IN THE OFFICE OF THE SECRETARY OF EDUCATION
COMMONWEALTH OF PENNSYLVANIA

ANGELA DIBATTISTA,	:	
Appellant	:	
	:	
v.	:	**Teacher Tenure Appeal**
	:	**No. 02-11**
	:	
MCKEESPORT AREA SCHOOL DISTRICT,	:	
Appellee	:	

OPINION AND ORDER

Angela DiBattista ("Ms. DiBattista") appeals to the Secretary of Education ("Secretary") from the decision of the McKeesport Area School District ("District") Board of Education ("Board") dismissing Ms. DiBattista from her position as a professional educator with the District on the grounds of immorality under Section 1122(a) of the Pennsylvania Public School Code of 1949 ("Public School Code"), Act of March 10, 1949, P.L. 30 *as amended*, 24 P.S. §§ 1-101 *et seq*. This matter is complex and involves facts and circumstances related to disciplinary actions concerning two educators, Ms. DiBattista and Patrick J. Collins ("Mr. Collins"), with two proceedings involving Mr. Collins and the current proceeding involving Ms. DiBattista. The first proceeding concerning Mr. Collins involved allegations that he harassed, assaulted, stalked, and/or terrorized Ms. DiBattista ("the Collins matter"). Much of the current matter originates from statements made by Ms. DiBattista on March 4, 2005, when she was prepared to testify in the Collins matter. During a witness preparation session, Ms. DiBattista unexpectedly disclosed that she had sexual intercourse ("sexual conduct") on District property. On appeal, Ms. DiBattista raises numerous defenses, procedural issues, and substantive issues. Based on a thorough review of the record and analysis of the law, this appeal is denied.

Findings of Fact

1. On August 27, 1993, the District hired Ms. DiBattista as a professional employee in the position of a full-time elementary teacher with the District. (Stip. No. 2).[1]

2. In 2004, a fellow teacher employed by the District was the subject of disciplinary action taken by the District related to allegations that he harassed, assaulted, stalked, and/or terrorized Ms. DiBattista. (Tr. III at 111-112; Tr. IV at 89, 95; Tr. V at 61-64).[2]

3. Mr. Collins and Ms. DiBattista engaged in an extra-marital affair lasting approximately six years and ending in 2004. (Tr. II at 48, 53).

4. The Collins matter was related to Mr. Collins' conduct toward Ms. DiBattista, including incidents that occurred "outside of the district, in bars, in homes, in union offices, in Gettysburg, in Pittsburgh," which culminated in a June 4, 2004 incident during which Ms. DiBattista's eye was injured on District property. (Tr. III at 55, 57, 111-112; Tr. IV at 61-64, 69-70, 93, 99).

5. The District believed that Mr. Collins injured Ms. DiBattista's eye and decided to initiate action to dismiss Mr. Collins. (Tr. II at 41; Tr. III at 84-85; Stip. No. 4).

6. The District Solicitors (three attorneys worked on the Collins matter) met with various witnesses on March 4, 2005 ("the March 4 meeting"), including Ms. DiBattista, to

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[1] "Stip." Refers to the stipulations entered into by the parties as part of the record at the hearings held before the Board.

[2] "Tr." generally refers to the transcript of the hearings before the Board, with specific references as follows:

"Tr. I" refers to the Transcript of Proceedings at the hearing on May 11, 2010
"Tr. II" refers to the Transcript of Proceedings at the hearing on May 24, 2010;
"Tr. II" refers to the Transcript of Proceedings at the hearing on May 25, 2010;
"Tr. IV" refers to the Transcript of Proceedings at the hearing on June 1, 2010;
"Tr. V" refers to the Transcript of Proceedings at the hearing on June 21, 2010; and
"Tr. VI" refers to the Transcript of Proceedings at the hearing on July 6, 2010.

discuss testimony in preparation for a hearing in the Collins matter which was scheduled for March 8, 2005. (Tr. II at 41; Tr. III at 84-85; Stip. No. 4).

7. Prior to the March 4 meeting, Ms. DiBattista had offered several versions of what happened to her eye on June 4, 2004, but did not specify that she had been injured by Mr. Collins. (Tr. II at 43, 47-48; Tr. III at 115-116).

8. Prior to the March 4 meeting, Ms. DiBattista recounted at various times that she sustained a bruised eye on June 4, 2004 when she threw a coffee mug or when she threw a popcorn tin against the wall and it bounced back; that it might have involved a desk pad; and/or that she might have been hit in the face when she tried to exit her classroom while Mr. Collins was standing in the doorway. (Tr. II at 43; Tr. III at 48-49, 86).

9. On at least two occasions prior to the March 4 meeting, Ms. DiBattista conferred with her brother who served as her attorney to discuss her testimony in the Collins matter. (Tr. V at 67-70).

10. On one occasion, Ms. DiBattista's attorney asked her whether Mr. Collins assaulted her in June of 2004 to which she replied "I don't think so." (Tr. V at 67-68).

11. On another occasion Ms. DiBattista's attorney asked Ms. DiBattista whether Mr. Collins hit her to which she replied, "yeah, he did." (Tr. V at 69-70).

12. At the March 4 meeting with the District Solicitors, Ms. DiBattista continued to provide various versions of what occurred on June 4, 2004 between her and Mr. Collins. (Tr. III at 48-49, 86).

13. Because of Ms. DiBattista's inconsistent accounts of what happened on June 4, 2004, Ms. DiBattista's attorney advised the District Solicitors that he was not sure that he would

agree to have her testify at the March 8, 2005 hearing in the Collins matter. (Tr. II at 43; Tr. III at 49-50, 61-62, 86-87).

14. In response, the District Solicitors explained to Ms. DiBattista and her attorney that if she refused to testify in the Collins matter, the District would want a release from her to absolve the District of any liability if the Collins matter did not proceed and should Ms. DiBattista be harmed by Mr. Collins in the future. (Tr. II at 42, 90, 110, 121-122, 125; Tr. III at 41-52, 59-60).

15. Neither at that time nor at any later date did Ms. DiBattista provide a written release to the District or any of its agents. (Tr. V at 78).

16. At no time did any representative of the District advise Ms. DiBattista that she could be compelled to testify in the Collins matter. (Tr. V at 67; Tr. III at 121, 126).

17. During the March 4 meeting with the District Solicitors there was a break and Ms. DiBattista and her attorney spoke privately. (Tr. II at 44; Tr. III at 47, 50).

18. After the break, Ms. DiBattista's attorney informed the District Solicitors that "Angela [DiBattista] is going to tell you something that I think you've been wanting to hear," inferring his belief that Ms. DiBattista was going to disclose that she had been assaulted by Mr. Collins. (Tr. II at 44; Tr. III at 50-51, 87-88, 110, 116; Tr. V at 72-73).

