IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Angela DiBattista,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1627 C.D. 2012
	:	
McKeesport Area School District,	:	Argued: June 20, 2013
	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: August 20, 2013**

Angela DiBattista (Petitioner) petitions for review of the Order of the Secretary of Education (Secretary), affirming the decision of the McKeesport Area School District (District), terminating Petitioner's employment with District. On appeal, Petitioner argues that the Secretary's findings are not supported by substantial evidence; therefore, the Secretary erred by finding that there was no immunity agreement between she and District in exchange for her testimony at a fellow teacher's arbitration hearing and by finding that District's disciplinary action against Petitioner was not barred by laches. For the reasons set forth herein, we reverse.

In 2004, a District teacher and Petitioner's co-worker (Co-worker) was the subject of disciplinary action taken by District that resulted from his conduct during a six year personal relationship with Petitioner, which culminated in a June 4, 2004 incident during which Petitioner received an injury to her eye. (Secretary Op., Findings of Fact (FOF) ¶¶ 2-5.) District pursued internal disciplinary charges against Co-worker that included striking, stalking and sexually harassing Petitioner, and other charges unrelated to Petitioner. (Hr'g Tr. at 111-112, May 25, 2010, R.R. at 331A; Hr'g Tr. at 89, June 1, 2010, R.R. at 379A; Hr'g Tr. at 61-64, June 21, 2010, R.R. at 418A.) In preparation for Co-worker's arbitration hearing, District's solicitors met with Petitioner on March 4, 2005. (FOF ¶ 6.) Petitioner's attorney, John Zoscak, advised District's solicitors that he was not sure whether Petitioner would testify at Co-worker's arbitration hearing; in response, District solicitors explained that if she refused to testify, District wanted a release from Petitioner absolving District of any liability should Petitioner be harmed by Co-worker in the future. (FOF ¶¶ 13-14.) Petitioner agreed to testify and, in speaking with District's solicitors in preparation for her testimony, she revealed that she had engaged in sexual conduct with Co-worker on District property when no students were present. (FOF ¶ 21.) At Co-worker's arbitration hearing on March 8, 2005, upon learning that District intended to raise this issue during Petitioner's testimony, Petitioner's attorney questioned District solicitor, "But what about [Petitioner]?" District's solicitors responded, "[h]ow many times have I got to tell you? I'm not interested in [Petitioner]." (FOF ¶ 37.) Moreover, District's solicitors had already told Petitioner's attorney at the meeting on March 4, 2005 that this "wasn't a proceeding that was going to involve filing charges against [Petitioner]." (FOF ¶ 27.) Petitioner testified at Co-worker's arbitration hearing

that she had engaged in sexual conduct on District property. (FOF ¶ 38.) Petitioner continued to teach in the District and received a "satisfactory" rating[1] for 2004-2005 on her evaluation in June 2005, signed by then Superintendent Patrick Risha. (FOF ¶¶ 41-42, 44-45.)

An Opinion and Award dated August 28, 2005 in Co-worker's arbitration found insufficient evidence against Co-worker, who was then reinstated. (FOF ¶ 46.) One week after Co-worker's arbitration concluded, when a District solicitor and Petitioner's attorney happened to meet in a social setting, the District solicitor stated that Petitioner "could put the case behind her for the rest of her life." (FOF ¶ 40.) However, in December 2005, Petitioner learned that a local newspaper obtained confidential information from Co-worker's arbitration and her attorney notified a District solicitor that the newspaper intended to publish an article about sexual misconduct in the District. (FOF ¶ 50-51.) District then advised Petitioner, by letter dated January 4, 2006, "that she was being placed on administrative leave immediately due to allegations of immorality" pursuant to Section 1122(a) of the Public School Code of 1949[2] (School Code). (FOF ¶ 53; Letter from District to Petitioner (January 4, 2006) at 1, R.R. at 504A.) On January 6, 2006, the local newspaper published the article on sexual misconduct in the District. (FOF ¶ 55.) District hired independent counsel (IC) and, on January 12, 2006, notified Petitioner that an investigatory interview, i.e., deposition, was scheduled for January 19, 2006. (FOF ¶¶ 49, 56.)

[1] Ratings could be either "satisfactory" or "unsatisfactory." (FOF ¶ 43.)

[2] Act of March 10, 1949, P.L. 30, as amended, 24 P.S. § 11-1122(a). This section provides, in pertinent part, that "[t]he only valid causes for termination of a contract heretofore or hereafter entered into with a professional employe shall be [*inter alia*] immorality." Id.

