they would not leave each other alone in a room with Martin. In this Court's evaluation, this demonstrates the existence of an offensive or hostile work environment. Such a hindrance to communication (and principals may need to speak confidentially and privately with a superintendent) affects the duties of the respective parties.

13. Before addressing that issue, this Court will first examine the "gross inefficiency" allegation, then consider the willful, persistent violation of Board policy and then analyze the "good and just cause" basis.

14. This Court cannot agree with the Referee as to the 'gross inefficiency' claim. The record does establish that Plaintiff was 'grossly inefficient'. "With regard to inefficiency, the key is the adjective 'gross'. To constitute gross inefficiency, the inefficiency must be flagrant, extreme, or complete." *Rumora vs. Board of Education of Ashtabula Area City School District.* Albeit there was some testimony for the Referee to find against the 'gross inefficiency' claim. Specifically, that his performance evaluations were quite strong, and the Board President's testimony was that prior to the revelation around June 10, 2009 of the sexual harassment allegations he was "very pleased" with Plaintiff, and had no intent or desire to get rid of him as Superintendent (Tr. 180). Further, there was testimony to the effect that Plaintiff was a stabilizing force in a financially troubled school district which had problems with prior Superintendents. Apparently, the Referee singled these items out, without considering the whole record. Although the above stated evidence, which appears to be positive for Plaintiff, it must be tempered by the other evidence of his actions while in power as the Superintendent. Without re-visiting the entire *Referee's Decision,* the Referee did find on more than one occasion that Plaintiff's actions "may be "impolite, could be considered crass or rude, unprofessional" and "not politically correct". Further, that Plaintiff "might have been lax to some degree in tolerating some of Mr. Hykes' disruptive conduct". And, more pointedly, that "the comments alleged by Mr. Martin were in fact made by Mr. Martin" – which directly challenges his credibility.[4] In light of what was truly happening under Plaintiff's 'leadership', there is sufficient evidence for the Board to hold that his conduct was flagrant, extreme or complete as to being grossly inefficient. Because the record supports - by the manifest weight of the evidence – this Court upholds the Board's rejection of the Referee's conclusion. Therefore, this Court concludes that termination based on "gross inefficiency" was warranted;[5]

15. With respect to the allegation of willful and persistent violation of Board policy, this Court again concurs with the Defendant's decision. The Defendant concluded that Plaintiff violated the Board's Sexual Harassment policy, and this Court agrees. In review, Plaintiff's conduct was never reported, and the witness testimony was - more often than not - that Plaintiff's conduct was inappropriate or unprofessional. Further, Some of the witnesses questioned, in their minds, whether this was sexual harassment. However, not taken in isolation, but rather in totality, this Court finds that Plaintiff's conduct was not only unquestionably crude, unprofessional, and inappropriate, it also constituted sexual harassment. Specifically, there are several instances which are just "over the top", highly sexually suggestive and created an offensive environment. While divergent conclusions could be reached on just how offensive some of Plaintiff's conduct was, not only are several acts objectively offensive in a sexual way, the cumulative effect of engaging in conduct which might otherwise just be crass, unprofessional, crude and inappropriate, makes the totality of the conduct intolerable. Although not inclusive, these are just a few of the examples of what this Court objectively, finds from specific acts of Plaintiff, totally inappropriate and offensive under the sexual harassment policy:

- laughing, touching a female employee's leg and repeating "That's right, do me first;"
- staring at female employees' bust lines, even to the point that one had to bend down and get his attention in order to get him to quit looking at her bust line;
- making a female employee do a pirouette in front of him so he could look at her, then telling her she has "sexy feet";
- calling a female employee at home and telling her "I just need to hear your voice";

[4] Plaintiff had denied saying some of the statements attributed to him. Further, although it cannot be considered for purposes of discharging him, the "mileage" issues clearly weigh on his lack of credibility.

[5] Obviously, based on the testimony, the Board was in the dark as to what was truly occurring under his watch. Thus, their testimony that "they were very pleased with him", that he was "a stabilizing force", and that they had "no intent on getting rid of him" must be viewed accordingly.