19. Predicated upon the remark of Ms. DiBattista's attorney, the District Solicitors likewise anticipated that Ms. DiBattista was finally going to explain how her eye was bruised on June 4, 2004. Specifically, the District Solicitors anticipated that Ms. DiBattista would disclose that Mr. Collins injured her eye. (Tr. II at 44; Tr. III at 51, 63-64, 88, 116).

20. During the March 4 meeting, Ms. DiBattista expressed willingness to testify that she had been assaulted by Mr. Collins. (Tr. V at 70-73).

21. During the March 4 meeting, Ms. DiBattista also unexpectedly revealed that she engaged in sexual conduct with Mr. Collins in District classrooms when students were not present. (Tr. II at 44; Tr. III at 51, 65-66, 88, 117; Stip. No. 4).

22. The District Solicitors had not expected Ms. DiBattista's disclosure. (Tr. II at 60, 88; Tr. V at 95, 132).

23. Ms. DiBattista's attorney had not expected Ms. DiBattista's disclosure and was "shocked" to learn that she had engaged in sexual conduct on District property. (Tr. V at 73).

24. Prior to Ms. DiBattista's disclosure at the March 4 meeting, the District Solicitors had no knowledge that Ms. DiBattista had engaged in sexual conduct with Mr. Collins in District classrooms. (Tr. II at 48; Tr. III at 47, 88, 117-118).

25. Following Ms. DiBattista's disclosure, the District Solicitors did not ask any follow-up questions related to the specifics of Ms. DiBattista's sexual conduct on District property. (Tr. V at 76)

Alleged Immunity Agreement

26. Following Ms. DiBattista's unforeseen admission of engaging in sexual conduct on District property, Ms. DiBattista's attorney immediately inquired, "is this where I ask for immunity"? (Tr. V at 73, 141).

27. In response to Ms. DiBattista's attorney's question, the District Solicitors indicated that they were "not interested" in Ms. DiBattista as the March 8, 2005 "hearing was on Mr. Collins," and it "wasn't a proceeding that was going to involve filing charges against Ms. DiBattista." (Tr. II at 45-46; Tr. V at 74).

28. The reference to "immunity agreement" was a term used by Ms. DiBattista's attorney. (Tr. V at 149).

29. No assurances were given to Ms. DiBattista or her attorney by the District Solicitors suggesting that she would not be disciplined for any information that she shared with regard to her sexual conduct on District property. (Tr. II at 45).

30. Although Ms. DiBattista's attorney "felt he had a protected contract for Ms. DiBattista's job" and agreed to let her testify because he "believed" he had an immunity agreement with the District Solicitors, the District Solicitors did not make any corresponding representations concerning immunity in exchange for Ms. DiBattista's March 8 testimony in the Collins' mater. (Tr. III at 51, 90, 121-122; Tr. V at 78-80).

31. At no time during the March 4 meeting or prior to Ms. DiBattista's testimony on March 8, 2005 did either the District Solicitors or her attorney propose a written immunity agreement or confirm or mention in any correspondence thereafter the existence of an alleged immunity agreement. (Tr. II at 39-70; Tr. III at 43- 82, 83-144; Tr. V at 44-150).

32. Ms. DiBattista's attorney had experience working with immunity agreements. He "wrote three or four or five immunity agreements" and reviewed other immunity agreements while employed in various positions. (Tr. V at 54-55).

33. As of 2005, Ms. DiBattista's attorney had over thirty years of experience as a practicing attorney licensed to practice in Pennsylvania. (Tr. V at 45).

The Collins Hearing

34. Ms. DiBattista testified in the Collins matter on March 8, 2005. (Stip. No. 4a).

35. Mr. Collins' formal charges were never amended to include allegations of sexual conduct on District property. (Tr. II at 64; Tr. III at 119-120).

36. During the March 8, 2005 hearing, one District Solicitor intended to delve into the sexual conduct on District property. (Tr. V at 93).

37. Ms. DiBattista's attorney questioned the District Solicitor, asking: "But what about Angela"? The District Solicitor answered: "How many times have I got to tell you? I'm not interested in Angela." (Tr. V at 95, 132; Tr. VI at 17).

38. Ms. DiBattista testified in the Collins matter that she engaged in sexual conduct on District property. (Stip. No. 4a).[3]

39. During the Collins matter, Mr. Collins admitted that he had engaged in sexual conduct with Ms. DiBattista on District property. (Tr. III at 119).

Events Following the March 8, 2005 Hearing

40. One week after the Collins matter concluded, a District Solicitor and Ms. DiBattista's attorney met by chance at a restaurant, and the District Solicitor indicated that Ms. DiBattista could put the case behind her for the rest of her life. (Tr. V at 89).

41. Ms. DiBattista continued to teach in the District during the month of March 2005 through the beginning of January 2006. (Tr. III at 27).

42. In June of 2005, Ms. DiBattista received her annual teacher evaluation for the 2004-05 school year. (Stip. No. 18).

43. There are only two evaluation results possible on the annual teacher evaluation: satisfactory or unsatisfactory. (Stip. No. 20).

44. Ms. DiBattista's June 2005 teacher evaluation rated her service for the 2004-05 school year satisfactory. (Stip. No. 19).

45. Former District Superintendent Patrick A. Risha ("Superintendent Risha") who served in that capacity from January 2005 until 2007 approved and signed Ms. DiBattista's 2004-05 satisfactory evaluation. (Stip. No. 20).

[3] The stipulation errs in referencing the date of August 8, 2005. It is clear from the record that the hearing was held on March 8, 2005.

46. An Opinion and Award dated August 28, 2005 found insufficient evidence in the Collins's matter to support the charges that Mr. Collins sexually harassed, assaulted, stalked, and/or terrorized Ms. DiBattista. Mr. Collins was reinstated as an elementary school teacher. (Tr. III at 92-92; Tr. IV at 89).

Ms. DiBattista: Investigation into Sexual Conduct on District Property and Disciplinary Action

47. The District delayed taking any formal action against Ms. DiBattista until the Collins matter was resolved and a decision was issued. The District believed that the arbitrator's decision could impact a disciplinary case against Ms. DiBattista. (Tr. III at 126-127).

48. Subsequent to the Opinion and Award in the Collins matter, the District Solicitors contemplated whether there were grounds to file an appeal from the Collins arbitration decision. (Tr. III at 126-128).

49. The District also hired new counsel ("Independent Counsel") to investigate the issue of alleged sexual conduct on District property prior to deciding whether to take any formal action against Ms. DiBattista. Tr. III at 8-9, 126-127).

50. In December of 2005, Ms. DiBattista learned that the Pittsburgh Tribune Review, a local newspaper, had obtained a copy of the Opinion and Award issued in the Collins matter. (Tr. V at 95-96).

51. In December of 2005, Ms. DiBattista's attorney notified a District Solicitor that the Pittsburgh Tribune Review obtained the Opinion and Award issued in the Collins matter and intended to publish an article about sexual misconduct within the District. (Tr. V at 101-102).