On January 19, 2006, District, through IC, and in the presence of Superintendent Risha and a District solicitor, conducted an investigatory interview of Petitioner during which Petitioner "read a prepared statement in which she asserted immunity" and "focused on her belief that she had an immunity agreement." (FOF ¶¶ 57, 59-60.) IC told Petitioner that District "did not agree with her assertion of immunity," but advised her that immunity was an affirmative defense that could be raised if she were ever charged with sexual misconduct. (FOF ¶¶ 62-63.) However, IC cautioned Petitioner that if she did not cooperate by answering the questions, he would advise Superintendent Risha to take disciplinary action against her for lack of cooperation. (FOF ¶ 65.)

On February 14, 2006, IC and Superintendent Risha conducted a second investigatory interview of Petitioner. (FOF ¶ 68.) After the interview, Superintendent Risha advised Petitioner that she must decide by April 3, 2006 whether to resign with paid leave through November 30, 2008 or face dismissal charges. (FOF ¶ 68-69.) Petitioner rejected the resignation with paid leave option[3] and, on April 24, 2006, received a Notice of Hearing and Statement of Charges for immorality.[4] (FOF ¶¶ 69, 73-74; Notice and Statement of Charges, April 24, 2006,

[3] Patricia Maksin, then Board Director and Pennsylvania State Education Association (PSEA) Vice President, who was PSEA President at the time of the hearings before the Board in this matter, testified that Petitioner and Co-worker were offered the same resignation package, but that "money wise, I can't tell you because they were on different salary schedules." (Hr'g Tr. at 40, June 21, 2010, R.R. at 412A.)

[4] The Secretary's findings of fact also include that Co-worker was investigated for immorality on District property and advised that he could either resign or face dismissal charges. Co-worker did not face dismissal charges because he agreed to a settlement wherein District permitted him to use sick leave paid at more than the normal rate until the date of his birthday, making him eligible for early retirement with thirty-one years of service, utilized the early

at 1-3, R.R. at 571A-73A.) Having elected a hearing before the District Board of School Directors (Board), Petitioner attended a pre-hearing conference on July 26, 2006 at "which it was decided that hearings would proceed on August 1 and 2, 2006." (FOF ¶¶ 82-83.) However, due to Petitioner's medical condition and also multiple scheduling conflicts by both District and Petitioner, no Board hearings were held until May 11, 2010, when the first of six hearings was held through July 6, 2010. (FOF ¶ 84-85.)

The hearing transcripts reveal that District called the following witnesses to testify at the Board hearings: (1) Petitioner; (2) Solicitors, Jacob Skezas, John Cambest, and Gary Matta; (3) former Superintendent Risha; (4) teachers Nicole and Michael Cherepko; (5) Title IX Investigators, Patricia Tkacik and Michael Matta, Jr.; (6) Co-worker; and (7) present Superintendent Michael B. Brinkos. Petitioner called the following witnesses to testify on her behalf: (1) Petitioner's then counsel, John N. Zoscak, Jr.; (2) President of District Education Association, Patricia Maksin; (3) retired District Superintendent, Frank A. McLaughlin; (4) Attorney Arthur H. Baker, III, a colleague of John Zoscak familiar with Co-worker's arbitration; and (5) David G. Donato, then Board member and local business owner. At the conclusion of the hearings, the Board determined that no immunity agreement was ever offered to Petitioner in Co-worker's arbitration, and District sustained its burden that Petitioner should be dismissed from employment. On February 23, 2011, the Board issued an Order terminating Petitioner. (FOF ¶ 94.)

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retirement penalty, and was provided full health insurance benefits paid for by District. (FOF ¶¶ 75-81.)

On March 28, 2011, Petitioner filed a Petition for Appeal with the Secretary. (Petition for Appeal, March 28, 2011, R.R. at 779A.) Petitioner raised in her appeal to the Secretary, *inter alia*, whether there was an immunity agreement between District and Petitioner, and whether the defense of laches applied. Pursuant to Section 1131 of the School Code,[5] the Secretary conducted a *de novo* review of the Board's record without taking additional evidence.

In addressing the issue of immunity, the Secretary noted that the parties were totally at odds on this issue, with Petitioner unequivocally asserting that she had immunity insulating her from any dismissal charges by District, and with District in disagreement about Petitioner's characterization of conversations during Co-worker's arbitration and the existence of an immunity agreement. (Secretary Op. at 15.) The Secretary concluded that there was no enforceable immunity agreement, reasoning that since Co-worker's arbitration involved the alleged June 2004 injury to Petitioner's eye, not immorality, and since District had never amended Co-worker's charges to include immorality, the critical testimony by Petitioner was only that Co-worker assaulted her, not the testimony that implicated

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[5] 24 P.S. § 11-1131. Section 1131 provides, in relevant part, as follows:

> In case the professional employe concerned considers . . . herself aggrieved by the action of the board of school directors, an appeal . . . may be taken to the Superintendent of Public Instruction at Harrisburg. . . . The Superintendent of Public Instruction shall review the official transcript of the record of the hearing before the board, and may hear and consider such additional testimony as he may deem advisable to enable him to make a proper order.