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- walking into a principals' meeting, putting his arms around a female employee and saying "here's my hottie honey";
- saying that he wanted to "spread some fertilizer" on a female employee and "help her grow"....that they could "grow together"; [6]
- commenting to others on females appearances' on the weather channel;
- asking a – single - female employee to go out to dinner on two separate occasions to talk about her employment status;
- telling a female employee that they need "to meet alone in his office";
- announcing at a Christmas party (albeit not on school grounds or time) but in the company of numerous school administrators that the party was "as much fun as being inside a prom queen's thighs on prom night"; [7]
- acting in such ways that the female employees had a pact with each other never to leave the other alone in a room with Plaintiff.

16. The above list – albeit only limited by this Court's attempt to be brief – definitely demonstrates that Plaintiff fostered an environment, through a pattern of behaviors, which violated the Board's Sexual Harassment policy. Therefore, this Court concludes that there was "good and just cause" for terminating Plaintiff and upholds Defendant's decision on this basis;

17. In reaching the conclusion here, this Court has reviewed a number of teacher termination cases involving "good and just cause" for purposes of comparison. The case law provides that in order to constitute "good and just cause" the conduct involved must be hostile to the school community and not merely some private act which has no impact on the teacher's professional duties. *Florian v. Highland Local Bd. Of Educ.* (1983), 24 Ohio App. 3d 41,42; *Oleske* supra at 65; *Bertolini v. Whitehall City School Dist. Board of Educ.* (2000), 139 Ohio App. 3d 595, 605;

18. By way of example only, in *Oleske*, supra, termination was upheld based on a teacher telling dirty jokes to middle school students and cleverly mispronouncing another teacher's name as "turd." In *Kitchen*, supra, an assistant superintendent's termination was upheld for appearing at a high school football game intoxicated, arrested for OMVI on the way home and misrepresenting the circumstances of the charges. Cf *Bertolini* (an otherwise effective associate superintendent who had "glowing evaluations" was improperly terminated for having adulterous relationship where there was no evidence of a negative impact on school community or serious impact on either of their professional duties) and *Florian* (adulterous affair by teacher without evidence it created hostility in school or had serious impact on professional duties not valid reason for termination);

19. Assessing the circumstances here, this Court is firmly convinced that Defendant acted absolutely appropriately by terminating Plaintiff. Some of the most poignant pieces of evidence were that some female employees had a pact assuring each other that they would not leave the other alone in a room with Plaintiff. (Tr. 244; 568) Additionally, there was evidence that because the Superintendent, and his designee and personal friend, Hykes (assistant to the Superintendent/ and Compliance Officer), were engaging in the inappropriate conduct, the school policy on harassment would not be enforced (Tr. 234-237; 395);

20. There certainly was an effect on the working conditions, morale and atmosphere while Plaintiff was in charge as the Superintendent. This is <u>not</u> a case involving just crude, sexual comments on

[6] Although Plaintiff attempted to implicate that he was referring to the school's levy slogan, there was rebutted testimony to show that it was <u>not</u> the slogan for the levy at the time when he made the statement.

[7] What disturbs this Court, as it must have the Board, is the reference is to a prom, which is a school sponsored event involving teenagers.

an assembly line[8]; this case involves the 'point person' and 'public face' of a public entity entrusted with educating children. Professionalism from the Superintendent is not only expected; it is required. Leaders lead by example; they establish the tone. They cannot lead and hope to properly direct and supervise the education of young people, if, in their communication and contact with other administrators, they engage in the conduct Plaintiff engaged in. How can teachers and administrators have any confidence that school board policy on harassment or offensive conduct be enforced if the Superintendent himself is repeatedly engaging in that type of conduct? Plaintiff's conduct was not only unprofessional, it was disruptive of school decorum, created an uncomfortable, intimidating, demeaning and offensive environment and did not exemplify proper leadership which instilled confidence that board policy on harassment and offensive conduct would be enforced. Plaintiff's conduct had or could have had a serious effect on the Bellevue City School system. To the contrary, Plaintiff's conduct was not merely private acts which had no bearing on his professional duties;

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21. Furthermore, Plaintiff's repeated, inappropriate conduct was hostile to the Management Philosophy and Mission Statement of Bellevue City Schools. Attached to Exhibit G is the "Leadership Program for Bellevue City Schools." The Management Philosophy espouses, among other things:

- "we will work to create a climate that values input, promotes respect, honesty and integrity among our staff and ourselves"
- "we will accomplish this climate through communication, teamwork...and a commitment to maintain a positive relationship with the public, leadership members and students."