52. On January 4, 2006, Ms. DiBattista was suspended from teaching in the District. (Exh. No. 3).[4]

53. By letter dated January 4, 2006, Ms. DiBattista was advised that she was being placed on administrative leave immediately due to allegations of immorality, willful neglect of duties and/or persistent and willful failure to comply with school laws under the Public School Code. (Exh. No. 3).

54. Ms. DiBattista suffered mental distress which caused her to seek medical attention in late December of 2005 and early January of 2006. (Tr. V at 118-119).

55. On or around January 6, 2006 the Pittsburgh Tribune Review published the article on sexual misconduct within the District. (Tr. V at 120).

56. On January 12, 2006, Ms. DiBattista was notified that the District scheduled an investigatory interview meeting for January 19, 2006 to discuss allegations of sexual conduct on District property. (Stip. No. 5; Exh. No. 4).

57. On January 19, 2006, Ms. DiBattista was questioned by Independent Counsel, a District Solicitor and Superintendent Risha. (Exh. No 5).

58. Ms. DiBattista was represented by counsel at the January 19, 2006 investigatory interview meeting. (Tr. V at 122-124).

59. Before the questioning began, Ms. DiBattista read a prepared statement in which she asserted immunity. (Exh. No. 5; Tr. V at 124).

60. The prepared statement "focused on her belief that she had an immunity agreement," and inquired into the status of the immunity agreement. (Tr. V at 124-125).

[4] "Exh." refers to exhibits admitted into evidence before the Board.

61. Superintendent Risha was unaware of any immunity issue prior to the investigatory interview on January 19, 2006. (Tr. III at 21-22).

62. Independent Counsel verbally communicated to Ms. DiBattista his understanding that the District did not agree with her assertion of immunity. (Exh. No. 5).

63. Independent Counsel advised Ms. DiBattista that an immunity agreement was an affirmative defense which could only be raised if she were charged with sexual misconduct. (Tr. III at 139-141).

64. There was no ruling on the immunity agreement at the January 19, 2006 investigatory interview meeting. (Tr. V at 126.)

65. Independent Counsel cautioned Ms. DiBattista that if she did not cooperate and answer the questions posed to her, he would advise Superintendent Risha to take disciplinary action against Ms. DiBattista for lack of cooperation. (Exh. No. 5).

66. The District Solicitor remained in the room throughout the questioning of Ms. DiBattista. (Exh. No. 5).

67. During the investigatory interview, Ms. DiBattista admitted to engaging in sexual conduct on several occasions on District property. (Stip. No. 6).

68. After a second investigatory meeting on February 14, 2006, Superintendent Risha gave Ms. DiBattista until April 3, 2006 to consider her options, which were to resign or to face dismissal charges, while knowing a dismissal recommendation would likely be forthcoming. (Tr. V at 39-40; Exh. No. 8).

69. As part of a resignation agreement, Ms. DiBattista was offered paid leave through November 30, 2008; but she turned it down. (Tr. V at 39).

70. On April 3, 2006, Ms. DiBattista attended a meeting with a teachers' union UniServe Representative. (Stip. No. 7).

71. At the April 3, 2006 meeting, Ms. DiBattista was advised that she would be disciplined for engaging in sexual conduct on District property and that a recommendation for dismissal would be made. She was further advised that she would be suspended without pay. (Stip. Nos. 8 and 10; Exh. No. 9).

72. On April 11, 2006, a letter was forwarded to Ms. DiBattista confirming her suspension without pay. (Stip. No. 11; Exh. No. 9).

73. On April 24, 2006, after the District concluded its investigation, a Notice of Hearing and Statement of Charges was issued to Ms. DiBattista. (Stip. No. 12).

74. Pursuant to Section 1122 of the Public School Code, Ms. DiBattista was charged with persistent negligence and/or immorality arising from her alleged sexual conduct on District property prior to the conclusion of the 2003-2004 school year. (Exh. No. 10).

Mr. Collins: Investigation into Sexual Conduct on District Property and Disciplinary Action

75. Mr. Collins was also investigated for allegedly engaging in sexual conduct on District property. (Tr. IV at 109).

76. Like Ms. DiBattista, Mr. Collins was advised that he had two options: to resign or to face dismissal charges. (Tr. V at 39-40; Tr. IV at 112).

77. Mr. Collins agreed to a settlement wherein or whereby he would be allowed to use his sick time and get his health insurance paid. (Tr. IV at 110).

78. Mr. Collins was permitted to retire after thirty-one years of service by using his sick days until the date of his birthday, making him eligible for early retirement. In addition, he was paid more than the normal rate for sick day compensation. (Tr. IV at 109-110).

79. Mr. Collins was given full health insurance benefits paid for by the District. (Tr. IV at 109-110).

80. When Mr. Collins retired, he did not get his full pension from the Commonwealth due to an early retirement penalty; and he did not get any retirement incentive from the District. (Tr. IV at 109-110, 112-113).

81. Because he agreed to the settlement, dismissal charges were not filed against Mr. Collins. (Tr. IV at 109-110).

Ms. DiBattista's Public Hearing

82. By letter dated May 5, 2006, Ms. DiBattista elected a hearing before the Board on the charges against her. (Stip. No. 14; Exh. Nos. 11, 39).

83. On July 26, 2006, a pre-hearing conference was held during which it was decided that hearings would proceed on August 1 and 2, 2006. (Exh. No. 19).

84. From August 1, 2006 until April 15, 2010, the District and the Board, through its Hearing Officer, scheduled or attempted to schedule several hearings; but no hearings were conducted until May 11, 2010 due to issues related to Ms. DiBattista's health and the unavailability of witnesses, attorneys and/or a hearing officer. (Exh. Nos. 22-48).

85. On May 11, 2010, the first of six hearings was held. The remaining five hearings were conducted on May 24, May 25, June 1, June 21, and July 6, 2010. (Tr. I at 4; Tr. III; Tr. IV; Tr. V; Tr. VI).

86. The District called Ms. DiBattista as its first witness on May 24, 2010 as on cross; but Ms. DiBattista invoked her right against self-incrimination and did not answer any substantive questions posed by the District. (Tr. II at 25-38).

87. Ms. DiBattista did answer that she reviewed and agreed with the stipulations. (Tr. II at 25).

88. The four individuals present when Ms. DiBattista was prepared to testify in the Collins matter (the three District Solicitors and Ms. DiBattista's then counsel) testified at Ms. DiBattista's dismissal hearing.

89. District Superintendent Michael Brinkos ("Superintendent Brinkos"), who was employed as an administrator with the District in various positions[5] for twelve years who began serving as District Superintendent in 2009, then testified. (Tr. IV at 114-115).

90. Superintendent Brinkos was questioned about immunity agreements with other educators and was asked whether, as Superintendent, he would expect to be privy to information about immunity agreements, to which Superintendent Brinkos replied: "I cannot think of any instance where I have sat in any of my positions in this district that I've ever heard an attorney representing the district offered immunity to anybody. So, I cannot answer that question." (Tr. IV at 128).

