IN ARBITRATION

BEFORE THE AMERICAN ARBITRATION ASSOCIATION

PETER B. LEWIS, Claimant, and **FAIRBANKS NORTH STAR BOROUGH SCHOOL DISTRICT,** Respondent.	)	**ARBITRATOR'S OPINION AND AWARD** Case No. 01-14-0000-9285

Arbitrator:	Robert W. Landau 2118 Foraker Drive Anchorage, AK 99517
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Hearing Dates and Location:	May 3-6, 2016 Fairbanks, Alaska
Closing Briefs Filed:	August 4, 2016
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INTRODUCTION

This is an arbitration proceeding pursuant to the employment agreement between Peter B. Lewis ("Lewis") and the Fairbanks North Star Borough School District ("District"). Lewis challenges the District's termination of his employment as superintendent of schools on June 9, 2014. As provided in their agreement, the parties jointly selected the undersigned arbitrator through the auspices of the American Arbitration Association. The arbitration hearing was held in Fairbanks on May 3-6, 2016. Both parties were represented by counsel and had the opportunity to present witness testimony and documentary evidence and to cross-examine adverse witnesses. The hearing was recorded and transcribed by a court reporter. Following the hearing, the parties submitted their closing arguments in written post-hearing briefs.

BACKGROUND

Peter Lewis was hired by the Fairbanks North Star Borough School District as superintendent of schools in 2010 and served in that capacity until his employment was terminated effective June 9, 2014. Prior to coming to Fairbanks, Lewis was a school superintendent in Clarkston, Washington for seven years and before that was a building-level administrator for 17 years at various schools in Washington state. In August 2013, Lewis and the District entered into a three-year employment contract beginning July 1, 2013 through June 30, 2016. The contract provides that Lewis may be terminated for cause including, among other things, "incompetence," which is defined as "the inability or unintentional or intentional failure to perform the Employee's duties under this Agreement."

During Lewis's tenure as Fairbanks superintendent, the District had approximately 14,000 students and 3,000 employees. Lewis directly supervised 11 professional employees and two administrative assistants. The professional employees included two assistant superintendents; the chief financial officer; and the directors of human resources, research and accountability, labor relations, maintenance and facilities, employment and education opportunity, grants and federal programs, special education, and technology.

As superintendent, Lewis was responsible to the Board of Education for the overall management of the school district including instructional programs and physical facilities. The Board consists of seven non-professional members elected by the public. In the first three years of Lewis's employment as superintendent, there was no indication that his job performance was anything less than satisfactory. The Board's written evaluations of Lewis's performance in 2012 and 2013 rated him as meeting or exceeding standards in each of the evaluation categories.

On March 24, 2014, Claude Fowlkes, a classified employee of the District who was working as a tutor at Hutchison High School, was arrested and charged with seven counts of sexual abuse of a male minor, [redacted], a student at Hutchison. Upon learning of the arrest, Lewis notified the School Board and indicated that the District would investigate the matter. The Board was subsequently provided with a packet of information regarding Fowlkes's employment history and disciplinary record, which indicated that he had been disciplined previously for misconduct involving a student. At a meeting on April 7, 2014, the Board voted to place Lewis

on administrative leave and have an outside entity conduct an investigation of whether District management, including the superintendent, had acted properly with respect to Fowlkes's employment. At the same time, the Board voted to appoint assistant superintendent Karen Gaborik as interim superintendent.

Shortly thereafter, the District hired an Anchorage law firm to conduct the outside investigation. After the investigation began, the Board received information that a former middle school teacher, [redacted], had engaged in misconduct involving students but had not been terminated. The investigation was broadened to include the [redacted] matter and the superintendent's involvement, if any, in handling it. The investigation lasted approximately two months and resulted in a detailed investigation report dated June 9, 2014. The attorney investigator interviewed more than 20 witnesses, including Lewis and other management employees, and gathered approximately 2800 pages of documents. The investigator also kept the Board informed as to the progress of the investigation.

On May 12, 2014, the Board met in executive session to review the preliminary findings of the investigation. After deliberation, the Board voted unanimously to provide Lewis with notice of its intent to terminate his employment agreement for cause. The Board issued a letter to Lewis as follows:

> On behalf of the Board of Education, you are hereby notified that we intend to pursue a for cause termination of your employment agreement for incompetence. Specifically:
>
> You have failed to perform your duty as superintendent of managing employee investigations, evaluations, discipline and hiring decisions to ensure consistent and fully informed decision-making. In particular, you failed to manage and oversee investigations of employees accused of serious inappropriate conduct with students. Significant

allegations and observations of grooming and other alarming behavior with students were either not understood or were not dealt with in a serious manner. It appears that a culture has developed in which allegations of employee misconduct involving students were dealt with haphazardly and by placing too high a burden on parents and students to prove employee misconduct.

You have exhibited a total failure of leadership leading up to the sexual abuse of a student on school property. Investigations involving repeated, serious allegations against an employee ultimately arrested on school grounds were mishandled. This culminated in an employee, who had repeatedly demonstrated a refusal to comply with District policy regarding appropriate student interaction, receiving a glowing evaluation followed by District placement of that employee in a school with no warning, instructions, or procedures designed to ensure the safety of students. Instead the principal was completely blindsided when an arrest was made at the school. In addition, you made a comment about the most recent student who was sexually abused by his tutor that minimized the seriousness of the tutors misconduct and the harm suffered by the student.

You have failed to ensure that the District operates in compliance with federal wage and hour laws. Specifically, despite your personal knowledge that an employee worked early morning and late at night you repeatedly certified that the employee worked only 80 regular hours during the relevant time periods.

