

# LABOR AND LEGAL UPDATE

**DELAWARE VALLEY ASSOCIATIONS OF  
SCHOOL BUSINESS OFFICIALS**

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# AT THE NEGOTIATIONS TABLE: THE HEADLINES

- Unions are emboldened. This is their time to ask for the kitchen sink.
- What is Act 1 again, and why should I care if the index remains flat?
- Who cares if the PSERs rate will hit 34.29% in 2019-20?
- Unions in the middle of the pack want to be at or near the top. Unions on top want breathing space between them and their peers.

# AT THE NEGOTIATIONS TABLE: THE HEADLINES

- In part, thanks to Governor Wolf, and in part due to some neglect by both labor and management, starting salaries have been a big push of PSEA during negotiations this season; and not just nominal gains, they are looking to accelerate starting salaries well into the \$50,000 to near \$60,000 range.

# AT THE NEGOTIATIONS TABLE: THE HEADLINES

- Healthcare remains highly regionalized and influenced by trends within a county or consortium.
- It appears the remaining Bucks-Mont consortium participants are going to try and stay together for the time being.
- Bargaining contracts with participants in the consortium remain difficult as the parties have no flexibility to explore plan design changes that could result in cost savings.
- Elsewhere, Districts are making significant changes in plan designs.
- West Chester core health plan is a QHDP with premium contributions to rise to 9% by the end of the contract and a flat dollar contribution to the deductible of \$500.00

# AT THE NEGOTIATIONS TABLE: THE HEADLINES

- In Upper Darby, all new teachers will be required to participate in the District's 2500/5000 QHDP with no employer contributions to the deductible.
- For a District with attritional turnover near 10%, it will be interesting to see the impact of this change.

# AT THE NEGOTIATIONS TABLE: THE HEADLINES

- A potpourri of proposals being made by PSEA, especially with its professional groups:
  - 8 weeks childbearing leave, that, if not used in its entirety, can be converted into childrearing leave so employees can have all of their sick days available upon returning from leave.
  - Stipends, in the thousands of dollars, for special education teachers. The more needy the student and the more complicated the program, the higher the stipend.
  - Paid IEP release days for teachers.
  - Seeking more credit reimbursement in a given year. Trying to get back what was lost over the past decade.
  - Hazard pay or enhanced benefits for teachers and aides who work with autistic support, emotional support, and life skills students.

# AT THE NEGOTIATIONS TABLE: THE HEADLINES

- Aggressive expansion of other leave days
  - More flexibility with how sick days are used;
  - Broader bereavement days;
  - More personal days. I have seen requests for 6+ in a given year with rollover opportunities.

# AT THE NEGOTIATIONS TABLE: THE HEADLINES

- In many areas, the old guard negotiators for both sides have been replaced by new board members and new lead negotiators for the local unions.
- Thus, bargaining can be awkward at times, especially right now.
- While still early, the Bureau of Mediation has not been helpful in seeing the parties through their growing pains.

# AT THE NEGOTIATIONS TABLE: THE HEADLINES

- So what impact has the Janus decision had on negotiations and labor in general?
- For the first time in, well, forever, PSEA is singing for its supper.
- Feast or famine with the uniserv reps assigned.
  - Paul Gottlieb
  - Allison Bronson
  - Vicki Milliard
  - Bonnie Neiman
  - Greg Moll
  - Wendy Leary
  - Adam Weber

# WILL FACT FINDING BE THE ANSWER?

- Fact Finding became a VERY useful tool to end an impasse, especially over the past 7-10 years.
- I'm not convinced such a venue is as hospitable to management right now.
- Only one local contract has gone through Fact-Finding since 2017.

# BENSALEM TOWNSHIP SCHOOL DISTRICT

- “The parties to this dispute have a long collective bargaining relationship. The most recent collective bargaining agreement between the parties was a six (6) year agreement that expired June 30, 2017. The parties have been unable to reach a successor agreement, and in fact, have been working more than a year without one. The Association declared an impasse and requested fact finding on October 23, 2018.

# BENSALEM TOWNSHIP SCHOOL DISTRICT

- The Bensalem School District presented evidence to support its position of being fiscally responsible over the last 9 years...However, the District faces ongoing and increasing budget-draining pressures from mandated policies such as transition to Pennsylvania Core Academic Standards, Every Student Succeeds Act, Pa Future Ready Index, and insufficient resources from the Fair Funding Formula. This is exacerbated by a skyrocketing pension obligation (539% increase over last 9 years), and increased charter school and special education costs. In fact, an analysis of the thirteen (13) Bucks County School Districts FY17-18 charter school costs reveals Bensalem paid over \$16,000,000, with the next highest school at just under \$6,000,000 (Bristol Township).

# BENSALEM TOWNSHIP SCHOOL DISTRICT

- To combat these factors, the District has taken proactive steps to responsibly steward taxpayer investment through initiatives such as capital investment and refinancing existing debt service in 2015 and 2017; enactment of guaranteed energy-savings programs; membership in the Bucks Mont Heath Care Consortium; tuition recovery efforts; charter school billing alterations; scheduling efficiencies; favorable vendor relationships; deferral of bus purchases; changing Workers Compensation Insurance carriers; technological advancements that yield future savings; and finally, one-time use of fund (health care fund balance, Plan Con, medical access program reimbursement), and a one-time subsidy from Parx Casino a few years back.