91. Superintendent Brinkos was questioned regarding whether he had been made aware of, or knew in fact, that such an "immunity" agreement had been made. He testified: "I would believe that if an attorney would offer immunity, I would want to know. However, I've never heard of that before." (Tr. IV at 128).

92. Former District Superintendent Risha testified that Ms. DiBattista's actions of engaging in sexual conduct with a fellow teacher on several occasions in District school

[5] Dr. Brinkos has twenty-two years of experience in education; and before becoming the District Superintendent he served as a special education teacher, supervisor of special education, director of special education, director of personnel and assistant superintendent.

buildings not only offended the morals of the community but also set a bad example to youth, whose ideals educators are supposed to foster and elevate. (Tr. III at 15-16).

93. The Board determined, among other things, that:

a. Ms. DiBattista engaged in sexual conduct in the classroom and that such behavior clearly offends the morals of the community. (Tr. V at 37-38; Tr. III at 15-16)

b. No immunity agreement, oral or written, was offered or accepted with respect to Ms. DiBattista's testimony in the Collins matter; and

c. The District sustained its burden that Ms. DiBattista should be dismissed from her employment with the District. (Adj. F.F. Nos. 13-15, 21).[6]

94. The Board issued an Order on February 23, 2011 dismissing Ms. DiBattista. (Order, February 23, 2011, Local Agency Hearing Adjudication).

95. Ms. DiBattista filed a Petition of Appeal with the Secretary of Education (Petition of Appeal, March 28, 2011).

Discussion

In her appeal to the Secretary of Education, Ms. DiBattista raised five issues:

(1) Whether there was an immunity agreement between the District and Ms. DiBattista which was conditioned upon Ms. DiBattista's testimony in the Collins matter;

(2) Whether Ms. DiBattista received a fair, impartial and objective hearing before the Board;

[6] "Adj. F.F." refers to the findings of fact set forth in the February 23, 2011 Local Agency Hearing Adjudication.

(3) Whether Ms. DiBattista was treated arbitrarily and capriciously in comparison to Mr. Collins, which thereby resulted in disparate treatment;

(4) Whether the defense of laches is applicable; and

(5) Whether the statute of limitations was violated by the District.

I. Standard of Review

Under Section 1131 of the Public School Code, the Secretary has the authority to review a teacher tenure appeal *de novo*. *Belasco v. Bd. of Pub. Educ.*, (Pa. 1986) 510 A.2d 337, 343. In such proceedings, the Secretary is the neutral fact-finder and may "conduct *de novo* review whether he takes additional testimony or merely reviews the official record of the proceedings before the board." *Id.* at 343. The Secretary has the authority to determine the credibility of the witnesses, the weight of the evidence, and the inferences to be drawn therefrom. *Id.* at 342; *Forest Area Sch. Dist. v. Shoup*, (Pa. Cmwlth. 1993) 621 A.2d 1121, 1124.

II. Immunity Agreement

A critical issue in the current controversy is whether the District offered, and Ms. DiBattista accepted, an immunity agreement or protective job agreement in exchange for her testimony in the 2005 Collins matter. The origins of the purported immunity agreement originate from the March 4 meeting wherein Ms. DiBattista and her attorney met with the District Solicitors in preparation for the hearing in the Collins matter.

The parties to this matter are wholly at odds on the issue of immunity. Ms. DiBattista unequivocally asserts that she has an immunity agreement or job protective agreement that insulates her from any dismissal charges brought forward by the District. The District disagrees with Ms. DiBattista's characterization of the conversation between the parties during the March 4 meeting and disputes the existence of an immunity or job protective agreement.

a. Written Agreement

It is undisputed that there is no written immunity agreement between the District and Ms. DiBattista. Although it may not be legally required, the prudent course of action would have been to reduce the agreement to writing. The inquiry, however, does not end here because Ms. DiBattista asserts that there is an oral agreement for immunity with the District.

b. Oral Agreement

An oral agreement greatly increases the potential for disputes related to both the existence and the terms of an agreement. Although an oral agreement may or may not be enforceable, the initial question is whether both parties intended to be legally bound. Where, as here, a party seeks to enforce a disputed oral agreement, it is incumbent upon that party to establish the essential terms and conditions that constitute an enforceable agreement. *Mazzella v. Koken*, (Pa. 1999) 739 A.2d 531. As with any contract, "the minds of the parties should meet upon all the terms, as well as the subject-matter, of the [agreement]." *Mazzella,* 559 Pa. at 224, 739 A.2d at 536. Unlike a disputed written agreement, in matters involving contracts composed of oral communications, it is imperative to look to surrounding circumstances and the course of dealings between the parties in order to ascertain their intent. *Westinghouse Elec. Co. v. Murphy, Inc.,* (Pa. 1967) 228 A.2d 656, 659. If there are "ambiguities and undetermined matters" which render the agreement impossible to understand and enforce, it must be set aside. *Mazella,* 739 A.2d at 537.

i. Existence of an Immunity Agreement

Ms. DiBattista asserts an immunity agreement exists between the parties and points to several reasons consisting, at best, of piecemeal support.

First, Ms. DiBattista argues an immunity agreement existed between herself and the District because she would not have testified in the Collins matter absent an agreement protecting her employment.

The record reveals that Ms. DiBattista disclosed her sexual conduct at the March 4 meeting to the surprise of the District Solicitors and Ms. DiBattista's attorney, and there is no evidence nor any suggestion that an immunity agreement of any type preceded her disclosure. To the contrary, Ms. DiBattista's attorney only inquired about the appropriateness of seeking immunity for Ms. DiBattista in the Collins matter *after* Ms. DiBattista's unforeseen admission of engaging in sexual conduct on District property. The brief dialogue between Ms. DiBattista's attorney and the District Solicitors never materialized into an enforceable oral agreement.

The record reveals that Ms. DiBattista's attorney did not directly ask the District Solicitors to grant Ms. DiBattista immunity, nor conversely, did the District Solicitors by their own volition offer to grant immunity to Ms. DiBattista in exchange for her testimony in the Collins matter. Looking at the exchange between the parties, the District Solicitors responded to Ms. DiBattista's attorney by indicating that their focus was on Mr. Collins and not Ms. DiBattista. The record supports a conclusion that Ms. DiBattista's attorney *felt* he had protected Ms. DiBattista's job since the District expressed a pointed interest in pursuing Mr. Collins. Although Ms. DiBattista's attorney did not object to Ms. DiBattista testifying because he *believed* there was an immunity agreement with the District Solicitors, there was never a meeting of the minds between the parties; and it cannot be said that both parties intended to be legally bound. Moreover, the record does not support a conclusion that Ms. DiBattista had a binding immunity agreement.