No effective working relationship exists between you and the Board. Not only have you demonstrated disrespect for the Board's role as your employer and the legislative body of the District, your attitude has permeated through to your staff resulting in a climate of disrespect toward the Board that undermines the supportive, positive environment necessary to promote a strong educational system.

In summary you have demonstrated an inability or unwillingness to perform the duties expected of a superintendent, which has resulted in potential liability to the District, a derogation of the public faith and confidence in the District and the Board's loss of trust and confidence in you.

You have the right to request a hearing prior to the Board making a final determination. That request must be made in writing delivered to the Borough Attorney's office on or before 5:00 p.m. within five business days of this notice. Failure to timely request a hearing will be considered a waiver of your hearing right. You are hereby

> suspended with pay pending the outcome of that hearing or a waiver of your hearing right. If you failed to request a timely hearing or otherwise waive that right your termination will be effective at 5:00 p.m. on Monday, May 19, 2014.

The letter, together with a preliminary summary of the investigation, was attached to a press release issued by the Board in conjunction with its May 12 meeting.

In a letter to the District dated May 16, 2014, Lewis's attorney demanded, as a matter of due process, a hearing before an impartial arbitrator pursuant to Lewis's employment agreement rather than the proffered pretermination hearing before the Board. The District responded that a pretermination hearing before the Board satisfied due process requirements and was not intended as a substitute for the arbitration provided in the employment agreement. After a further exchange of correspondence, Lewis notified the District of his decision to forego the pre-termination hearing offered by the Board.

On June 9, 2014, the Board, having received the final investigation report, voted unanimously to terminate Lewis's employment agreement for cause. On June 11, Lewis signed a one-year contract to serve as interim superintendent for the Colville School District in Washington. In December 2014, Lewis signed a three-year contract to serve as the Colville superintendent through June 30, 2018.

On July 8, 2014, Lewis's attorney contacted the American Arbitration Association to initiate this arbitration proceeding pursuant to his employment agreement with the District.

FINDINGS AND CONCLUSIONS

In this arbitration there are three primary issues in dispute: (A) whether the District afforded Lewis adequate due process before his employment was terminated; (B) whether the District had cause to terminate Lewis for incompetence pursuant to his employment agreement; and (C) if the District did not have cause, whether Lewis is entitled to compensatory damages, reputational damages or punitive damages.

A. Due Process

Lewis was offered the opportunity for (a) a pretermination hearing before the School Board and (b) a post-termination arbitration before an impartial arbitrator as provided in his employment agreement. Lewis elected to forego the pretermination hearing but participated fully in the post–termination arbitration. Lewis argues that the proffered pretermination hearing before the Board was inadequate due process under federal and state constitutional law because the Board was not a neutral decisionmaker and individual Board members had made statements indicating they believed it was unlikely that the Board would change its mind about his termination. Lewis does not dispute that his post-termination arbitration satisfied his right to a post-termination hearing.

Under federal law, a public employee has a protected property interest in his employment and is entitled to notice and an opportunity to be heard before discharge, except in extraordinary circumstances. *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 538 (1985). The pretermination hearing should provide an initial check against a mistaken decision by the employer, ensuring that there

are reasonable grounds to believe the charges against the employee are true and support the proposed action. *Id.* at 545-46. At a minimum, the employee must receive written or oral notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. *Id.* However, the pretermination hearing need not be conducted before an impartial decisionmaker and may be conducted by the person or entity who made the proposed discharge decision, so long as the employee is provided with a full adversarial post-termination hearing before an impartial decisionmaker. *Walker v. City of Berkeley,* 951 F.2d 182, 183-84 (9th Cir. 1991). Therefore, the pre-termination hearing offered to Lewis did not violate his due process rights under federal law.

Like the federal constitution, the Alaska constitution affords pretermination due process protection to public employees who may only be terminated for just cause. *McMillan v. Anchorage Community Hospital,* 646 P.2d 857, 864 (Alaska 1982). Under Alaska law, a public employee ordinarily has the right to a full adversarial hearing before he may be effectively dismissed. *Storrs v. Municipality of Anchorage,* 721 P.2d 1146, 1150 (Alaska 1986); *Nichols v. Eckert*, 504 P.2d 1359, 1366 (Alaska 1973). In *Storrs,* however, the Alaska Supreme Court went on to hold that in limited circumstances, a collective bargaining agreement may alter the pretermination rights of covered employees:

> We hold that a post-termination adversarial hearing may satisfy the requirements of Alaska's Due Process Clause when a collective bargaining agreement waives the constitutionally mandated pretermination adversarial hearing. Such a substitution of a post-termination hearing for a pretermination hearing is permissible "so

> long as the negotiated agreement provides fair, reasonable, and efficacious procedures by which employer-employee disputes may be resolved." [Citations omitted.] Where, as here, a discharged employee can seek post-termination judicial review of his grievance, due process has not been offended.

721 P.2d at 1150. Similarly, in the present case Lewis's employment agreement provides for a full adversarial arbitration before an impartial arbitrator. Under the rationale of *Storrs,* therefore, Lewis was not denied due process in accordance with Alaska law.