The Mission Statement includes a Statement of Beliefs, which asserts that organizationally, Defendant believes in, among other things:

- "a secure, nurturing and Healthy environment is Essential to Achievement"
- "respect is fundamental"
- "Every person has value"

The strategies to be employed include:

- "ways to improve the environment for all students and staff by reflecting respect, responsibility, pride and self-esteem."

Plaintiff's conduct was contrary to this Philosophy, Mission Statement and strategy. Because Plaintiff repeatedly engaged in such inappropriate, hostile, offensive conduct, these aspirations would be difficult, if not impossible, to achieve under his leadership;

22. In order to complete the analysis, this Court will review Plaintiff's "Assignment of Errors." In Assignment of Error No. I, Plaintiff argues that Defendant erred by not giving him an opportunity to correct his deficiencies. Plaintiff cites and relies on cases, which hold that it is error - in the context of those cases - not to consider the "teacher's" entire record. While this Court recognizes those cases, they are factually distinguishable. Those cases involve situations where a range of potential sanctions existed and the conduct, which was actionable, was not the "norm" for the teacher. Here, this Court previously found that "gross inefficiency" was a proper basis for termination, and further found that Plaintiff engaging in repeated inappropriate conduct which created an offensive work environment. There is nothing in the statute or Plaintiff's contract which provides for a range of possible sanctions. Furthermore, even the Referee in the *Referee's Decision* found that "the Board is not required to give Mr. Martin opportunity to correct deficiencies relating to allegations of sexual harassment or other good and

[8] This is not to be taken as if this Court would condone that such behavior either.

just cause". Additionally, this Court finds the recent case of *Elsass v. St. Mary's School District Board of Educ.* 2011-Ohio-1870, ¶ 34-36 most enlightening. The Court in *Elsass* rejected the legal proposition Plaintiff proposes and finds the case authority Plaintiff relies on here distinguishable. In *Elsass*, the Court found that the teacher's otherwise distinguished career had nothing to do with whether Elsass had publicly masturbated. Likewise, here the fact Plaintiff had an otherwise clean record, does not effect the analysis or decision to terminate him for "good and just cause" for repeated acts which created a sexually, offensive work environment. This Court concludes that Defendant did not violate statutory or case law by terminating Plaintiff without weighing other sanctions; 619 478

23. Assignment of Error No. 2 alleges that Defendant's Order based on "gross inefficiency" is not supported by the weight of the evidence. This Court disagrees with Plaintiff's assertion and has addressed this above. This Court stands by its analysis and holding as set forth herein above;

24. This Court has also previously addressed Assignment of Error No. 3. This Court finds that Plaintiff did persistently and willfully violated the Board's policy on sexual harassment, and has addressed this above also. Additionally, this Court stands by its analysis and holding as set forth herein above;

25. With regard to Assignment of Error No. 4, basing termination of alleged facts not in evidence, this Court finds that any such reliance on comments about the Rotary function during "Bike Week" were insignificant in the totality of facts. There was significant evidence aside from this, to justify termination;[9]