Second, Ms. DiBattista argues an immunity agreement existed between herself and the District because a District Solicitor considered "deputizing" her attorney and another attorney as Assistant Solicitors during proceedings related to the Collins matter in order to allow them to attend the proceedings. Ms. DiBattista's allegation that a District Solicitor considered "deputizing" her attorney as an Assistant Solicitor in the Collins matter is unsubstantiated. More significantly, however, it is a tenuous argument to suggest that a District Solicitor's alleged consideration of "deputizing" or otherwise allowing Ms. DiBattista's attorney to attend the hearing in the Collins matter is somehow reflective of the existence of an immunity agreement. Ms. DiBattista advances no distinct argument to intelligibly advance this position.

Third, Ms. DiBattista asserts that she has immunity because a District Solicitor intended to question her about the sexual conduct during the hearing in the Collins matter to bolster the District's case; and as such, the District Solicitor sought to have Ms. DiBattista provide testimony related to that sexual conduct. On this point, Ms. DiBattista highlights that her attorney questioned the District Solicitor about having her testify to which question the District Solicitor responded that he had no interest in Ms. DiBattista. Ms. DiBattista's position is that the District Solicitor's remark expressing disinterest in her conduct evidences the existence of an immunity agreement because it implied an understanding that the District was not interested in pursuing disciplinary action against her. The exchange between Ms. DiBattista's attorney and the District Solicitor, however, can reasonably be interpreted as nothing more than confirmation of the focus of the imminent proceedings in the Collins matter. That on March 8, 2005, the District Solicitor implied that he was "not interested" in Ms. DiBattista since the proceeding was against Mr. Collins, should not be construed as an assurance that the District would not then, or at any point in the future, be "interested" in otherwise investigating and/or pursuing dismissal

charges against Ms. DiBattista for sexual misconduct on District property. Further, nothing about that exchange fully illuminates the essential terms and conditions and/or the meeting of the minds necessary to create an enforceable oral agreement.

Fourth, Ms. DiBattista asserts that she obtained immunity because subsequent to the Collins matter a District Solicitor told her attorney that she could put the case behind her for the rest of her life. This conversation between Ms. DiBattista's attorney and a District Solicitor, however, took place by happenstance at a restaurant one week after the hearing in the Collins matter had concluded. Given the context and circumstances of the accidental meeting, the District Solicitor's remark that Ms. DiBattista could put the case behind her is more consistent with a personal observation and cannot reasonably be construed as representative of the District's official position. Further, the comment made by the District Solicitor is too ambiguous to possess the significance attributed to it by Ms. DiBattista. With the recent conclusion of the Collins matter, it could be said that Ms. DiBattista could put the Collins matter behind her as she had already testified in that case. Again, although a convenient inference, it is overreaching to conclude that one District Solicitor's statement during a casual social encounter a referred to anything more than the Collins matter. The District Solicitor's loose remark lacks the resounding significance needed to be considered an assurance of the existence of an immunity agreement.

Fifth, Ms. DiBattista asserts that her June 2005 satisfactory evaluation, despite the District's knowledge of her sexual conduct on District property, evidences that the District was acting in accordance with an alleged immunity agreement. However, the award of a satisfactory evaluation for the 2004-05 school year in June 2005 is not persuasive in the outcome of this matter because the District's dismissal action is not predicated upon Ms. DiBattista's

competency during the 2004-05 school year. Further, it is reasonable to conclude that a district would be reluctant to base an unsatisfactory rating on such conduct where, as here, the district had not yet conducted an investigation. For these reasons, the awarding of a satisfactory evaluation for the 2004-2005 school year does not support the existence of an immunity agreement. Moreover, the mere fact that Ms. DiBattista received a satisfactory annual evaluation does not preclude the District from pursuing a dismissal action on grounds other than incompetency.

Sixth, Ms. DiBattista argues that her continued employment with the District, given the District's knowledge of her sexual conduct on District property, evidences the existence of a job protection agreement. Ms. DiBattista emphasizes that despite her disclosure at the March 4 meeting, she continued to teach in the District through the beginning of January 2006 when she was suspended. Ms. DiBattista's continued employment with the District, however, is not necessarily supportive of the existence of an immunity agreement especially in light of the District's explanation of the time lapse between learning of Ms. DiBattista's sexual conduct on District property in March 2005 and her suspension in early January 2006. Ms. DiBattista's continued employment with the District is explained by the steps undertaken by the District with regard to resolution of the Collins matter and the investigation related to Ms. DiBattista's conduct and cannot reasonably be construed as a blanket endorsement of the existence of an immunity agreement.

As explained by the District, it was necessary to delay any formal action against Ms. DiBattista until the Collins matter was resolved and a decision was issued, because the decision in the Collins matter could have impacted the District's case against Ms. DiBattista. After the decision in favor of Mr. Collins at the end of August 2005, the District Solicitors needed time to

determine whether there were grounds to appeal the Collins' decision. The District also explained that it was necessary to investigate fully Ms. DiBattista's conduct prior to taking any formal action against her.

Finally, Ms. DiBattista asserts that an immunity agreement existed because Independent Counsel referenced an alleged immunity agreement during the January 19, 2006 investigatory interview. The exchange between Independent Counsel and Ms. DiBattista, however, is not tantamount to an acknowledgement that an immunity agreement existed.

Ms. DiBattista read the prepared statement asserting her belief that she had immunity and inquired into the status of the immunity agreement. In response, Independent Counsel explained that an immunity agreement may only be raised as a defense if charges are brought, and that Ms. DiBattista's claim that there was an immunity agreement would not prevent the investigatory interview. In fact, Independent Counsel clearly stated that the District disagreed with Ms. DiBattista's statement that she had been granted immunity. On this point, former District Superintendent Risha testified that he was unaware of Ms. DiBattista's belief that there was an immunity agreement until the investigatory interview meeting on January 19, 2006. Simply, there was no ruling on the immunity agreement at the January 19, 2006 investigatory interview meeting. Based upon the record, Independent Counsel's remarks cannot reasonably be construed as an acknowledgement that an immunity agreement existed between Ms. DiBattista and the District.

For the foregoing reasons alone, it is reasonable to conclude that an oral agreement between the District and Ms. DiBattista did not exist. This conclusion is further supported by the lack of any writing mentioning an alleged immunity agreement.

ii. Lack of any Writing Related to an Immunity Agreement

Curiously, absent from the record is any evidence of measures taken to memorialize, reference or otherwise suggest that the parties entered into an oral agreement during the March 4 meeting. Moreover, there is no evidence that either party confirmed or otherwise referenced or suggested in any written correspondence the existence, or potential existence, of an oral agreement for immunity.

The record does not reflect any tangential written documentation between the parties referencing that Ms. DiBattista had requested immunity at the March 4 meeting (or any other meeting) with the District Solicitors or that the District ever offered immunity to her. For example, if the District extended immunity to Ms. DiBattista in exchange for her testimony in the Collins matter, as Ms. DiBattista asserts, one would expect that such action would have been communicated to the District Superintendent. To the contrary, Superintendent Risha had no knowledge of an alleged immunity agreement or Ms. DiBattista's assertion that she had immunity or job protection until the investigatory interview in January 2006. If Ms. DiBattista was afforded job security or immunity, as alleged, it is reasonable to expect that the District Superintendent would have been made aware of such circumstances.