B. Cause for Termination

The central issue in this arbitration is whether the District had cause to terminate Lewis's employment for "incompetence," which is defined as "the inability or unintentional or intentional failure to perform the Employee's duties under this Agreement." The superintendent's duties are described in the job description attached to the employment agreement which states in pertinent part:

> As executive officer of the Board, the Superintendent shall have the following specific powers and duties and shall be directly responsible to the Board for their proper exercise. * * *
>
> 4. Responsible for suspension or dismissal of any employee;
>
> 6. Has the power to make administrative rules and regulations to implement the policies of the Board and is charged with the enforcement of the rules, regulations, and policies;
>
> 9. Is responsible for the operation of the school system, the development of the teaching staff, the growth and welfare of the pupils, and the methods of instruction and management used by teachers and principals;
>
> 10. Delegates any of the powers and duties which the Board has entrusted to him/her but shall continue to be responsible to the Board for the execution of the powers and duties delegated;

According to the District, Lewis failed to meet his responsibilities with respect to the suspension and discharge of two District employees, Claude Fowlkes and [redacted], thereby putting District students at risk. The District recognizes that the decision whether to discipline or terminate an employee is a "judgment call" that involves a balancing of the employee's rights against student safety. Nevertheless, the District contends that in such cases it is proper to err on the side of student safety and if the superintendent makes a judgment call that later turns out to be mistaken, he has failed to perform his duties under the employment agreement and may be terminated for incompetence.

In *Skagway City School Board v. Davis,* 543 P.2d 218 (Alaska 1975), the Alaska Supreme Court discussed the allocation of the burden of proof in a case where a school superintendent was terminated for performance reasons prior to the expiration of his three-year employment contract. The court held that the employer had the burden to prove by a preponderance of the evidence that the superintendent's discharge was justified. *Id.* at 222-23. This is the applicable burden of proof in this case.

1. Claude Fowlkes

Claude Fowlkes was initially hired by the District in January 2006. He worked in several part-time and full-time positions as a resources aide; graduation success/dropout coach; career guide specialist; student support specialist; and classroom tutor. He also had a series of Student Activity Sponsorship (SAS) contracts as a study club facilitator; track and field coach; after school study club; and homework hotline advisor. Throughout his employment he was a classified

employee covered by the collective bargaining agreement between the District and the Education Support Staff Association (ESSA).

On August 11, 2012, [redacted], the parents of District student [redacted], sent a letter to Clarence Bolden, the District's human resources director. [redacted] The letter complained that Fowlkes, who had been [redacted]'s mentor and graduation coach at Tanana Middle School, had exchanged inappropriate and vulgar Facebook messages with [redacted] Attached to the letter were seven pages of Facebook messages between Fowlkes and [redacted] in September 2011 and July 2012. Prior to sending the letter, [redacted] spoke to Bolden and Lewis about [redacted] concerns and gave them a "heads up" that a written complaint would follow.

In accordance with the District's past practice, the [redacted] complaint was investigated by labor relations director Gayle Pierce who normally performed and managed investigations and discipline for unionized employees. Pierce had served as labor relations director since 2001 and had worked directly with four District superintendents including Lewis. According to Pierce, the procedure for handling employee investigations and discipline did not change significantly throughout her tenure, except that Lewis was more "hands-on" than previous superintendents and had instructed her to consult with an attorney regarding any serious disciplinary matters. As superintendent, Lewis did not personally perform disciplinary investigations, but he was generally made aware of significant disciplinary investigations and he would review the investigation findings and recommendations

before a disciplinary decision was made. Pierce testified that in her 13 years as labor relations director, none of the four superintendents for whom she worked, including Lewis, ever overruled any of her recommendations regarding discipline or termination.

Pierce began her investigation of the [redacted] complaint by placing Fowlkes on administrative leave on the first day of the 2012-13 school year. She then interviewed Fowlkes, in the presence of his union representative, about the Facebook messages with [redacted] and the concerns raised in the [redacted] letter. She also interviewed [redacted] about Fowlkes's relationship to [redacted]. [redacted] mentioned that Fowlkes had previously been accused of having an inappropriate relationship with a male client at [redacted] where Fowlkes had been employed separately from his District employment. Pierce was aware of this allegation because it had been investigated in March 2012 by Greg Platt, the principal at Tanana Middle School where Fowlkes worked. Platt had spoken to the [redacted] executive director who was unable to substantiate the allegation of an inappropriate relationship. Finding no evidence of misconduct, Platt's opinion was that Fowlkes "presents no danger to our students" and he recommended to Pierce that Fowlkes, who had been placed on administrative leave during the investigation, be returned to work at Tanana.

After she completed her investigation of the [redacted] complaint, Pierce consulted telephonically with Rockie Hansen, a school law attorney in Spokane (also admitted to practice in Alaska) who had worked with Lewis previously and had

been hired by Lewis as a legal consultant for the District. The conference call with Hansen was made from Lewis's office, although Pierce handled most of the conversation and Lewis may have been in and out of the office attending to other matters while the call took place. Pierce provided Hansen with copies of the Facebook messages and other pertinent information. Based on her investigation, Pierce concluded that "a strong letter of discipline and loss of pay" was warranted for Fowlkes's inappropriate messages with [redacted]. Among the factors considered by Pierce were that Fowlkes had been employed by the District for several years and had no prior discipline in his file; Fowlkes had a pre-existing mentor relationship with [redacted]; most of the inappropriate messages took place during the summer when Fowlkes was not on contract and [redacted] was not yet re-enrolled as a District student [redacted]; some of the inappropriate messages had been initiated by [redacted], not Fowlkes; there was no evidence of any improper sexual conduct in the Facebook messages, just vulgar language; and principles of progressive discipline under the collective bargaining agreement justified some level of discipline but not outright termination. During the telephone consultation with Hansen, neither Hansen nor Lewis expressed any disagreement with Pierce's recommended discipline.