# BENSALEM TOWNSHIP SCHOOL DISTRICT

- In spite of these measures, the District recently received from Moody's Investors Services a downgrade in their PA's Issuer and general obligation limited tax ratings and assigned a negative outlook. Bensalem School District has raised its tax millage rate 8 times from 2009-10 to current tax year, the average tax rate increase being 2% per increase, which is 0.3 percentage points below the ACT I Index rate for the period. While Real Estate taxes normally provide the District with the largest sources of revenue, due to limitations of the ACT I index, revenues foregone in prior years if taxes were not raised cannot be made up in future years by larger increases in the tax rate. In conclusion, if sufficient revenues cannot be increased via taxes and state subsidies, in order to meet Association salary demand, and increasing charter school costs, stringent cost cutting measures must be taken.

# BENSALEM TOWNSHIP SCHOOL DISTRICT

## DISTRICT POSITION:

Year one – 2017-18 – Hard Freeze

Year two – 2018-19 – No step; No Column; \$3,000 bonus each member

Year three – 2019-20 – No step; column movement for all eligible members below a master's degree; \$2,000 bonus each member

Year four – 2020-21 – No step; column movement for all eligible members below a master's degree; \$2,000 bonus each member

# BENSALEM TOWNSHIP SCHOOL DISTRICT

- Year five – 2021-22 – No step; no column; \$2,000 each member
  - Long term Substitutes prorated for anyone working full semester or more, paid at fiscal year end.
  - Reopener Clause – if charter school funding changes to reduce District obligation, willing to reopen wage negotiations;
  - Scale/Columns – at end of contract, reduce columns above master's level by two (2); limit column movement to maximum one (1) per year.

# BENSALEM TOWNSHIP SCHOOL DISTRICT

The Association presented salary evidence as represented through financial reports provided by the Pennsylvania Department of Education. The Association stated initially that the District is conservative in its budgeting practices, historically underestimating revenues, and overstating expenditures. In 2017-18, the District received \$2,642,532 in unbudgeted, unanticipated local revenue. In 2018-19, the District budgeted for an increase of 2.1% over the 2017-18 number. On the expenditure side, in 2017-18 there was a \$522,140 surplus, and in 2018-19 projections indicate a 3.1% increase will occur in expenditures over 2017-18.

# BENSALEM TOWNSHIP SCHOOL DISTRICT

The taxing efforts have been relatively high compared to other school districts in Bucks County, and the Commonwealth as a whole. More specifically, the District has raised \$23.75 million more than what it would have raised, had the tax levies been at the County average over the past 5 years. As the District maintains budgetary reserves of unallocated funds aside from its primary budget, the Association contends that the Bensalem Township School District's actual fund balance on June 30, 2018 was \$16,634,846.

# BENSALEM TOWNSHIP SCHOOL DISTRICT

Furthermore, the District has \$8,307,127 of unallocated funds in a budgetary reserve account for 2018-19. In spite of this information, the priority of bargaining unit salary accounts has declined over the past 6 years from 40.1% of total instruction expenditures in 2013-14 to 35.4% in 2018-19. The Association presented evidence in the form of charts and graphs depicting a pattern by the District of forecasting it will experience a deficit, but also predicting it will have a large surplus. It then utilizes monies in its reserve account to offset the deficit in the budget.

# BENSALEM TOWNSHIP SCHOOL DISTRICT

The Association presented further evidence and argument depicting the sacrifices the bargaining unit has made since 2011 in accepting pay freezes, delayed salary increases, accepting in good faith limited or no step increases or column movement, and minimal “cell” increases. It stated that if the District’s salary proposal is implemented, members will end the five (5) year proposed contract at the same salary with which they started. Additionally, they will have higher health costs resulting in a realized decrease in salary over the 2016-17 level. Furthermore, as the District proposal does not include service credit toward retirement, members stand to lose five (5) years of credited service for retirement/pension purposes.

# BENSALEM TOWNSHIP SCHOOL DISTRICT

The Association concluded its fiscal presentation by stating the District is in a good and stable financial position; that while Standard and Poor and Moody's recommend fund balance surplus between 5 and 10%, the District actually enjoys an 11-13% balance surplus; and finally, it questioned why the District did not raise taxes above the Act 1 index in prior years, as that would be an option through a special exception. All in all, it appeared the District had turned the corner financially and in order to maintain the quality level of instructors in the District, and to maintain the District's exceptional reputation as a desirable District, the Association's salary proposal can and should be met.

# BENSALEM TOWNSHIP SCHOOL DISTRICT

## ASSOCIATION POSITION:

Year one – 2017-18 Hard freeze

Year two – 2018-19 – Step and column movement; \$1,000 on scale added to each cell

Year three – 2019-20 – Step and column movement; \$1,000 on scale added to each cell

Year four – 2020-21 – Step and column movement; \$1,000 on scale added to each cell

Year five – 2021-22 – Step and column movement; \$1,000 on scale added to each cell

- Super maximum salaries eligibility extends to all bargaining unit members.

# BENSALEM TOWNSHIP SCHOOL DISTRICT

## FACT FINDER RECOMMENDATIONS

Year One – 2017-2018 – Hard freeze. No step or column movement; no bonus, no salary increase to cell value.

Year Two – 2018-2019 - \$3,000 one time lump sum bonus for bargaining unit members to be paid within 45 calendar days of the parties agreement to the report. No salary increase to cell value or no step movement. Additionally, no column movement is appropriate for year two of the agreement.

