



THE EMPLOYMENT OF THE SUPERINTENDENT: THE HIRING PROCESS AND CONTRACTUAL PROVISIONS

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BOARD POLICY & CBA CONSIDERATIONS

- ❖ The Board should review its employment related policies to assure that the solicitation of candidates comport with the protocols as stated.
 - Equal opportunity policy
 - Nondiscrimination policy
 - Recruiting and Hiring policy
- ❖ Provisions in collective bargaining agreements (“CBAs”) may require postings of administrative openings, including the position of Superintendent of Schools.

MEANS OF CONDUCTING THE SUPERINTENDENT'S SEARCH

- ❖ Superintendent's Searches are usually conducted through a professional search firm or through the BOCES.
- ❖ School Boards may choose to conduct a search through their own means using school district staff .
- ❖ When intending to engage a search firm or BOCES an RFP method should be used.
- ❖ An important element of the search process will be whether or not the search is considered to be "private" such that candidate identities will not be known until the final candidate is chosen.

MEANS OF CONDUCTING THE SUPERINTENDENT'S SEARCH

- ❖ The search consultants and BOCES search team may be interviewed in executive session prior to engagement.
- ❖ A contract that includes the time table for the search, the deliverables and payment schedule should be entered into if a search firm or BOCES is engaged.
- ❖ The manner in which the constituencies of the school community will be engaged is an important aspect of conducting the search.
- ❖ The development of the profile of the superintendent should be determined ahead of seeking applicants.

FORMAL BACKGROUND CHECKS

- ❖ If the Board is doing formal background check with a company the Board must comply with the requirements set forth in the federal Fair Credit Reporting Act..
- ❖ The applicant must be informed, in writing (in a stand alone format) that the information obtained may be used as part of decision making process.
- ❖ Informed of of his or her right to a description of the nature and scope of the investigation
- ❖ There must be written permission to do the background check.
- ❖ Certify to the company from which you are getting the report that you: (a) notified the applicant and got their permission to get a background report; (b) complied with all of the FCRA requirements; and (c) won't discriminate against the applicant or employee, or otherwise misuse the information in violation of federal or state equal opportunity laws or regulations.

CONSIDERATIONS DURING THE HIRING PROCESS

- ❖ New York law prohibits all employers - both public and private - from asking prospective or current employees about their salary history and compensation. It also prohibits businesses from seeking similar information from other sources.
- ❖ The law also prohibits an employer from relying on an applicant's salary history information as a factor in determining whether to interview or offer employment
- ❖ An applicant may voluntarily disclose their salary history information to a prospective employer, for example, to justify a higher salary or wage, as long as it is being done without prompting from the prospective employer. If an applicant voluntarily discloses salary history information, the prospective employer may factor in that information in determining the salary for that person.

DURATION OF SUPERINTENDENT CONTRACTS

- ❖ In Westchester and Putnam Counties there are four categories of employing entities whose superintendents may be employed for the following terms:
- ❖ Union Free and Central School Districts: 3-5 years (Ed. Law 1711[3])
- ❖ Central School Districts: 3-5 years (Ed. Law 1711[3])
- ❖ Small City School Districts: 1-5 years (Ed. Law 2507[1])
- ❖ BOCES: Up to 3 years (Ed. Law 1950[4][a][1])

[Note: the executory period of the contract or contract extension may not exceed the maximum number of years described above. See *Lewiston-Porter CSD v. Sobol*, 154 A.D.2d777(1989). A Shorter contract terms would be void. See *Appeal of Greenstein*, 20 Ed. Dept. Rept. 304(1980)]

CONTRACT DURATION AND “EVERGREEN CLAUSES”

- ❖ Since contract extension agreements are lawful, contract language may include an **Evergreen Clause** that would automatically renew the agreement for an additional year or years, so long as the executory period of the extension would not exceed the permissible contract term.
- ❖ Where such clauses are agreed to there should be a notification requirement imposed upon the Superintendent to forewarn the Board of the approaching deadline that would trigger the extension.

[Sample Language: “For automatic extension of this agreement to occur, the Superintendent must notify the Board in writing of the date by which its decision to extend the agreement must be acted upon or else this automatic renewal provision shall be null and void .”]

CONTRACT RENEWAL & TERMINATION CLAUSES

- ❖ A common provision in the employment agreement is a **notification of intent to renew** for an additional year(s).
- ❖ A one year prior notice requirement is most common, but a longer period of notice is permissible.
- ❖ Additional language indicating that a failure to give notice of intent to renew the agreement shall not result in an automatic extension is important in order to avoid giving public notice that the agreement is not being extended. Otherwise, typically, an addendum agreement or new agreement would be voted upon at or about the time of the renewal notice deadline date.
- ❖ Superintendent's notice to voluntarily terminate the agreement is typically 4-6 months.