26. Assignment of Error No. 5 assails consideration of Plaintiff's comment at the private Christmas party. The parties apparently disagree as to whether this was a "school" function or a "private" function. This Court finds that in the "good and just cause" analysis, mere private conduct is not a proper basis for termination. But, as previously set forth, the test is if conduct is hostile to the school community and/or not merely some private act which has no impact on the teacher's professional duties. Here, this Court finds that the "prom queen comment" is not only crass, irresponsible, and unprofessional, it is hostile to the school community and does impact Plaintiff's professional duties. The statement was made relating to a school type function ("prom"), in the midst of numerous school administrators/ personnel. It was offensive, sexually suggestive, and inappropriate. It was also adverse to the duties, responsibilities and mission of the school. Which Plaintiff was suppose to not only uphold, but lead by example as the Superintendent. While made at a party not on school grounds during school time, the effects of making such a statement had effects that reached far beyond the walls of the home where the party was held.[10] Unlike an adulterous affair, which had no effect whatsoever on ability to perform professional duties, the "prom queen comment" was more like the teacher who masturbated in public in the sense that while at a private party, the conduct was engaged in publicly with others impacted. Plaintiff attempts to focus on isolated pieces of the entire record. Defendant, and this Court, have considered the whole record. As a part and parcel of the entire record, this Court finds that it was not error to consider the "prom queen comment" in the totality of circumstances justifying termination;

25. With regard to Assignment of Error Nos. 6 and 7, this Court finds that Defendant did not base its termination on facts not relevant, and the Referee's failure to assess credibility of every witness and factual issue. It is apparent that Defendant was merely commenting on these points in its thorough analysis. Defendant accepted the Referee's factual conclusions, it simply reached a different conclusion regarding the effect of those facts;

26. With respect to Assignment of Error No. 8, this Court finds that Defendant did accord due deference to the Referee's findings. Again, it is the Board's prerogative to reject the recommendation of the Referee and so state. This Court finds that Defendant did follow established Ohio law, and justifiably terminated Plaintiff;

27. Finally, this Court notes that while a Referee's recommendation should be afforded considerable weight, the responsibility for making the ultimate decision belongs to the School Board. It is not only the Board's right to make an independent determination, it is the Board's duty. *Kitchen*, supra, ¶39. It is in the School Board's province to determine the significance of the facts of the Superintendent's conduct. The Trial Court may not

[9] This Court does note that it followed Defendant's counsels assertion about this event. Specifically, that although it did not take place on school grounds and arguably was not necessarily a school function, it did reveal Plaintiff's knowledge of Mr. Hykes behaviors and Plaintiff's acquiescence or lack of willingness to correct them.

[10] Oddly enough one of the female employees present – whom heard the statement – had a daughter that was a prom queen. Although there is no evidence Plaintiff had knowledge of that fact, Plaintiff's statement still has a chilling effect on those around that heard it.

substitute its judgment for, or second guess, the Board of Education's determination. *Id; Oleske*, supra at P. 65. Here, having carefully reviewed the record and entire transcript, this Court finds that the Board's decision to terminate Plaintiff's contract is supported by the weight of the evidence. A full and fair hearing was provided and due process afforded the parties. Defendant did not violate a statutory right of, or constitutional obligation to, Plaintiff. This Court cannot – and based on the evidence will not - substitute its judgment for that of the Board of Education. This Court believes that the Defendant's "got it absolutely right" in rendering their decision;

28. ***Accordingly, this Court finds that the Board of Education justifiably and properly terminated Plaintiff Martin's contract as Superintendent.*** Thus, Plaintiff's Complaint is without merit and should be dismissed.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that, based on the foregoing, Plaintiff's Complaint be **DISMISSED.**

IT IS FURTHER ORDERED Plaintiff shall bear the Costs of this action.

IT IS SO ORDERED

RE Bat 12/22/11

JUDGE ROGER E. BINETTE
(Sitting by Assignment)

County Clerk Of Courts Is ORDERED to enter this Judgment Entry on its journals, and shall serve upon all parties not in default for failure to appear Notice of this Judgment Entry and its date of entry upon the journal. Within 3 days of journalizing this Judgment Entry, the Clerk shall serve the parties. Civ. R. 58(B) & 5(B)

COPIES BY REGULAR MAIL TO:

Dennis L. Pergram - Attorney for Plaintiff
Daniel D. Mason - Attorney for Defendant
Judge Roger Binette
courtesy copy hand-delivered to Judge James Conway