Year Three – 2019-2020 – No salary increase to cell value. One step movement for eligible unit members. Column movement for all eligible employees, limited to one(1) column maximum movement per year. Those moving step but not realizing salary increase, and those at the top of scale (not super max) will receive \$1,250 one time lump sum bonus, payable when compensation due for step movement.

# BENSALEM TOWNSHIP SCHOOL DISTRICT

Year Four – 2020-2021 – Increase of \$350.000 to the value of each cell on the scale. A one step movement should be granted to all eligible unit members. Column movement for all eligible employees, limited to one (1) column maximum movement per year.

Year Five – 2021-2022 – Increase of \$350.00 to the value of each cell on the scale. One step movement should be granted to all eligible unit members. Column movement for all eligible employees, limited to one (1) column maximum movement per year.

# BENSALEM TOWNSHIP SCHOOL DISTRICT

Recommending no change to number of columns and reject District proposal pertaining to such elimination. Recommending adoption of District proposal that column movement be limited to one (1) per year maximum.

Recommending adopt District proposal of a wage reopener if District charter school obligations decrease.

Recommending Association proposal to eliminate the two-tiered system for employees hired on or after 2012.

# OIL CITY AREA SCHOOL DISTRICT

The Oil City Area School District (District) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on November 27, 2018, from a Proposed Decision and Order (PDO) issued on November 7, 2018, in which the Hearing Examiner found that the District violated Section 1201(a)(1) and (5) of the Public Employee Relations Act (PERA), by transferring bargaining unit cafeteria work to Nutrition, Inc. The Oil City Education Support Professionals, PSEA/NEA (Union) filed a response to the exceptions on December 19, 2018.

# OIL CITY AREA SCHOOL DISTRICT

The bargaining unit members have performed cafeteria work at the District for the past 25 years. The cafeteria work consists of monitoring duties, such as watching the students, lining students up for their lunches, helping students open condiment packets and other food items, making sure the students are sitting down and being safe, and serving as a cashier. ***The unit shared some of the cafeteria work with the District's teachers, who are in a different bargaining unit, until the beginning of the 2017-2018 school year.***

At the start of the 2017-2018 school year, the District began using employees of Nutrition, Inc. to perform cafeteria work with the bargaining unit employees.

# OIL CITY AREA SCHOOL DISTRICT

Based on the parties' stipulations, the Hearing Examiner noted that the bargaining unit members have not performed the cafeteria work exclusively in the District, and that in the years prior to the 2017-2018 school year, the number of bargaining unit members performing the cafeteria work, and the proportion of the cafeteria work performed by the bargaining unit members, fluctuated from year to year. Although the Union only presented evidence regarding the 2016-2017 and 2017-2018 school year lunch room assignments, the Hearing Examiner stated that Union President Robin Echenoz testified that the hours spent by unit members performing the cafeteria work did not vary widely over the years.

# OIL CITY AREA SCHOOL DISTRICT

- Accordingly, the Hearing Examiner determined that the cafeteria work for the 2017-2018 school year amounted to a deviation from the past-practice for bargaining unit members, and concluded that the District violated Section 1201(a)(1) and (5) of PERA by unilaterally removing bargaining unit work and significantly altering the extent to which unit members and non-unit personnel perform the cafeteria work.

# OIL CITY AREA SCHOOL DISTRICT

The Hearing Examiner directed the District to *inter alia*, “rescind the contract with Nutrition, Inc. to the extent it involved the nonmanagerial cafeteria work at the District’s Middle School and three Elementary Schools, restore the status quo ante, and make whole any bargaining unit employes who have been adversely affected due to the District’s unfair practices...”

On exceptions, the District argues that ***the Union failed to establish a change in the extent to which bargaining unit employes performed the lunch room monitoring duties. The District asserts that the parties stipulated that the assignment of bargaining unit members or other persons to the lunch room occurred on an annual basis and fluctuated from year to year.***

# OIL CITY AREA SCHOOL DISTRICT

The District argues that the Union's evidence of a comparison of the lunch room monitoring duties between the 2016-2017 school year and the 2017-2018 school year was not sufficient to sustain the Union's burden of establishing a change in the extent to which bargaining unit members shared in the lunch room monitoring duties.

It is widely accepted that a public employer commits an unfair practice by transferring any amount of bargaining unit work to non-members of the bargaining unit without fulfilling its bargaining obligation with the employe representative. City of Harrisburg v. PLRB, 605 A.2d 440 (Pa. Cmwlth. 1992). To establish that there has been an unlawful removal of bargaining unit work, the employe representative has the burden of proving that the employer unilaterally transferred or assigned to non-bargaining unit members, work that was exclusively performed by bargaining unit employes. AFSCME, Council 13 v. PLRB, 616 A.2d 135 (Pa. Cmwlth. 1992); Lake Lehman Educational Support Personnel Association v. Lake Lehman School District, 37 PPER 56 (Final Order, 2006).

# OIL CITY AREA SCHOOL DISTRICT

The employe representative may sustain its burden of proof in one of two ways. The employe representative may show that the bargaining unit exclusively performed the duties at issue, such that assignment of those duties to non-members of the bargaining unit is a change in the assignment of work. See City of Allentown v. PLRB, 85 I A.2d 988 (Pa. Cmwlt. 2004). Alternatively, where the duties were shared by bargaining unit and non-unit employes, the employe representative can satisfy its burden of proof by establishing that the bargaining unit members ***exclusively performed an identifiable proportion or quantum of the shared duties such that the bargaining unit members have developed an expectation and interest in retaining that amount of work.*** AFSCME, Council 13, supra.; Lake Lehman School District, supra.