On August 30, 2012, Pierce issued her disciplinary letter to Fowlkes. In the letter Pierce made findings that the language used in the Facebook messages was "vulgar and sophomoric" and not appropriate between an adult school employee and a student; that Fowlkes improperly bought food for [redacted] in an apparent effort to establish an exclusive personal relationship with him; and that Fowlkes had not

been entirely truthful about the Facebook messages and his relationship with [redacted] during his investigatory interview. As discipline for Fowlkes's misconduct, Pierce issued a formal reprimand together with a loss of two days' pay. In addition, Pierce directed Fowlkes not to have any further contact with [redacted] until he graduated from high school; to abide by the District's staff-student boundaries brochure; to refrain from using Facebook when communicating with students; to refrain from developing special or exclusive relationships with students; to maintain focus on the goals of his position when interacting with students; and to always be a good role model when interacting with students and not use foul language or expletives. The reprimand letter was placed in Fowlkes's personnel file. In addition, Pierce sent separate letters to the principals of Lathrop High School and Tanana Middle School, the two schools where Fowlkes was working, advising them of the directives in the reprimand letter.

In November 2012, Pierce was notified of two instances where Fowlkes had been observed speaking to [redacted] at Lathrop High School, in apparent violation of her no-contact directive. On one occasion Fowlkes was seen talking to [redacted] and another student in a hallway after school. A week later, Fowlkes was again observed having a conversation with [redacted] and another student as they exited the school cafeteria. Pierce conducted an investigatory interview with Fowlkes, who told her that in both instances [redacted] had initiated the contact with him, that he could not control [redacted]'s wanting to speak to him, and that he wanted to be removed from Lathrop to avoid any further contact with [redacted]. Pierce consulted with HR director Bolden about whether Fowlkes should be terminated for violation of the no-contact

directive. They both agreed that there was no specific evidence that Fowlkes had sought out [redacted] in violation of the no-contact order, and that the best course of action would be to remove Fowlkes from Lathrop and move him to Tanana Middle School on a full-time basis so there would be no opportunity for him to have contact with [redacted]. Pierce also consulted with attorney Hansen about the matter. Based on her investigation, Pierce concluded that there was an insufficient basis to terminate Fowlkes for violation of the no-contact order and she arranged for him to be transferred full-time to Tanana. Pierce did not recall speaking to Lewis about her investigation or the decision to remove Fowlkes from Lathrop and reassign him to Tanana on a full-time basis.

At the end of the 2012-13 school year, Fowlkes was laid off. In his annual performance evaluation in April 2013, Tanana principal Greg Platt gave Fowlkes an overall evaluation of "Meets Standards." In the evaluation category of "Pupil Contacts," which includes the observation of appropriate boundaries with students, Platt rated Fowlkes as "Exceeds Standards."

In the summer of 2013, Fowlkes applied for a tutor position at Hutchison High School. He was one of two applicants from the internal hiring pool approved by the HR office for the position, but the other applicant subsequently removed herself from consideration. Traci Gatewood, who was the new HR director after having been promoted into the position by Lewis following Clarence Bolden's retirement, testified that she reminded District principals to check the personnel files of all job applicants, including internal applicants, before making a hiring decision. The principal at Hutchison, Dan Domke, testified that he had no

recollection of being told to review the personnel files of internal applicants and assumed that Fowlkes was qualified for the position because he was in the hiring pool forwarded by the HR department. Domke was not aware of Fowlkes's prior discipline and ultimately hired him for the tutor position.

On March 24, 2014, Fowlkes was arrested at Hutchison and charged with multiple counts of sexual abuse of a minor in the first degree. The victim was [redacted], a 15-year-old male student at Hutchison.

2. [redacted]

[redacted] was hired in [redacted] as a [redacted] teacher at [redacted] School and as a [redacted] School. During the fall of [redacted], [redacted] made several comments about the appearance of female middle school students to another teacher at [redacted] that [redacted] considered inappropriate. On one occasion in [redacted], [redacted] and [redacted] went to dinner together. According to [redacted], [redacted] was severely intoxicated and during the course of the dinner confided to [redacted], among other things, that he had just broken up with his 15-year-old girlfriend [redacted] and that he wanted to have sex with a specific student at [redacted] School about whom he had previously indicated a sexual interest. [redacted] reported [redacted]'s comments to [redacted] principal [redacted], but there is no evidence that [redacted]'s concerns were elevated to District administration.

In early [redacted], an assistant principal at [redacted] contacted labor relations director Pierce and reported allegations about [redacted]'s failure to maintain appropriate boundaries with students, although apparently not including the specific

allegations made by [redacted]. Pierce directed that [redacted] be placed on suspension pending investigation. The investigation was conducted by District EEO director Elizabeth Schaffhauser, who issued her findings on [redacted] The findings include a number of infractions where [redacted] failed to maintain appropriate boundaries with students, such as buying lunch and ice cream for student office aides, and where his personal conduct was concerning, such as exhibiting signs of being intoxicated during work hours. The investigation report admonished [redacted] for failing to maintain appropriate boundaries with students, but did not mention any sexual impropriety by [redacted] nor did it address the specific concerns reported by [redacted] to his principal. Upon reviewing the investigation findings, Pierce spoke to principal [redacted] about the need to follow-up on the concerns raised and learned that [redacted] was meeting weekly with [redacted] about these issues. Pierce testified that the issues raised in the investigation findings and her discussion with principal [redacted] would not normally be elevated to the superintendent even though Lewis was copied on the investigation report.

Shortly thereafter, [redacted]'s father [redacted], a retired school superintendent [redacted], was visiting in Fairbanks and got together with Lewis for lunch on [redacted]. [redacted] had previously invited the [redacted] family for dinner at the Lewis home the preceding year when [redacted] arrived in town to begin [redacted] District employment. According to [redacted], after [redacted] returned to school following the [redacted] investigation report, he boasted that he was "untouchable" because he was friends with the superintendent.

On [redacted], [redacted] received a formal disciplinary reprimand and loss of pay for two days from principal [redacted] for violating [redacted] explicit directive to have no contact with a particular student. [redacted]'s disciplinary letter notified [redacted] that any future disregard of an administrator directive would subject him to more severe discipline up to and including termination. The letter was copied to Gayle Pierce and [redacted]'s personnel file, but there is no indication that Lewis was aware of this specific discipline.