Id. This has been interpreted to mean that the Secretary conducts a *de novo* review and makes his or her own findings of fact. Belasco v. Board of Public Education of the School District of Pittsburgh, 510 Pa. 504, 514-15, 510 A.2d 337, 342-43 (1986). As further explained in Belasco, the Superintendent of Public Instruction has been replaced by the Secretary. Id. at 509, 510 A.2d at 340.

the dismissal charges against Petitioner. Therefore, the Secretary determined that it was not reasonable to conclude that District would have granted Petitioner immunity in exchange for her disclosure that went beyond the testimony sought for Co-worker's arbitration hearing. (Secretary Op. at 23.) On the issue of laches, the Secretary concluded that District was diligent in pursuing the charges against Petitioner, who failed to meet her burden that laches applied. (Secretary Op. at 27-31.) Thus, the Secretary issued an Order affirming District's termination of Petitioner's employment pursuant to Section 1122 of the School Code. Petitioner now appeals to this Court.[6]

Petitioner argues that the Secretary erred by not finding there had been an immunity agreement between District and Petitioner. Petitioner maintains that all of the surrounding circumstances show that a meeting of the minds arose between Petitioner and District that, if Petitioner agreed to testify, District would have no interest in pursuing Petitioner in connection with such testimony and would no longer require her to sign a waiver to protect District if Petitioner were to suffer any future injuries caused by Co-worker. Petitioner contends District assured her that District never intended to pursue any charges against her, and only did so when a local newspaper printed an article about sexual misconduct in the District after obtaining a copy of confidential material from Co-worker's arbitration. Petitioner further maintains that the Secretary erred by dismissing Petitioner's defense of laches.

[6] "This Court's review is limited to a determination of whether the findings of fact made by the Secretary are supported by substantial evidence, errors of law were committed or constitutional rights were violated" and "[s]ubstantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." McFerren v. Farrell Area School District, 993 A.2d 344, 352 n.6 (Pa. Cmwlth. 2010).

It is undisputed that there was no *written* immunity agreement between District and Petitioner. The question is whether there was an oral agreement or meeting of the minds, either express or implied, between Petitioner and District that, if Petitioner testified in Co-worker's arbitration, District would not pursue any charges against her. Because whether such an agreement existed in this case is a question of law, not of fact, our review is plenary. See Reitmyer v. Coxe Brothers & Co., Inc., 264 Pa. 372, 376, 107 A. 739, 741 (1919) (holding that the question of whether an implied contract existed between parties is a question of law for the court).[7]

Whether implied or express, the enforceability of an oral agreement is governed by contract law principles and the parties' intent must be found from the surrounding circumstances and course of dealing between the parties. Westinghouse Electric Co. v. Murphy, Inc., 425 Pa. 166, 171-72, 228 A.2d 656, 659 (1967); Boyle v. Steiman, 631 A.2d 1025, 1033 (Pa. Super. 1993).

> [W]here no express contract exists, but yet where circumstances appear which, according to the ordinary course of business dealings, and . . . understanding . . . show a mutual intention to contract . . . the law will not simply imply a contract, but it will derive the terms of a contract so far as practicable from the conditions shown.

Reitmyer, 264 Pa. at 375, 107 A. at 740. The Superior Court has stated:

[7] District contends that this Court should look to United States v. Holtz, No. CRIM. A. 92-00459, 1993 WL 482953 (E.D. Pa. Nov. 15, 1993), aff'd, 31 F.3d 1174 (3d Cir. 1994), an unpublished Third Circuit opinion, for guidance and instruction. Notwithstanding that Holtz is not controlling here, it is also inapposite. The testimony for which immunity was being asserted in that case was not crucial to the case. Id. at *6. In contrast, District believed that it did not have a case against Co-worker without Petitioner's testimony. (Hr'g Tr. at 56, 58, May 24, 2010, R.R. at 288A-89A.)