# OIL CITY AREA SCHOOL DISTRICT

A basic concept derived from the Board case law regarding removal of bargaining unit work is that bargaining unit employees must, under the circumstances of the case, '**develop an expectation**' of a level of shared work, which requires some showing a repeated assignment of a certain amount of the duties over time. Indeed, even in cases where the evidence of shared work duties took place within a one year period, there were several instances of repeat assignments of those duties to bargaining unit employees. For example, in Wyoming Valley West Educational Support Personnel Association v. Wyoming Valley West School District, bargaining unit employees developed an expectation in cleaning the stadium because on thirty occasions during the preceding year, bargaining unit employees were assigned to work alongside volunteers when the stadium needed cleaning.

# OIL CITY AREA SCHOOL DISTRICT

In Palmerton Area Education Support Personnel Association v. Palmerton Area School District, 41 PPER 96 (Proposed Decision and Order, 2010), there was sufficient evidence of an expectation in taking inventory of the freezer where the inventory was conducted once a month for nine months out of year, and three bargaining unit employes were consistently assigned to assist with each inventory.

No similar repeated assignments, or developed expectation, of a particular amount of bargaining unit lunch monitoring duties may be discerned from this record.

# OIL CITY AREA SCHOOL DISTRICT

Accordingly, under the parties' stipulations, although bargaining unit employees worked in the lunchroom on a daily basis, their assignment to lunch room duties occurred annually. This factual situation, as stipulated to by the parties, is unlike the Board's prior cases, where the bargaining unit members' assignment to the duties occurred, not annually, but each time the work at issue was to be performed.

Upon a thorough review of the entire record, there is no evidence from which the Board is able to discern any repeated trend or expectation in the number of bargaining unit employees, or proportion of work that they are annually assigned in the lunchroom.

# 5-528 OF THE SCHOOL CODE

## THIRD PARTY SERVICE

### Third-Party Services

- (a) In addition to the requirements of any other law or regulation, a school employer shall not enter into a contract with a third party ***for non-instructional services*** unless the following conditions are met:
  - (1) The school employer shall solicit applications from third parties.
  - (2) The school employer's solicitation shall require each third party to provide in the application:
    - (i) A minimum three-year cost projection to the school employer, using generally accepted accounting principles.
    - (ii) Information concerning any violation of Federal or State law or regulation by the third party, composite information about the criminal and disciplinary records of current employees of the third party who may perform the non-instructional services and information concerning any traffic violation or chargeable accidents that occurred during the course of employment by an individual employee of the third party.
    - (iii) Any additional information that the school employer deems appropriate.

# 5-528 OF THE SCHOOL CODE

## THIRD PARTY SERVICE

- The school employer shall conduct a minimum of one public hearing prior to a regularly scheduled board meeting to present to the public the selected proposal of a third party to perform the non-instructional services and to receive public comment. The school employer shall provide notice to the public of the date, time and location of the first public hearing:
  - (i) on or before the initial date that bids to provide the non-instructional services are solicited; or
  - (ii) a minimum of thirty (30) days prior to the public board meeting, whichever provides a greater period of notice.
- (b) For a school employe whose employment is terminated due to a third party entering into a contract with the school employer for non-instructional services and who seeks employment from the third party during the effective date of the contract, the following shall apply:
  - (1) The third party shall give consideration to the school employe, which shall include an interview, when hiring any new employe for the same or a substantially similar position which the school employe held with the school employer.
  - (2) If requested by the third party, the school employer shall provide to the third party information regarding the performance and employment duties of the school employe.

# 5-528 OF THE SCHOOL CODE THIRD PARTY SERVICE

- "Non-instructional services" shall mean services provided by a school employee whose terms and conditions of employment are governed by a collective bargaining agreement negotiated between the school employer and the exclusive representative of the employee and excluding services provided by a professional employee, a substitute or a temporary professional employee as those terms are defined under section 1101.
- Please note, PDE has been directing Districts to complete the process under 5-528 regardless of whether the definition is met above. Through back and forth with PDE, I believe they now understand the employees to be outsourced must currently be in a CBA.

# 5-528 OF THE SCHOOL CODE THIRD PARTY SERVICE

- Impact of 5-528 on the collective bargaining process may be significant especially due to timing.

# WAGE AND HOUR ISSUES

# FLSA - TIME CLOCK ISSUES WORK AND ROUNDING

- When an employee punches in early for a shift or punches out late at the end of the day, the [FLSA](#) does allow you to “disregard” the additional time outside the normal shift *if the employee does not actually perform any work*.
- For example, if an employee arrives 20 minutes early, punches in, and then sits in the break room drinking coffee or chatting with coworkers, you are not obligated to pay for that time.
- On the other hand, if an employee punches in early and starts working, you must pay the individual for that time. You may not adjust the timecard to match the employee’s scheduled starting time if the employee was actually working.