In [redacted], Fairbanks police responded to a disturbance at [redacted]'s apartment and found him highly intoxicated with a group of boys, [redacted]. The incident was reported to [redacted] who consulted with Pierce. Pierce concluded that [redacted] needed to resign or be terminated, and communicated this to HR director Bolden. Bolden discussed the matter with Lewis who agreed that [redacted] "needed to go." Bolden recommended that the District enter into a voluntary separation agreement with [redacted] to avoid the time and expense of a potential termination dispute, and Lewis agreed. Lewis consulted with attorney Hansen regarding the proposed separation agreement and accepted certain changes she recommended. Under the separation agreement, [redacted] would resign effective immediately and would waive any and all claims against the District; in exchange, the District would pay him a lump sum of $5000 and would provide him a neutral reference to third parties regarding his employment history. [redacted] accepted the separation agreement which was executed on [redacted].

3. Analysis

The District argues that superintendent Lewis failed to perform his most basic duty of ensuring student safety by mishandling complaints of serious misconduct involving Claude Fowlkes and [redacted]. With respect to Fowlkes, the District contends that Lewis exercised poor judgment by failing to terminate his employment following (a) his inappropriate Facebook messages with [redacted] and (b) his violation of the directive not to have any contact with [redacted]. The District asserts that in deciding to keep Fowlkes employed with the District, Lewis failed to direct further investigation into other serious complaints against Fowlkes, and either ignored or downplayed the repeated warnings of [redacted]. With respect to [redacted], the District argues that Lewis used poor judgment by not terminating him but rather allowing him to resign in a separation agreement that paid him $5000 and provided him with a neutral employment reference. According to the District, Lewis's flawed decisions regarding both employees were compounded by his failure to ensure that an adequate investigation process was in place to capture, retain and make available information about allegations of serious misconduct against District employees.

The parties do not disagree that the superintendent is broadly responsible for the overall management of the District. That responsibility extends to the District's 14,000 students and its 3000 employees, as well as its physical facilities. Given the breadth and scope of the superintendent's responsibilities, he or she must necessarily delegate many of the powers and duties entrusted to the superintendent by the Board, although the superintendent continues to be

responsible to the Board for the execution of all delegated powers and duties. But the fact that the superintendent is "responsible" for everything that goes on within the District does not necessarily mean that whenever a problem arises or something goes wrong, the superintendent has failed to perform his duties and therefore may be terminated for incompetence. In other words, "responsibility" does not necessarily equate to "incompetence." The District acknowledges that the superintendent has broad discretionary authority to make "judgment calls" on many matters, including disciplinary decisions. In this case, after Claude Fowlkes was arrested in March 2014 and an investigation was undertaken, the School Board disagreed, in hindsight, with certain disciplinary judgment calls made by Lewis and his management staff two years earlier. But this does not necessarily mean that Lewis failed to perform his duties or was incompetent. If the "termination for cause" language in Lewis's employment agreement is to have any meaning, the definition of "incompetence" must be interpreted to mean significant and substantial noncompliance with assigned duties. It cannot reasonably mean that whenever the Board disagrees with a discretionary judgment call made by the superintendent or his management staff, that this would be grounds to terminate the superintendent for incompetence. Furthermore, it is fundamentally unfair to judge the superintendent's performance of his duties based primarily on hindsight, i.e., the occurrence of subsequent events. A fair evaluation of the superintendent's discretionary decisions must be based on the circumstances existing at the time each decision was made.

I first examine the District's allegation that Lewis failed to discharge Claude Fowlkes in August 2012 for exchanging inappropriate Facebook messages with [redacted], a student with whom he had a mentor relationship. School Board president Heidi Haas, who was the District's primary witness, testified that in her opinion, any time a District employee has demonstrated inappropriate boundary issues with a student, they should be terminated. Haas further testified that if an employee is untruthful during a disciplinary investigation, they should also be terminated. Fowlkes, however, was a classified employee covered by a collective bargaining agreement that requires progressive discipline and could not be terminated at will, only for just cause. As explained by Gayle Pierce – a seasoned labor relations professional – she took into account that Fowlkes was a longstanding employee without prior discipline, and that there was no sexual element to the inappropriate Facebook messages, in deciding to issue a letter of reprimand and loss of two days' pay instead of terminating Fowlkes. In my capacity as a labor arbitrator who has handled several hundred disciplinary grievances under collective bargaining agreements in the past 25 years, I can say that the level of discipline issued by Pierce was entirely consistent with the severity of Fowlkes's proven misconduct and that it is highly unlikely that a decision to terminate Fowlkes for the inappropriate Facebook messages would be upheld in a grievance arbitration. Accordingly, I conclude that the discipline issued by Pierce was well within the bounds of her professional discretion. I further conclude that superintendent Lewis had no duty to override Pierce's recommended discipline and did not act improperly when he accepted Pierce's disciplinary recommendation.

The District faults Lewis and Pierce for not conducting further investigation of an allegation in March 2012 that Fowlkes had had inappropriate sexual contact with a male client during his employment at [redacted]. The allegation was investigated by Tanana principal Greg Platt who spoke to the [redacted] director but was unable to substantiate the allegation. Platt also learned that the police had not pursued the matter further with Fowlkes beyond an initial contact. Considering that this allegation involved a different employer and there was no substantiated evidence of any misconduct found by [redacted] or the police, I do not find that Lewis or Pierce had any duty to undertake further investigation based on the information available to them at the time.