Given these facts, it is entirely plausible to infer that an oral agreement for immunity between the District and Ms. DiBattista did not exist.

iii. Formation of an Immunity Agreement: Terms

Whether written or oral, for an agreement to exist it must be determined what the parties reasonably understand to be the essential terms of the purported agreement. When attempting to identify the terms of Ms. DiBattista's purported oral immunity agreement, it becomes patently clear that there is no enforceable agreement because the terms simply cannot be identified.

Ms. DiBattista fervently argues that it is inconceivable that she would have testified in the Collins matter with regard to engaging in sexual conduct on District property unless she believed her employment with the District to be protected through an immunity or job protection agreement. To be clear, Ms. DiBattista may have held the belief that there was a job protection agreement involved in her testimony in the Collins matter, as a *quid pro quo*. However, an agreement exists only when there is a meeting of the minds between the parties. A review of the totality of the circumstances and evidence on the record belies a conclusion that there was such a meeting of the minds.

Ms. DiBattista seems to assert that the terms of the alleged agreement for immunity imposed on her an obligation to testify in the Collins matter about engaging in sexual conduct on District property. However, the Collins matter did not involve allegations relating to sexual conduct on District property. Rather, the allegations involved the June 2004 injury to Ms. DiBattista's eye. It was Ms. DiBattista's testimony that Mr. Collins' assaulted her that was critically important to the District in proving the charges against Mr. Collins.

Even after Ms. DiBattista's disclosure, the District Solicitors did not amend the charges against Mr. Collins' to include allegations of sexual conduct on District property. Therefore, Ms. DiBattista's disclosure of sexual conduct on District property was never the focus of the Collins matter. It is, therefore, unreasonable to conclude that the District Solicitors extended an immunity or job protection agreement to Ms. DiBattista in exchange for her disclosure and/or testimony related to engaging in sexual conduct on District property.

Moreover, the District could not have readily developed this line of testimony in the hearing related to the Collins matter because the District did not seek detailed information from Ms. DiBattista during the March 4 meeting. Having no further details relating to the dates, times

and specific places at which the sexual conduct occurred, the District Solicitors were simply without information to determine the extent of testimony that Ms. DiBattista could offer. It is unlikely that the District Solicitors extended an immunity or job protection agreement to Ms. DiBattista in exchange for testimony not necessary to prove the charges pending against Mr. Collins.

Without information sufficient to determine the extent of the testimony Ms. DiBattista agreed to offer at the March 8, 2005 hearing in the Collins matter, any bargain associated with the testimony is unclear. It is also not possible to ascertain the bargained-for exchange or further assure that there was a meeting of the minds between the District and Ms. DiBattista. *Mazzella*, 739 A.2d at 536. Consequently, it is not possible to identify the specific bargained-for terms contained in the alleged immunity agreement.

III. Fair, Impartial and Objective Hearing before the Board

Ms. DiBattista also contends that she did not receive a fair, impartial and objective hearing before the Board when the main witnesses against her were the District Solicitors hired by the Board. Ms. DiBattista puts forward two primary arguments on this point.

First, Ms. DiBattista asserts that a District Solicitor was allowed to sit in on her January 19, 2006 investigatory interview when he should have been excluded. Specifically, Ms. DiBattista contends that the District Solicitor had an opportunity to hear her statements and preview her defense of immunity prior to testifying at her hearing. As already discussed, prior to the January 19, 2006 investigatory interview, the District was unaware that Ms. DiBattista intended to share a statement asserting the existence of an immunity agreement. Consequently, there was no reason to believe that the District Solicitor would be called to testify about the existence of an alleged immunity agreement. Because there was no forewarning from Ms.

DiBattista prior to the investigatory interview that immunity would be raised, there is no evidence that the District Solicitor was present for purposes of preparing his own testimony. Moreover, while there was a discussion among Independent Counsel and Ms. DiBattista regarding the appropriate time to raise an immunity defense, the discussion did not yield any information concerning the formation of the alleged immunity agreement. Further, Ms. DiBattista was represented by counsel during the investigatory interview and raised no objection to the District Solicitor's presence in the room. For all of these reasons, Ms. DiBattista's first argument is rejected.

Second, Ms. DiBattista asserts that the investigation did not yield relevant new information since the District already had knowledge of her sexual conduct on District property; instead, the investigation resulted in a delay. Ms. DiBattista's suggestion that there was no reason for an investigation, however, is not supported by the record. At the March 4 meeting the District Solicitors did not seek further information relating to Ms. DiBattista's disclosure of sexual conduct on District property. Consequently, absent further investigation, the District was without details related to the dates, times and specific places at which the sexual conduct occurred. During the January 2006 investigatory meeting, the District was able to elicit information from Ms. DiBattista. Mr. Collins was also subjected to an investigatory interview during the January 2006 meeting relating to sexual conduct on District property, and his information either corroborated or refuted Ms. DiBattista's statements. For these reasons, it cannot be concluded that the investigation was conducted for the pretextual purpose of causing delay as asserted by Ms. DiBattista. Even if the investigation failed to produce additional details, the initiation of the investigation was a pragmatic decision by the District intended to uncover additional details relevant to determine their course of action.

Ms. DiBattista also asserts that the District's Statement of Charges was defective. Although the parties stipulated that the Statement of Charges did not include the date or dates of the sexual conduct on school property, the District's only obligation was to provide sufficient information in the Statement of Charges to permit Ms. DiBattista to form a defense. *Lucciola v. Sec'y of Educ*, (Pa. Cmwlth. 1976) 360 A.2d 310. The Statement of Charges informed Ms. DiBattista that she was being charged with persistent negligence and/or immorality arising from her sexual conduct in school buildings within the District prior to the conclusion of the 2003-04 school year. The need to identify a particular date or dates was not necessary to afford Ms. DiBattista an opportunity to prepare a defense in response to the allegations.

Ultimately, Ms. DiBattista was provided notice of being placed on paid administrative leave during the District's investigation and of the upcoming investigatory interviews at which she was represented by counsel. Further, she was informed that there was a basis for dismissal charges. She was given time to consider whether she wanted to resign or face the charges; and after deciding to face the charges, she was notified that her suspension with pay was converted to a suspension without pay. Finally, she received the Statement of Charges.

In light of the foregoing, Ms. DiBattista received a fair and impartial hearing before the Board.

IV. Disparate Treatment

Ms. DiBattista argues that she was treated arbitrarily and capriciously as compared to Mr. Collins. In support of her argument, Ms. DiBattista asserts that Mr. Collins was never charged with immorality; and he was permitted to become eligible for early retirement by using his sick days until the date of his birthday and was paid more than the normal rate for sick day compensation.