# FLSA - TIME CLOCK ISSUES WORK AND ROUNDING

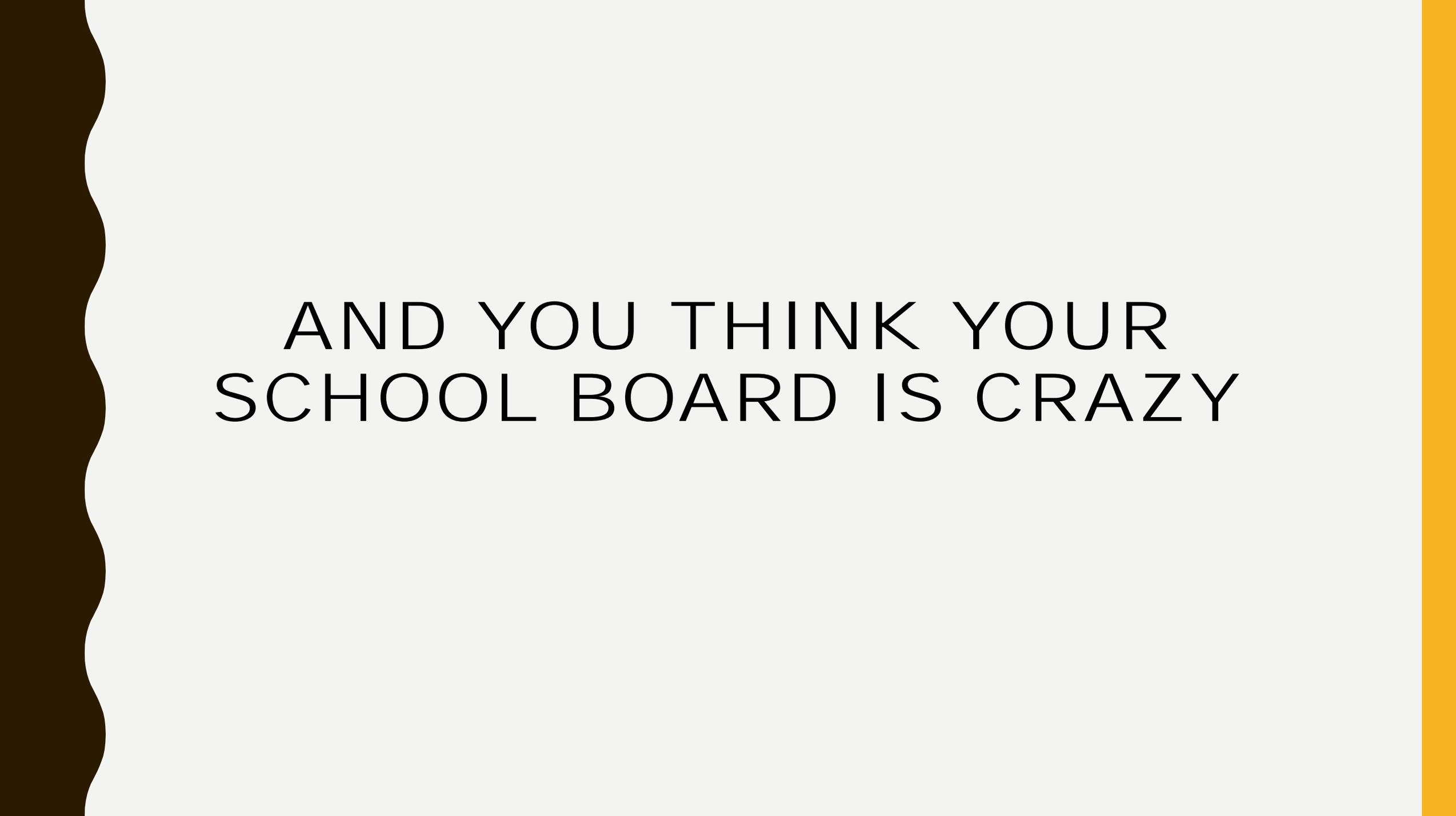
- The FLSA also allows for rounding on timecards. For example, with a seven-minute rule, you would round a punch up or down to the nearest quarter-hour. For instance, if an employee punches in at 7:54 a.m., and punches out at 5:12 p.m., he would be paid from 8 a.m. to 5:15 p.m.
- A time rounding system must work equally in favor of both parties, and is only legal under the FLSA if it “averages out so that the employees are fully compensated for all the time they actually work.” If the rounding system only works in one direction, there can be no averaging out and the employee will be underpaid
- The [FLSA regulations](#) state that rounding is permissible “to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour.”
- When used consistently over time, rounding practices will average out the actual number of working hours. You are not allowed to use rounding only to your advantage because it would result in paying employees for fewer hours than they actually worked.

# FLSA: ENGAGED TO WAIT VS ON-CALL TIME

- Whether waiting time is hours worked under the Act depends upon the particular circumstances. Generally, the facts may show that the employee was engaged to wait (which is work time) or the facts may show that the employee was waiting to be engaged (which is not work time). For example, a secretary who reads a book while waiting for dictation or a fireman who plays checkers while waiting for an alarm is working during such periods of inactivity. These employees have been "engaged to wait."

# FLSA: ENGAGED TO WAIT VS ON-CALL TIME

- An employee who is required to remain on call on the employer's premises is working while "on call." An employee who is required to remain on call at home, or who is allowed to leave a message where he/she can be reached, is not working (in most cases) while on call. Additional constraints on the employee's freedom could require this time to be compensated.



AND YOU THINK YOUR  
SCHOOL BOARD IS CRAZY

# ZURCHIN V. AMBRIDGE AREA SCHOOL DISTRICT

- Female employee, who worked as superintendent, brought action against school district, multiple school board members, and assistant to the superintendent, alleging sex discrimination, retaliation, and tortious interference with contractual relations

# ZURCHIN V. AMBRIDGE AREA SCHOOL DISTRICT

- Plaintiff was hired as the Superintendent of Ambridge Area School District (“AASD”) on March 20, 2013. At the time of her hiring, several school board members opposed her selection and preferred to hire a male candidate who was a high school principal from the area.
- As a consequence of Plaintiff's hiring over the male candidate, Defendants **Roger Kowal** and **Brian Padgett** began a targeted retaliatory campaign to foster a hostile working environment and recruited other board members to further their discriminatory objective.
- The pattern of retaliation and creation of a hostile work environment was consistent and pervasive from the outset of Plaintiff's employment.