> "A contract implied in fact has the same legal effect as any other contract. It differs from an express contract only in the manner of its formation. An express contract is formed by either written or verbal communications." Ingrassia Constr. Co. v. Walsh, 486 A.2d 478, 483 n.7, 483 (Pa. Super. 1984). "A contract implied in fact[] is an actual contract, and . . . arises where the parties agree upon the obligations to be incurred, but their intention, instead of being expressed in words, is inferred from their acts in the light of the surrounding circumstances." Tyco Elecs. Corp. v. Davis, 895 A.2d 638, 640 (Pa. Super. 2006). "A contract implied in fact can be found by looking to the surrounding facts of the parties' dealings. Offer and acceptance need not be identifiable and the moment of formation need not be pinpointed." Ingrassia Constr. Co., 486 A.2d at 483.

Bricklayers of Western Pennsylvania Combined Funds, Inc. v. Scott's Development Co., 41 A.3d 16, 29-30 (Pa. Super.), petition for allowance of appeal granted in part by, ___ Pa. ___, 58 A.3d 748 (2012). "[T]he facts and circumstances under which the parties contracted . . . form a sort of context that may properly be resorted to as an aid in interpreting the contract, to the end that the objects and purposes of the parties may be carried into effect." Alcorn Combustion Co. v. M. W. Kellogg Co., 311 Pa. 270, 274, 166 A. 862, 863 (1933).

In order to determine whether there was a mutual intent by the parties, through the surrounding circumstances and their course of dealing, to enter into an immunity agreement we must look at the evidence presented by the parties. From the numerous depositions and hearings, with hundreds of pages of testimony, we first review the testimony of District's witnesses. After District learned that Petitioner would probably not testify against Co-worker, Solicitor Skezas admitted that he informed both Petitioner and her counsel that District needed Petitioner to testify because District would not have a case against Co-worker without her testimony. (Hr'g Tr. at 56, 58, May 24, 2010, R.R. at 288A-89A.) Skezas further

admitted that he informed Petitioner that, if she did not testify, District would need a release from her that she would not hold District responsible should she be harmed by Co-worker in the future. (Hr'g Tr. at 43-44, 61, R.R. at 285A, 290A.) Skezas further acknowledged, as probably accurate, that Petitioner was "a scared and battered woman at that point." (Hr'g Tr. at 56-57, R.R. at 288A-89A.)

Solicitor Cambest's testimony buttresses Solicitor Skezas's admission that Petitioner would have to sign a release if she refused to testify during Co-worker's arbitration. Recalling that Petitioner exhibited reluctance to testify, Cambest stated that Solicitor Gary Matta stated that without Petitioner's testimony, the charges against Co-worker could not go forward, noting that if the arbitration did not proceed District would need a signed document from Petitioner releasing District from future liability in this matter. (Hr'g Tr. at 50, May 25, 2010, R.R. at 316A.)

Superintendent Risha testified that, when the newspaper leak occurred in January 2006, he tried to console Petitioner by stating "this is all going to be ok" and one "month from now . . . we can all just have a drink and relax over this." (Hr'g Tr. at 37-38, May 25, 2010, R.R. at 313A.) Superintendent Risha acknowledged that Petitioner was so upset upon learning that Co-worker was reinstated to the classroom that one of Petitioner's principals sent her home and Superintendent Risha then went to her son's house to comfort her. (Hr'g Tr. at 28-29, R.R. at 310A-11A.) In addition, when only two ratings were possible, satisfactory or unsatisfactory, Superintendent Risha rated Petitioner satisfactory for the 2004-05 school year when the events involving the alleged Co-worker assault occurred. (Stipulations 19-20, FOF ¶ 43-44.)

The above summary of testimony by District's witnesses reveals that District believed that it most likely did not have a case against Co-worker unless Petitioner testified during the arbitration proceedings; however, Petitioner was reluctant to testify and, in order to persuade her to testify, District assured her that she would be protected from any potential administrative repercussions. District's positive evaluation of Petitioner, along with repeated assurances that District was not interested in targeting Petitioner, but needed her testimony to have a case against Co-worker, further indicates that District did not intend to pursue disciplinary charges against Petitioner. In fact, after Co-worker's arbitration, many months elapsed before District suspended Petitioner and did so only after the publication of the newspaper article.

The testimony of Petitioner's witnesses further supports that the parties intended Petitioner to testify during Co-worker's arbitration without fear of repercussions from District. Petitioner's attorney, Zoscak, testified that Co-worker had been stalking and making threats against Petitioner while District was investigating a physical assault, a tire slashing incident, threats, and the showing of a weapon involving Co-worker. Attorney Zoscak testified that in March 2005, in a meeting with Solicitor Skezas, Title IX Investigators Matta, Jr. and Tkacik, and Petitioner, District asserted that it could not pursue terroristic threats, sexual harassment, ordinary harassment, stalking, and assault charges against Co-worker without Petitioner's help. Attorney Zoscak stated that District offered a lot of friendly talk, promising that they wanted to protect Petitioner, and put her in contact with a women's shelter where she could live anonymously for protection from her husband and Co-worker; Solicitor Skezas even offered his law firm's help

without charge to get a Protection from Abuse Order. Attorney Zoscak stated that he, again, told Solicitor Skezas that he did not want Petitioner to testify because he did not think District had a case but, according to Attorney Zoscak, District said they were "going forward with it as long as [Petitioner] testifies." (Hr'g Tr., June 21, 2010, at 63-66, R.R. at 418A-19A.)