I next consider the District's charge that Lewis failed to perform his duties by not terminating Fowlkes following his apparent violation of the directive not to have contact with [redacted] in November 2012. This incident was investigated by Pierce who reviewed the witness statements and video of the incident and conducted an investigatory interview with Fowlkes who maintained that it was [redacted] who initiated both contacts. Fowlkes asked to be moved from Lathrop because he could not control [redacted]'s actions in wanting to speak to him. Based on her investigation, Pierce did not believe there was a sustainable basis for terminating Fowlkes for violating the no-contact directive. Pierce consulted with HR director Bolden about the matter, and they both agreed that the best course of action would be to move Fowlkes out of Lathrop so there would be no opportunity for him to have contact with [redacted]. As with the inappropriate Facebook messages, I do not find that Pierce's investigation was deficient or that her decision to transfer Fowlkes to full-time at

Tanana was improper or an abuse of her discretion to make such decisions. To sustain Fowlkes's termination for violation of the no-contact directive, the District would have had to prove that Fowlkes was deliberately insubordinate and that progressive discipline had been exhausted such that termination was the only remaining option under the collective bargaining agreement. In my judgment, based on the evidence gathered by Pierce, this would have been a doubtful proposition. Furthermore, I do not find that Lewis had any duty to seek Fowlkes's termination for violation of the no-contact directive or that he had an obligation to override Pierce's transfer decision. At that point there was no proof of any sexual misconduct by Fowlkes; his only established misconduct was using vulgar language and not observing appropriate boundaries with [redacted] which, under principles of progressive discipline, were insufficient to support termination.

In terminating Lewis, the Board criticized him for the fact that Fowlkes received a "glowing evaluation" from Tanana principal Greg Platt in April 2013. But there is no evidence that Platt's evaluation was based on anything other than his legitimate observations of Fowlkes's performance at Tanana Middle School during the 2012-13 school year. Moreover, the evidence indicates that Lewis was not normally involved in performing or reviewing employee evaluations other than the employees he directly supervised. The Board also blamed Lewis for Fowlkes's placement at Hutchison High School for the 2013-14 school year "with no warning, instructions, or procedures designed to ensure the safety of students" such that Hutchison principal Dan Domke was "completely blindsided" when Fowlkes was later arrested for sex abuse at his school. But HR director Traci Gatewood had

instructed building principals, in person and by email, to check the personnel files of every internal job applicant. Although principal Domke testified that he did not recall receiving such an instruction, if he or his staff had checked Fowlkes's personnel file, they would have seen Pierce's August 2012 disciplinary reprimand and could have taken it into account in deciding whether or not to hire Fowlkes. I conclude that superintendent Lewis cannot fairly be blamed for these alleged deficiencies nor did he fail to perform any duty related to employee evaluations or personnel files.

Next I consider the District's charge that Lewis mishandled the [redacted] situation and used poor judgment in allowing him to resign with a separation agreement that paid him $5000 and provided a neutral employment reference. I agree that [redacted]'s comments to [redacted] about [redacted]'s sexual interest in certain [redacted] students in the fall of [redacted] were a matter of concern that warranted investigation. [redacted] reported the comments to principal [redacted] but it does not appear that [redacted] reported this information to District administration. The District's EEO investigation report of [redacted] detailed certain boundary issues with [redacted] but did not address his sexual comments made to [redacted]. Likewise, principal [redacted]'s disciplinary reprimand on [redacted] addresses [redacted]'s boundary issues with a specific student but did not include the [redacted] information. [redacted] was later disciplined, at the Board's direction, for not reporting [redacted]'s sexual comments to upper management. Under these circumstances, it is unfair to blame superintendent Lewis for not taking action as to allegations of which he was unaware. Nor do I find any evidence,

beyond mere speculation, that Lewis's limited social interaction with [redacted] and his father had any influence on the District's disciplinary investigations of [redacted]'s conduct. Lewis was not directly involved in any of the [redacted] investigations or disciplinary decisions, other than concurring with Pierce's assessment that [redacted]'s employment should be terminated. In this regard, I find nothing improper in Lewis's decision to enter into a separation agreement with [redacted] rather than terminate him. Labor relations director Pierce and attorney Hansen testified that these types of separation agreements are not uncommon and had previously been used within the District without Board approval. Separation agreements secure the employee's immediate resignation in exchange for a small lump sum and a waiver of all claims the employee may have against the employer, frequently saving the time, effort and expense of a grievance arbitration or court litigation. Once Lewis agreed that [redacted] "needed to go," it was not an abuse of his discretion to decide that a separation agreement was the most efficient means of assuring [redacted]'s immediate departure.

The District further charges that Lewis failed to ensure that an investigation process was in place which captured, retained and made available information about allegations of serious misconduct against District employees, constituting a failure of leadership. There is evidence that the District did not have an adequate centralized system for maintaining and tracking disciplinary investigations, sometimes causing management to be unaware of previous discipline pertaining to an employee. For example, there were allegations in February 2009 that Claude Fowlkes had given a student alcohol, tobacco, marijuana, and pornography. The

allegations were investigated by EEO director Schaffhauser who concluded that there was insufficient evidence to substantiate the allegations. Her investigation report, however, was not found in Fowlkes's personnel file and Schaffhauser reported that her investigation file was destroyed in 2012 under the District's document retention policy. Both labor relations director Pierce and superintendent Lewis were unaware of the 2009 allegations and investigation. While this example indicates that the District's procedures for tracking and retaining disciplinary investigations needed improvement, it does not mean that Lewis was incompetent in failing to perform his duties as superintendent. When he took over as superintendent in 2010, Lewis inherited the disciplinary practices and procedures that were in place under previous superintendents. He continued the existing procedures except that he added the requirement that Pierce and other managers responsible for disciplinary investigations should consult with an attorney prior to deciding serious disciplinary matters. By all accounts he was also receptive to and supportive of efforts to improve the District's practices and procedures regarding discipline. For example, when he promoted Traci Gatewood to become HR director in 2013, she proposed a wide-ranging audit of her office's practices and procedures including the tracking and record keeping of disciplinary investigations. Gatewood testified that if Lewis had remained as superintendent, she believed he would likely have accepted her recommended changes and improvements. Under these circumstances, I cannot conclude that Lewis was incompetent or failed to perform his duties as superintendent regarding disciplinary matters.