# ZURCHIN V. AMBRIDGE AREA SCHOOL DISTRICT

- During a board meeting on June 12, 2013, Defendant Padgett screamed, “You mother f####er, you better watch yourself. I will go after you. You better watch yourself, you mother f####er,” and “I will get you,” at Plaintiff.
- Defendant Padgett was subdued by other board members, who separated him from Plaintiff. Defendant Kowal laughed during the threat and thereafter.
- After Plaintiff filed a police report on June 13, 2013, Defendant Padgett was charged with harassment and terroristic threats. After word circulated that Defendant Padgett was going to shoot Plaintiff at a future board meeting, police were present at subsequent board proceedings.

# ZURCHIN V. AMBRIDGE AREA SCHOOL DISTRICT

- Defendant Padgett concluded his term on the school board in November 2013 and pled guilty to the harassment charges in July 2014 after Plaintiff refused to withdraw the criminal complaint. After Defendant Padgett entered his plea, Defendant Kowal informed Plaintiff, “I will ruin you if it's the last thing I do; if it means ruining this school district.”
- Concerted activity was thereafter undertaken by Defendants Kowal, Padgett, and Mealie for the purpose of causing harm to Plaintiff's professional reputation and employment. For example, Plaintiff was publicly and falsely accused of running a meth lab and engaging in Satanic worship. Defendants engaged in a deliberate, malicious, and ongoing pattern of abusive and threatening behavior to cause Plaintiff physical, emotional, and economic harm.

# ZURCHIN V. AMBRIDGE AREA SCHOOL DISTRICT

- In September 2014, School Resource Officer Nate Smith mistreated and restrained without authorization J.H., an African American student with a documented disability.
- Based upon video surveillance and school policy, Plaintiff reported that incident to the Pennsylvania Department of Education, Bureau of Special Education, as an improper restraint and requested that the local police department remove Smith from his role as a School Resource Officer.
- After Defendant Kowal informed the police chief that he should not heed Plaintiff's concerns, Smith remained on school grounds.
- When Plaintiff suggested offering a summer school graduation ceremony for students with special needs, Defendant Locher stated, "F#### those kids." Several board members directly interfered with Plaintiff's attempts to satisfy the rights of special needs students in an effort to force her resignation through an oppressive and retaliatory work environment.

# ZURCHIN V. AMBRIDGE AREA SCHOOL DISTRICT

- In March 2015, Plaintiff advised the board that she had received a report that school district funds were being stolen by the Baden tax collector.
- Defendant Kowal, a personal friend of the auditors serving the district and tax collector, became defensive, verbally abusive, and challenged Plaintiff's need to report the information. The tax collector was convicted in federal court of mail fraud and filing false income tax returns. Plaintiff's report was met with animosity and hostility to create an oppressive work environment to compel her to resign or be terminated.

# ZURCHIN V. AMBRIDGE AREA SCHOOL DISTRICT

- Also, in March 2015, a teacher filed a complaint, alleging that Defendant Mealie was subjecting her to sexual harassment by making unwelcome visits to her home. The teacher turned over sixty pages of text messages demonstrating that the harassment had occurred.
- Plaintiff suspended Defendant Mealie pending an investigation and participated as a witness in the district's independent investigation. In addition to revealing sexual harassment by Defendant Mealie, the text messages between February and March 2015 illustrated collusion between board members and Defendant Mealie to create a hostile work environment for Plaintiff, an intent to physically harm Plaintiff, a desire to effectuate Plaintiff's discharge, and malice.

# ZURCHIN V. AMBRIDGE AREA SCHOOL DISTRICT

- In July 2015, Plaintiff was denied a 2% pay increase, after all other active administrators were given a 2% pay increase and one-time bonuses ranging from \$1,000 to \$2,000.
- Defendant Locher indicated that the board would not give raises to any individual who had not yet had an evaluation. Pursuant to school district policy and the terms of Plaintiff's employment contract, the board was required to perform her annual evaluation prior to the end of the school year.
- By refusing to perform the evaluation, the board denied Plaintiff an increase which she was otherwise due. Additionally, the board interfered with Plaintiff's ability to attend educational conferences and required her to exhaust vacation days to attend same, despite conference attendance being permitted under the terms of her contract.

# ZURCHIN V. AMBRIDGE AREA SCHOOL DISTRICT

- On October 12, 2015, Defendant Keber told custodial staff members that if they came to a special board meeting and looked up, they would see Plaintiff with her head in a noose hanging from the bridge. Thereafter, the board members engaged in intensifying public actions to foment public antipathy toward Plaintiff. After outlining Defendants' actions and text messages between June 2013 and October 2015, Plaintiff alleges that she was hospitalized for stroke-like symptoms.
- As a result of Defendants' conduct, Plaintiff was diagnosed with [post-traumatic stress disorder](#), anxiety, and depression, requiring her to take medical leave. The medical leave, which commenced less than twenty-four hours after Defendant Keber's noose comment, was extended, and Plaintiff was ultimately not released to return to work.