It is incumbent upon a complainant proffering a disparate treatment argument to compare his or her treatment with others similarly situated. *Commonwealth Dep't of Health v. Nwogwugwu,* (Pa. Cmwlth. 1991) 594 A.2d 847, 851. Here, Ms. DiBattista asserts that, unlike Mr. Collins, she was charged with immorality and was unable to retire with the same monetary incentive and advantage as Mr. Collins. Ms. DiBattista's argument is without merit.

Fundamentally, both Ms. DiBattista and Mr. Collins engaged in the same conduct and were given the same opportunity to resign or to face dismissal charges. It is true that unlike Ms. DiBattista, Mr. Collins was not charged with immorality. Mr. Collins was not charged with immorality, however, because he agreed to a settlement with the District before he was charged. Ms. DiBattista was offered that same option: resign or face dismissal charges. The amounts of money offered to Mr. Collins and Ms. DiBattista was dependent upon their respective salary scales and years of services. The fact that Mr. Collins had enough years of service, as compared to Ms. DiBattista's years of service, for him to be eligible for early retirement does not support Ms. DiBattista's contention that they were not treated equally under the circumstances.

V. Defense of Laches

Laches is an equitable doctrine that bars relief when a complaining party is guilty of want of due diligence in failing to promptly institute an action to the prejudice of another. *Stilp v. Hafer*, (Pa. 1998) 718 A.2d 290. To prevail on a defense of laches, a party must show: (1) inexcusable delay in instituting suit; and (2) prejudice resulting to the opposing party's position or rights as a result of that delay. *Weinberg v. Commonwealth*, (Pa. 1985) 501 A.2d 239, 242. For purposes of laches, whether the complaining party acted with due diligence depends upon what he or she might have known by using information within his or her reach. Prejudice may be found where some change in the condition or relation between the parties occurs during the

period of delay. "The prejudice required is established where, for example, witnesses die or become unavailable, records are lost or destroyed, and changes in position occur due to the anticipation that a party will not pursue a particular claim." *Id.*

The defense of laches is an affirmative defense; therefore the burden of proving laches is on Ms. DiBattista. *Weinberg*, 501 A.2d at 242. Additionally, Ms. DiBattista's burden is heavier because there is a historical reluctance of the courts to apply estoppel to the government as "Courts will require a stronger showing when estoppels is asserted against a governmental entity than when it is asserted against an individual." *In re Estate of Leitham*, (Pa. Cmwlth. 1999) 726 A.2d 1116, 1119. A decision as to the applicability of the laches defense may only be made by a thorough examination of the facts and circumstances and an *ad hoc* balancing of conflicting interests in each case. *Id.*

Here, Ms. DiBattista argues that the defense of laches is applicable because the District was put on notice of her alleged immoral conduct in March 2005, she was permitted to continue teaching until her January 4, 2006 suspension, she was not charged until April 24, 2006, and she was not terminated until February 23, 2010. She alleges that the delay between the March 4 meeting and her February 2010 dismissal was inexcusable and that it prejudiced her in three respects: (1) she was subjected to public humiliation after the Pittsburgh Tribune Review published its article on teacher misconduct in the District; (2) numerous witnesses could not answer questions posed to them at the hearing because they could not recall information; and (3) Ms. DiBattista was suspended from her teaching position without pay on April 11, 2006 which caused extreme financial hardship and deprivation of job satisfaction. Assuming *arguendo* that delay prejudiced Ms. DiBattista, she failed to first establish that the delay was inexcusable.

Although Ms. DiBattista contends that the District did not produce any plausible reason for waiting approximately thirteen months before charging her and approximately four years before holding the first substantive hearing, the record suggests otherwise. The District provided two reasons justifying the delay and explaining the lapse in time between the March 4, 2005 meeting and issuing charges against Ms. DiBattista in April 2006.

First, the District believed it necessary to delay any formal action against Ms. DiBattista until the Collins matter was resolved, an arbitration award was entered, and any appeals taken. As explained by the District, the arbitrator's credibility decision relating to Ms. DiBattista's testimony could have impacted the District's case against Ms. DiBattista. The Opinion and Award in the Collins matter was not issued until the end of August 2005. Subsequent to the Opinion and Award in the Collins matter, the District Solicitors needed time to contemplate whether or not there were grounds to appeal from the Collins' arbitration decision.

Second, the District believed it necessary to fully investigate Ms. DiBattista's disclosure of sexual conduct on District property prior to taking any formal action against her. Because the District Solicitors did not inquire into Ms. DiBattista's disclosure of sexual conduct on District property during the March 4 meeting in preparation for the Collins matter, the District lacked details related to the sexual conduct. During deliberations related to the appeal of the Collins matter, the District hired Independent Counsel to investigate the statements made by Mr. Collins and Ms. DiBattista. Again, the initiation of such an investigation was a pragmatic decision by the District intended to uncover relevant details in order to determine whether they had sufficient evidence to charge Ms. DiBattista. Following the conclusion of the investigation, Ms. DiBattista was charged on April 24, 2006.

For these reasons, it cannot be said that the delay in charging Ms. DiBattista was inexcusable because the passage of time was clearly attributable to reasonable procedural steps taken at the discretion of the District to acquire additional information and knowledge needed to pursue action against her.

Similarly, although Ms. DiBattista was charged on April 24, 2006 and the first substantive hearing was not held until May 11, 2010, the delay was not squarely caused by a lack of due diligence on the part of the District. From August 1, 2006 to April 15, 2010, the record reveals that several hearings were scheduled or were attempted to be scheduled. However, no hearings were conducted because of a number of issues related to the unavailability of witnesses, changes in hearing officers, the unavailability of hearing officers, and Ms. DiBattista's own health issues. Given the history of this matter, delay in scheduling the hearings cannot be wholly attributed to the fault of any particular party.

"The application of the equitable doctrine of laches does not depend upon the fact that definite time has elapsed since the cause of action accrued, but whether, under the circumstances of the particular case, the complaining party is guilty of want of due diligence in failing to institute his action to another's prejudice." *Weinberg,* 501 A.2d at 242. It is clear from the record that any degree of delay in the District's actions, in either bringing charges and/or scheduling the first substantive hearing, was neither unreasonable nor unjustified. Therefore, it cannot be said that there was a lack of due diligence in failing to promptly institute an action.

The District was diligent in pursuing the charges against Ms. DiBattista. Ms. DiBattista has not established the first element of the defense of laches and has failed to demonstrate that laches applies.[7]

VI. Statute of Limitations

Ms. DiBattista argues that the Statute of Limitations was violated by the District when it brought termination proceedings in April 2006 related to an alleged immoral act occurring prior to April 2000. Ms. DiBattista points to 42 Pa.C.S.A. § 5501(a), which states that "[a]n action, proceeding or appeal must be commenced within the time specified in or pursuant to this chapter unless, in the case of a civil action or proceeding, a different time is provided by this title or another statute . . . ." Ms. DiBattista alleges that 42 Pa.C.S.A. § 5527(b),[8] which provides for a six year statute of limitations, is applicable to her case. On this basis, Ms. DiBattista avers that any alleged sexual misconduct which occurred prior to April 1, 2000 is time-barred and may not be considered by the Board. The statute of limitations cited by Ms. DiBattista, however, is applicable to civil action but not to administrative dismissal proceedings before a school board.