The District's termination letter also criticized Lewis for making a comment

about the victim of Fowlkes's sex abuse that "minimized the seriousness of [Fowlkes's] misconduct and the harm suffered by the student." This refers to a comment made by Lewis to [redacted] that the victim was [redacted]. [redacted] was initially confused by the comment but later believed the comment was intended to minimize the seriousness of Fowlkes's crime. Lewis denied any intent to minimize the offense. Even if [redacted]'s perception of Lewis's comment is credited, at most it was an isolated stray remark made in a private conversation that is insufficient to establish that Lewis was incompetent or that he failed to perform his duties.

4. Other Grounds for Termination

The District's termination letter identified two additional reasons for terminating Lewis's employment agreement for incompetence. First was the charge that Lewis failed to ensure compliance with wage and hour laws with regard to [redacted]. For many years [redacted] had worked substantial overtime hours [redacted] but had declined to record these hours on [redacted] time sheets and was unwilling to accept payment for the overtime hours. On several occasions Lewis told [redacted] to record any overtime worked on her time sheets, but [redacted] continued to decline to do so. This situation had existed under two previous superintendents, neither of whom had ever instructed [redacted] to record [redacted] overtime hours. Given [redacted]'s willful refusal to record [redacted] overtime even after being asked to do so by Lewis, this hardly justifies Lewis's termination for incompetence. In fact, it appears that Lewis was more proactive on this issue than the two preceding superintendents.

The District's termination letter also alleges that Lewis demonstrated disrespect to the Board and that his attitude "has permeated through to your staff resulting in a climate of disrespect toward the Board," hampering an effective working relationship between the superintendent and the Board. According to Board president Haas, this allegation was based on (a) Lewis's comment to [redacted] that "the board was making a bigger deal out of this then [sic] it needed; they were blowing it way out of proportion and setting the district up for big lawsuits;" (b) Lewis's hiring of outside counsel Rockie Hansen without informing the Board; (c) entering into the separation agreement with [redacted] without informing the Board; (d) the statement in Lewis's email to the Board after Fowlkes's arrest that he would not be sharing information with the Board; and (e) the fact that Gayle Pierce, together with several other senior management members, appeared and made comments to the Board at its May 6, 2014 meeting in support of Lewis. After examining each of these allegations in context, I find that they do not support the Board's conclusion that Lewis was disrespectful or incompetent. First, Lewis's comment to [redacted] was an expression of his personal opinion in a private conversation with a subordinate and does not rise to the level of showing disrespect to the Board; it was merely a disagreement with the Board's actions. Disagreement is not the same thing as disrespect. Second, the evidence shows that the District routinely hired outside attorneys and consultants like Rockie Hansen without notifying or obtaining prior approval from the Board. In Hansen's case, Lewis specifically got approval to hire her from the chief financial officer. Third, as discussed earlier, the District had a past practice of using separation

agreements, without Board involvement, to ensure the immediate departure of an employee rather than engage in potentially expensive and time-consuming arbitration or litigation. While the Board certainly has the authority to require notice and/or approval of such agreements, there was no such policy or directive in place at the time Lewis entered into the [redacted] separation agreement. Fourth, Lewis testified that his statement that he would not be sharing information with the Board after Fowlkes' arrest was based on his mistaken belief that the Board might later play a role with respect to the discipline of a classified employee and was not an attempt to withhold information from the Board. This type of statement is standard at the outset of certain kinds of disciplinary investigations and is not evidence of disrespect. Fifth, the evidence clearly demonstrates that the showing of support for Lewis by Pierce and other senior managers at a Board meeting prior to his termination was a genuine expression of their personal opinions and that Lewis had nothing to do with promoting or organizing their appearance. This is also not evidence of disrespect by Lewis.

Prior to Fowlkes's arrest in March 2014, the Board had given Lewis high marks for his leadership, professionalism and integrity. In his final performance evaluation in July 2013, former Board president Kristina Brophy stated: "Without a doubt, Pete functions with integrity at all times. I believe he sets the example on how to function fairly while striving to assist the board in carrying out the mission." Board member Heidi Haas stated that "Mr. Lewis has worked well overall in an attempt to meet the priorities of the board" and "Mr. Lewis is clear on where he stands on issues and provides the board with adequate information supporting his

position. He maintains a professional relationship with board members even in difficult times." Board member John Thies stated: "Pete is a great leader and superintendent. We couldn't ask for a better person to lead our district." Board member Sue Hull stated: "In my view, Pete has a good relationship with the board" and "I am grateful to have Pete Lewis as our superintendent. He is an able administrator and a highly valuable asset to the district." Board member Lisa Gentry stated: "I appreciate the time Pete puts aside to understand our perspectives and provides clear input. Pete listens to our complaints and gives us the utmost priority to clear them up or make the situation better. He seems genuine in his desire to make the Fairbanks North Star Borough School District the best in Alaska." At the Board meeting on May 13, 2014 – the day after the Board gave notice of its intent to terminate Lewis's employment contract – Board member Wendy Dominique stated that she "did not believe there was anyone who liked to fire someone from their job. She thought Superintendent Lewis was doing a great job, but the board's number one priority was to take care of students. When the board found there were things going on in regards to the allegations, it had no other choice. If the board could have kept Superintendent Lewis, they would have." The foregoing comments indicate that even though the Board felt that Lewis's performance as superintendent had been good or even excellent, it felt compelled by Fowlkes's arrest and the circumstances leading to it to conclude that someone had to be held responsible for what happened and Lewis, as the senior management executive, became that person. If Lewis's employment had been at will, there is no question that he could have been summarily dismissed at the