# ZURCHIN V. AMBRIDGE AREA SCHOOL DISTRICT

- Plaintiff asserts nine claims against Defendants. (*Id.* at ¶¶ 123–236). Relevant to the pending motions to dismiss, Plaintiff asserts the following claims: (1) a claim for sex discrimination and retaliation at Count III against Defendants AASD, Keber, Kowal, Locher, and Padgett, (*id.* at ¶¶ 147–153); (2) a claim pursuant to [42 U.S.C. § 1983](#) at Count IV against all Defendants, (*id.* at ¶¶ 154–164); (3) a claim pursuant to [42 U.S.C. § 1985](#) at Count VI \*687 against Defendants Keber, Kowal, Locher, Mealie, and Padgett, (*id.* at ¶¶ 179–191); and (4) a claim for tortious interference with contractual relations at Count VIII against Defendants Keber, Kowal, Locher, Mealie, and Padgett, (*id.* at ¶¶ 204–220).

# ZURCHIN V. AMBRIDGE AREA SCHOOL DISTRICT

- Count III—Sex Discrimination and Retaliation (PHRA)
  - The following defenses were raised by the defendants:
    - Defendants Keber, Kowal, and Locher argue that Plaintiff's claim fails for four reasons. First, Defendants assert that they are not “employers” under the PHRA. (Docket No. 22 at 7–8).
      - **The argument failed:** It is well settled that “[w]hile... Title VII does not permit individual liability, the PHRA does provide for individual liability in cases where a person aids and abets acts of discrimination
    - Defendants Keber, Kowal, and Locher also reiterate their arguments that they were not supervisory employees. (Docket No. 33 at 3–5). Without providing case authority, Defendants assert that school board members do not have individual supervisory power. (*Id.* at 4–5).
    - **The argument failed but could be used down the road:** For the reasons discussed above, the Court concludes that, at this early stage of the litigation, Plaintiff has pled sufficient facts to state a claim for relief under 43 Pa.C.S. § 955(e).

# ZURCHIN V. AMBRIDGE AREA SCHOOL DISTRICT

- Next, Defendants Keber, Kowal, and Locher contend that Count III must be dismissed because they did not take adverse employment actions against her. (Docket No. 22 at 8–10).
- **Another failing argument:** “An adverse employment action is one that alters the terms, conditions or privileges of employment and includes actions that are more than trivial or minor changes in an employee's working conditions, such as suspension without pay and transfer to an undesirable position.”
- Keber, Kowal, and Locher maintain that Count III must be dismissed because Plaintiff has failed to state a viable hostile work environment claim. (Docket No. 22 at 10–15; Docket No. 33 at 5–7).
- **Another dud for this group:** In this Court's estimation, as discussed, Plaintiff has sufficiently alleged facts demonstrating that she was subjected to a hostile work environment. To this end, to establish a hostile work environment under the PHRA, Plaintiff must demonstrate that: (1) she suffered intentional discrimination because of her gender; (2) the harassment was severe or pervasive and regular; (3) the harassment detrimentally affected her; (4) the harassment would detrimentally affect a reasonable person of the same protected class; and (5) the harasser was a supervisory employee or agent

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- Defendants also contend that Plaintiff has failed to state a viable retaliation claim because she did not engage in any protected activity, Defendants Locher and Kowal did not take adverse action against Plaintiff, and there is no causal connection between Plaintiff's protected activity and the alleged adverse actions. (Docket No. 22 at 16–18; Docket No. 33 at 7–9).
- To establish a prima facie case of \*691 retaliation under the anti-discrimination statutes, a plaintiff must show:“(1) protected employee activity; (2) adverse action by the employer either after or contemporaneous with the employee's protected activity; and (3) a causal connection between the employee's protected activity and the employer's adverse action.”

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- In her Complaint, Plaintiff alleges that she opposed the mistreatment of J.H., an African American student with a documented disability, and requested that Smith be removed as a School Resource Officer. (Docket No. I at ¶¶ 67–74). Accepting Plaintiff's allegations as true, the Court finds that her actions fall under the opposition clause.
- Plaintiff also alleges that she participated in the investigation of a sexual harassment complaint against Mealie and suspended Mealie pending the results of the investigation. (Docket No. I at ¶¶ 92–93). Again accepting Plaintiff's allegations as true, the Court concludes that her participation in the investigation falls within the participation clause

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- Defendants Keber, Kowal, and Locher argue that Plaintiff's claim is redundant because she has sued them in their official capacities in addition to having sued AASD. (Docket No. 22 at 18–19). In response, Plaintiff states that her claim is “against the district and only select individual board members” and clarifies that she “did not sue the district and the school board collectively.” (Docket No. 16 at 30). In their reply, Defendants Keber, Kowal, and Locher agree with Plaintiff and state that “the *official* capacity claims (but not the *individual* capacity claims) asserted against them should be dismissed with prejudice as duplicative

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- Where individual defendants are named in their official capacities, only the liability of the agency which the officers represent is really at issue.” [McCachren v. Blacklick Valley Sch. Dist., 217 F.Supp.2d 594, 599 \(W.D. Pa. 2002\)](#) (citing [Brandon v. Holt, 469 U.S. 464, 471, 105 S.Ct. 873, 83 L.Ed.2d 878 \(1985\)](#); [Owen v. City of Independence, 445 U.S. 622, 638 n.18, 100 S.Ct. 1398, 63 L.Ed.2d 673 \(1980\)](#); [Melo v. Hafer, 912 F.2d 628 \(3d Cir. 1990\)](#) ). The Court finds that “there is no reason to continue the claims against the individual defendants in their official capacities: those defendants are already potentially liable in their personal capacities, and the potential liability of the school district and school board for the claims against them makes the official capacity actions needlessly duplicative.”