Attorney Zoscak testified further that he and Petitioner went to the District interview location at about 10:00 a.m. on March 5, 2005, but District solicitors did not begin Petitioner's interview until 9:00 p.m. that evening and she was the last one to be interviewed. (Hr'g Tr. at 71-72, R.R. at 420A.) Attorney Zoscak stated that he remained concerned that Petitioner was sticking her neck out and testified how District again asked for a release if she was not going to testify. (Hr'g Tr. at 77-80, R.R. at 421A.) Zoscak stated that it was "[b]eyond a doubt" that there was an agreement between him and Solicitors Cambest and Skezas that Petitioner's job would be protected if she testified at the arbitration hearing, (Hr'g Tr. at 77, R.R. at 421A), and that he permitted Petitioner to testify because he felt that he had a protected contract for her job and there was no release, (Hr'g Tr. at 79, R.R. at 421A). Attorney Zoscak further testified that he ran into Solicitor Cambest at a local restaurant after Co-worker's arbitration where Solicitor Cambest told him that Petitioner did well at the arbitration, she made the case for District, and they had a winner. (Hr'g Tr. at 88-89, R.R. at 423A-24A.) Attorney Zoscak further testified that Solicitor Cambest told him to be sure to "thank [Petitioner] for her cooperation" and tell her that "she can put this behind her for the rest of her life." (Hr'g Tr. at 89, R.R. at 424A.)

Attorney Baker testified that Solicitor Cambest stated, in the presence of he and Attorney Zoscak, that "we are not going to do anything to get [Petitioner] regardless of what is said in that hearing." (Hr'g Tr. at 17, July 6, 2010, R.R. at 461A.) Attorney Baker acknowledged that, on the Friday before Co-worker's arbitration hearing, he was present when Attorney Zoscak told Solicitor Cambest that he was not sure if he was going to let Petitioner answer any questions because it could result in trouble for her, and Cambest stated that he did not care what Petitioner said because District would not target her. After Petitioner's March 5, 2005 interview, Attorney Zoscak left the room, told Attorney Baker that Petitioner had gone into great detail about her relationship with Co-worker, and how glad he was that he had made an immunity deal with Solicitor Cambest before Petitioner was interviewed. (Hr'g Tr. at 19-37, R.R. at 461A-466A.)

District Education Association President Maksin testified on behalf of Petitioner that District was investigating Co-worker, not Petitioner, and that Petitioner was never under investigation before the 2006 newspaper article was printed. (Hr'g Tr. at 30, June 21, 2010, R.R. at 410A.) When Petitioner was concerned that District might move her from her school because of these matters, Maksin testified that she reassured Petitioner that the "investigation was not about her" and "[D]istrict was not looking upon [her as] causing trouble." (Hr'g Tr. at 34, R.R. at 411A.)

The foregoing testimony supports the conclusion that Petitioner believed that she would not suffer any repercussions if she testified during Co-worker's arbitration. As such, both District's and Petitioner's witnesses' testimony supports

the conclusion that the surrounding circumstances show that, during the course of dealings between District and Petitioner over Co-worker's investigation and preparation for arbitration, the parties mutually intended that if Petitioner agreed to testify she would have no concern or fear that any District action would be brought against her as a result of such cooperation. Therefore, we hold that, as a matter of law, an enforceable implied immunity agreement existed between District and Petitioner.

Because there was an implied agreement that Petitioner would have immunity if she testified at the request of District in its March 2005 arbitration against Co-worker, Petitioner's testimony cannot provide the basis for her termination from employment. Therefore, we reverse the Secretary's Order upholding Petitioner's termination from employment with District.[8]

RENÉE COHN JUBELIRER, Judge

[8] Because of our disposition of this case, we do not reach Petitioner's additional argument that the Secretary erred by dismissing the defense of laches.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Angela DiBattista,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1627 C.D. 2012
	:	
McKeesport Area School District,	:	
	:	
Respondent	:	

O R D E R

NOW, August 20, 2013, the Order of the Secretary of Education in the above-captioned matter is hereby **REVERSED**.

RENÉE COHN JUBELIRER, Judge