Moreover, assuming *arguendo* that 42 Pa.C.S.A. § 5527(b) is applicable, then the Statute of Limitations would run from the point at which the District became aware of Ms. DiBattista's sexual conduct. Generally, the "time within which a matter must be commenced . . . shall be computed . . . from the time the cause of action accrued . . . ." 42 Pa.C.S.A. § 5502(a). Prior to

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[7] The Secretary need not address the second element of the defense of laches based upon the conclusion that Ms. DiBattista did not establish the first required element in a defense of laches. Even if the record supported Ms. DiBattista's position that the delay was inexcusable, the record does not support a finding that Ms. DiBattista relied on the delay to her detriment.

[8] 42 Pa.C.S. § 5527(b) provides for a limitation of time in civil actions and proceedings: "Any civil action or proceeding which is neither subject to another limitation specified in this subchapter nor excluded from the application of a period of limitation by section 5531 (relating to no limitation) must be commenced within six years."

her disclosure at the March 4 meeting, the District had no knowledge that Ms. DiBattista had engaged in sexual conduct on District property. Consequently, the six-year statute of limitations period would have only begun to run on March 4, 2005. On April 24, 2006, the District issued a Statement of Charges against Ms. DiBattista which was well within any six-year Statute of Limitations.

It is further noted that contrary to Ms. DiBattista's position that the alleged immoral act occurred prior to April 1, 2000, the record is devoid of evidence specifying when the sexual conduct occurred. The parties stipulated that the Statement of Charges did not allege the date or dates that the alleged sexual activity on school property occurred. Ms. DiBattista, however, did not provide testimony clarifying when the sexual conduct alleged in the Statement of Charges had occurred. As such, Ms. DiBattista's averment that the sexual conduct occurred prior to April 2000 is given no weight.

VII. Immorality

A tenured professional employee, such as Ms. DiBattista, may only be dismissed for the reasons set forth in Section 1122 of the Public School Code. *Foderaro v. Sch. Dist. of Philadelphia,* (Pa. Cmwlth. 1987) 531 A.2d 570, 571. Section 1122 of the Public School Code, *as amended,* 24 P.S. §11-1122, provides in pertinent part:

> [t]he only valid causes for termination of a contract heretofore or hereafter entered into with a professional employee shall be immorality; incompetency...; intemperance; cruelty; persistent negligence in the performance of duties; willful neglect of duties...persistent and willful violation of or failure to comply with school laws of this Commonwealth (including official directives and established policy of the board of directors); on the part of the professional employe....

The record indicates that the District pursued two grounds for dismissal under Section 1122 of the Public School Code. Pursuant to Section 1122 of the Public School Code, Ms.

DiBattista was charged with persistent negligence and/or immorality arising from alleged sexual misconduct in District classrooms. (Exh. No. 10). In order to uphold Ms. DiBattista's dismissal, only one of these charges must be established. *Horton v. Jefferson County-DuBois Area Vocational Technical Sch.*, (Pa. Cmlwth. 1993) 630 A.2d 481, 483.

Immorality is defined as "a course of conduct that offends the morals of a community and is a bad example to the youth whose ideals a professional educator is supposed to foster and elevate." *Horasko v. Sch. Dist. of Mount Pleasant Township,* (Pa. 1939) 6 A.2d 866, 868. The District bears the burden of proving that: (1) the conduct actually occurred; (2) such conduct offends the morals of the community; and (3) the conduct is a bad example to the youth whose ideals the educator is supposed to foster and elevate. *Palmer v. Wilson Area Sch. Dist.*, TTA No. 5-94.

Generally, the District is required to present evidence from which the Secretary can determine that Ms. DiBattista's conduct offended the morals of the community. *Id.* If there are insufficient facts from which the Secretary can determine or infer whether the conduct offends the morals of the community, no determination can be made on the issue of immorality. *Id.*

However, there are exceptions to this general rule. There is conduct that is so egregious that its immoral nature transcends geographic or community boundaries. *Id.* Even in the absence of evidence of community standards, courts have expressed a willingness to review legal precedent to determine whether similar conduct has been adjudicated to be immoral. "For example, courts have found that when a professional educator engages in sexual misconduct, it is never morally acceptable. Thus, even if no evidence of community standards is produced in a sexual misconduct case, both the Board and the Secretary can make a finding regarding

immorality." *See eg. Keating v. Riverside Bd. of Sch. Directors*, (Pa. Cmwlth. 1986) 513 A.2d 547.

Through the disclosures of Ms. DiBattista and Mr. Collins, it is undisputed that Ms. DiBattista engaged in sexual misconduct on District property. At the hearing, testimony from multiple witnesses testified that Ms. DiBattista's conduct offended the morals of the community and that her actions set a bad example for the youth of the community. For example, Former District Superintendent Risha testified that by engaging in sexual misconduct with a fellow teacher on several occasions in District school buildings, Ms. DiBattista's conduct not only offended the morals of the community but was also a bad example to youth whose ideals educators are supposed to foster and elevate.

On this basis, the Secretary now upholds the Board's finding that Ms. DiBattista's conduct offended the morals of the community and set a bad example to the youth whose ideals she was supposed to foster and elevate. Ms. DiBattista's conduct clearly constitutes sexual misconduct which is never morally acceptable. Thus, Ms. DiBattista's conduct constitutes immorality which was a proper basis for dismissing her from her employment with the District.[9]

VIII. Conclusion

The District has sustained its burden that Ms. DiBattista should be dismissed from her employment with the District on the grounds of immorality under Section 1122(a) of the Public School Code.

Accordingly, the follow Order is entered:

[9] The Board made no findings regarding the persistent negligence charge against Ms. DiBattista.

IN THE OFFICE OF THE SECRETARY OF EDUCATION
COMMONWEALTH OF PENNSYLVANIA

ANGELA DIBATTISTA,	:	
Appellant	:	
	:	
v.	:	**Teacher Tenure Appeal**
	:	**No. 02-11, 03-11**
	:	
MCKEESPORT AREA SCHOOL DISTRICT,	:	
	:	
Appellee	:	

ORDER

AND NOW, this 23rd day of July 2012, it is hereby ordered and decreed that Angela DiBattista's appeal is denied; and the decision of the McKeesport Area School District terminating her employment with the McKeesport Area School District on grounds of immorality under Section 1122(a) of the Public School Code is affirmed.

Ronald J. Tomalis
Secretary of Education

Date Mailed: July 23, 2012