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- Defendant Mealie argues that Count IV must be dismissed because she was Plaintiff's subordinate. (Docket No. 25 at 6–8; Docket No. 32 at 2–4). She asserts that she was an Assistant to the Superintendent, that she was not Plaintiff's supervisor, and that Plaintiff was empowered by her position to discipline her. (Docket No. 25 at 8). It is well settled that “[t]he question of whether a particular individual holds a ‘supervisory position’ over another must be answered by reference to the power that the individual actually holds, not by reference to his or her formal job title.” [\*McCleester v. Mackel\*, No. 06–CV–120, 2008 WL 821531, at \\*9, 2008 U.S. Dist. LEXIS 27505, at \\*29 \(W.D. Pa. Mar. 27, 2008\)](#). Further, “[t]he issue of supervisory authority is a question of fact,” as “[a] de facto supervisor who lacks the power to terminate a subordinate's employment may nevertheless abuse his or her power with respect to that subordinate, and may even constructively discharge that subordinate, so long as he or she exercises some authority over him or her.”

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- Plaintiff has alleged, inter alia, that text messages between the board members and Defendant Mealie illustrate collusion between the board members and Defendant Mealie to create a hostile work environment for Plaintiff, an intent to physically harm Plaintiff, a desire to effectuate Plaintiff's discharge, and malice

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- Count VIII—Tortious Interference With Contractual Relations
  - As to Count VIII, Defendants Keber, Kowal, Locher, and Mealie argue that Plaintiff's claim fails because they are entitled to immunity and they are agents of AASD. (Docket No. 22 at 21–22; Docket No. 25 at 16–17; Docket No. 32 at 7–8). To establish a claim for tortious interference with contractual relations, a plaintiff must prove the following: (1) the existence of a contractual relation between the complainant and a third party; (2) purposeful action on the part of the defendant, specifically intended to harm the existing relation; (3) the absence of privilege or justification on the part of the defendant; and (4) the occasioning of actual legal damage as a result of the defendant's conduct.

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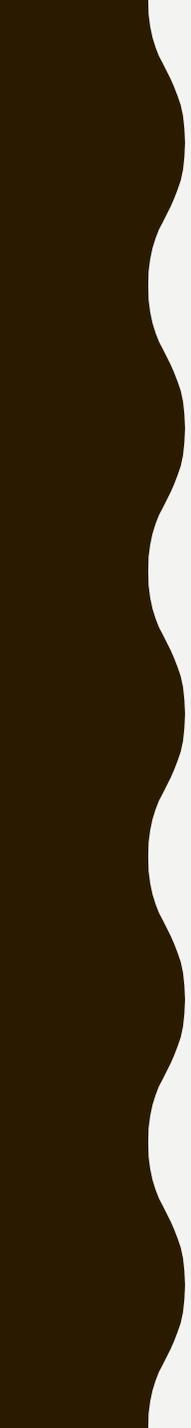
- “[B]ecause a corporation acts through its agents and officers, those individuals are not considered third parties to a contract when acting in their official capacities.” *Id.* at \*16, 2011 U.S. Dist. LEXIS 34920 at \*50 (citing [Avins v. Moll, 610 F.Supp. 308, 318 \(E.D. Pa. 1984\)](#); [Maier v. Maretti, 448 Pa.Super. 276, 671 A.2d 701, 707 \(1996\)](#) ). “However, a corporation's employee can act as a third party when the employee was acting outside of the scope of employment
- With respect to school board members' immunity, “ ‘[a]n official's status as a high public official for purposes of absolute immunity is determined on a case-by-case basis, and depends on the nature of his duties, the importance of his office, and particularly whether or not he has policy-making functions.’ ” [Graham, 2006 WL 1669881, at \\*5, 2006 U.S. Dist. LEXIS 39258, at \\*12](#) (quoting [Zugarek v. S.Tioga Sch. Dist., 214 F.Supp.2d 468, 479 \(M.D. Pa. 2002\)](#) ). However, “high public officials are entitled to absolute immunity from state law suits only when acting in their official capacities.”

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- “School board members, ‘entrusted with a policymaking role for the School District, are high public officials entitled to absolute immunity from state law suits when acting in their official capacities.’ ” *Id.* at \*5, 2006 U.S. Dist. LEXIS 39258 at \*13 (quoting [Zugarek, 214 F.Supp.2d at 479](#)). Thus, in accordance with well-established law, the Court will grant Defendants' motion to dismiss Count VII to the extent that Plaintiff asserts her claim against Defendants in their official capacity. *Id.*; [Forrest, 2011 WL 1549492, at \\*16, 2011 U.S. Dist. LEXIS 34920, at \\*50](#) (“[B]ecause a corporation acts through its agents and officers, those individuals are not considered third parties to a contract when acting in their official capacities.”).

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- The Court finds, however, that Plaintiff has sufficiently alleged her claim as to Defendants' potential liability in their personal capacities. To this end, Plaintiff has alleged, inter alia, that Defendants maliciously and recklessly interfered with her contract by spreading false and unsubstantiated claims regarding her efficacy as superintendent. (Docket No. I at ¶¶ 204–220). Plaintiff's factual allegations as a whole, which the Court must accept as true at this stage of the proceedings, include Defendants' conduct as occurring outside the scope of activities that were in connection with school district business.



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