Board's pleasure. But because Lewis had a three-year contract requiring cause for termination, such as incompetence or a failure to perform his duties, the District is required to prove that Lewis was in fact incompetent and substantially failed to perform his duties. On this record, I conclude that the District failed to demonstrate by a preponderance of the evidence that Lewis was incompetent or that he failed to perform his duties. Therefore, the District did not have valid cause to terminate his employment.

C. Damages

Lewis seeks (a) contract damages for breach of his employment agreement; (b) reputational damages for the Board's alleged false and defamatory statements that damaged his reputation and career; and (c) punitive damages for the Board's alleged "reckless indifference" to his rights.

As to contract damages, the normal rule is that a wrongfully discharged employee is entitled to the total amount of the agreed-upon salary for the unexpired term of his employment, less what he could earn by making diligent efforts to obtain similar employment. *Skagway City School Board v. Davis,* 543 P.2d 218, 225 (Alaska 1975). Lewis was terminated by the District on June 9, 2014 and subsequently obtained employment as superintendent of the Colville, Washington school district beginning July 1, 2014. His contract damages, therefore, would be the difference between what he would have earned for the remainder of his three-year contract with the District and what he earned as the Colville superintendent. This would include such items as non-reimbursed moving expenses; lost wages from the date of termination by the District to the date of hire by Colville; the

difference in salary between his District contract and his Colville contract; the difference in additional compensation for expenses between his District contract and the Colville contract; and the amount forfeited from his State of Alaska retirement account when he was terminated prior to completing five years of employment.

The District argues that Lewis's contract damages should be zero because any lost income from his termination by the District would be more than made up by the increased purchasing power of living in Colville, Washington where the cost of living is lower than in Fairbanks. As noted by Lewis, however, there is no evidence that this methodology for calculating damages has ever been accepted in Alaska. Accordingly, there should be no reduction in Lewis's contract damages based on a geographic cost of living comparison.

As to reputational and punitive damages for the Board's alleged defamation of Lewis, Alaska law provides that speech on matters of public interest is conditionally privileged and requires proof of actual malice to overcome the privilege. *See, e.g., Taranto v. North Slope Borough,* 992 P.2d 1111, 1114-15 (Alaska 1999); *Municipality of Anchorage v. Anchorage Daily News,* 779 P.2d 584, 591 (Alaska 1990). Here there is no question that the School Board's public release of information concerning Lewis's termination involved matters of public interest. As the superintendent of Fairbanks schools, Lewis was clearly a public figure in the community. In the wake of the arrest of a District employee for sexually abusing a student on school grounds, the Board had a legitimate public interest in investigating the circumstances leading to the arrest, including a

determination of whether the District's management staff, including the superintendent, properly performed their duties. Therefore, the Board's public release of its May 12, 2014 letter notifying Lewis that it intended to terminate his employment agreement for cause, and any related statements to the news media, were conditionally privileged.

In his request for reputational and punitive damages, Lewis argues that a number of statements and accusations in the May 12 letter were false and defamatory, and as such constitute "acts done with malice or bad motives or reckless indifference to the interests of another." *Alaska Northern Development v. Alyeska Pipeline Service Co.,* 666 P.2d 33, 41 (Alaska 1983). After considering the entire record, however, I do not find convincing evidence that the Board acted with malicious intent or reckless indifference toward Lewis. The Board authorized an investigation by an outside attorney and, based on information gathered during the investigation, came to the conclusion that Lewis should be held responsible for management's role in the events leading up to the arrest of Claude Fowlkes. Even though I have determined that the allegations in the Board's May 12 letter are insufficient to prove that Lewis was incompetent or failed to perform his duties, this does not mean that the Board acted with malice or reckless indifference. Furthermore, as noted by the District, Alaska law does not permit punitive damages to be awarded against a municipality without statutory authorization. *Hazen v. Municipality of Anchorage,* 718 456, 465-66 (Alaska 1986); *Richardson v. Fairbanks North Star Borough,* 705 P.2d 454, 456 n.1 (Alaska 1985). Accordingly, I conclude that Lewis is not entitled to reputational or punitive damages.

Finally, Lewis requests an award of attorney's fees and costs, including the costs of this arbitration. Attorney's fees and costs will be awarded separately following the issuance of this interim award upon proper motion and supporting evidence. With respect to the costs of arbitration, I note that Alaska law requires the employer to be responsible for all of the costs of arbitration where the underlying employment agreement requires the employee to arbitrate, rather than litigate, any disputes arising out of the employment. *Gibson v. Nye Frontier Ford,* 205 P.3d 1091, 1099-1101 (Alaska 2009).

INTERIM AWARD

The Fairbanks North Star Borough School District did not have proper cause to terminate the employment agreement of superintendent Peter B. Lewis. Lewis is awarded contract damages as specified in the body of this decision. Within 10 days of the date of this award, counsel shall attempt to stipulate to the exact calculation of the contract damages and shall advise the arbitrator. Lewis is not awarded any reputational or punitive damages. Attorney's fees and costs, including the costs of arbitration, will be awarded separately upon proper motion made within 10 days of the date of this award.

Respectfully submitted,

Robert W. Landau
Arbitrator

September 14, 2016
Anchorage, Alaska