FAILURE TO EVALUATE AND CONTRACT RENEWAL

- ❖ In *Appeal of Wilson*, 47 Ed. Dept. Rep. 448(2008) a school superintendent appealed to the Commissioner to have her contract extended based upon a failure to implement the evaluation process in the Superintendent's Contract.
- ❖ The Commissioner denied the appeal noting that the automatic renewal provision in the contract was not dependent upon the outcome of the annual evaluation of the Superintendent required by the Commissioner's APPR Regulations at 8 NYCRR §100.2(o)(1)(iii)(a)(2)

SALARY AND DEFERRED COMPENSATION PROVISIONS

- ❖ Salary Determination based upon *comparables*, experience and with an eye towards retention.
- ❖ Future year increases may be based upon: [1] fixed percentage increases (e.g. tax cap percentage);[2] evaluation based increases and/or [3] goals acquisition based increases (to base or non-recurring bonus payment).
- ❖ Longevity based retention pay or deferred compensation
- ❖ Annual non-elective district contributions into the superintendent's IRC§403(b) tax sheltered annuity account. (Subject to the limitation of IRC §415(c) for all employee elective contributions into IRC §403(b) and §457 accounts, as well as the employer non-elective contribution into the §403[b] account)

EVALUATION & CRITICISM

- ❖ The Superintendent of Schools is subject to annual evaluation on a form typically subject to mutual agreement.
- ❖ If agreement cannot be reached the Board should have the contractual right to determine the evaluation instrument.
- ❖ The evaluation should be developed at the beginning of the school year and conducted to conclusion by no later than June.
- ❖ Most agreements have a contract clause that requires the Board to bring to the Superintendent's attention significant criticisms.

LEAVE BENEFITS IN SUPERINTENDENTS' AGREEMENTS

- ❖ Vacation Days*
- ❖ Sick Leave (meeting at least the statutory minimum of 10 annual and 150 accumulated of Ed. Law §3005-b)*
- ❖ Holidays
- ❖ Personal Leave
- ❖ Bereavement Leave

[Note 1: There are often provisions for payouts for vacation days, annually or upon separation/retirement. Sick leave payout provisions are also common features upon separation/retirement. Payments may be made into the Superintendent's IRC §403(b) account.]

Note 2: According to the NYS Comptroller's audits, payouts should be prorated for days vesting in the final school year of employment for pre-June 30 separations See Report of NYS Comptroller 2007M-213.]

HEALTH INSURANCE BENEFITS

- ❖ **Health Insurance** - contract language references to health insurance plan participation and premium cost sharing during the period of active employment should be worded flexibly to assure participation in a plan that can be made available to the Superintendent (i.e., “*The Superintendent shall be entitled to participate in a District provided health insurance plan.*”)
- ❖ **Retiree Health Insurance** - the agreement should clearly state the minimum period for vesting and participation in a District provided health insurance plan, as well as the premium share, conditioned upon retirement to receive benefits from the NYSTRS.
- ❖ **Medicare Reimbursement** - rights should be explicitly stated to be conditioned upon the Superintendent retiring from the District to receive benefits from the NYSTRS. (e.g., floor or standard Medicare Part B reimbursement)
- ❖ **Dental and Optical Insurance** - are often through union welfare benefits funds or a District provided plans.

HEALTH INSURANCE BENEFITS

- ❖ **Disability Insurance** - usually based upon a dollar limitation regarding the District's annual payment.
- ❖ **Life Insurance** – usually an individual or group term policy based upon a face value amount or a contractual provision with a specific dollar limitation regarding the District's annual payment.

[Note: The NYS Comptroller recommends several quotes where face value of insurance is contractually referenced]

STATUTORY RESTRICTION REGARDING “ME-TOO” PROVISIONS

- ❖ The Superintendent’s Agreement may not have clauses that tie-into salary or benefits provisions from other employee contracts or collective bargaining agreements:
- ❖ Education Law Section 1711(3)
- ❖ Education Law 2507(1)

The contract terms “relating to an increase in salary, compensation or other benefits, shall not be based on or tied to the terms of any contract or collective bargaining agreement that the board of education has or will enter with the teachers or other employees of the school district.”

TERMINATION PROVISIONS

- ❖ **“For Cause” Termination** – based upon conducting a due process proceeding that may be held in private, preceded by a probable cause finding by the Board of Education.
- ❖ Typically a Board appointed hearing office presides and makes a report with recommendations for Board action on the charges and whether or not the contract may be terminated.
- ❖ Pay rights are typically continued during the pendency of the proceedings.

- ❖ **“No-Fault Termination”** – Usually a feature in longer term contracts, allowing for placement on a paid leave of absence with a duty of due diligence to seek comparable employment elsewhere before the final contract year.

RESIDENCY REQUIREMENTS & MOVING EXPENSES

- ❖ **Residency** - may be required either within the boundaries of the school district or within a radial mileage distance from the District Offices. (e.g. 30-40 miles)
- ❖ Failure to meet a residency deadline could result in the automatic discontinuation of the contract, without invoking the *for cause* due process hearing provision (e.g., where residency outside of the district is undisputed after inquiry)*. See *Appeal of D. C. 48 Ed. Dept Rep 113*, Decision No.15,809(2008)

* Minimal Due Process as described in *Cleveland Bd. of Educ. v, Loudermill*, 470 532(1985)

RESIDENCY REQUIREMENTS & MOVING EXPENSES

- ❖ **Moving Expenses** – A fixed upper limit cost should be established and a requirement for there to be at least three price quotes from reputable moving companies.
- ❖ These expenses may include the cost of temporary housing while exploring rental or purchase opportunities.
- ❖ A time limit on when such costs may be reimbursable is a common provision.

NYSED REQUIREMENTS

- ❖ **Certification** – The Superintendent of Schools must maintain certification as required by NYSED (School District Administrator [“SDA”]or School District Leader [“SDL”])
- ❖ **Distinguished Educator Clause** - Pursuant to Ed. Law §211-b(5)(a) all contracts with superintendents must specify that the superintendent shall be required to cooperate fully with any distinguished educator appointed by the commissioner to work with the District for its improvement as per Ed. Law §211-c.

MEDICAL EXAMINATIONS

- ❖ A post offer of employment and pre-employment medical examination for fitness to serve as Superintendent is a common provision in Superintendent's Contracts.
- ❖ Some agreements provide for the annual examination of the Superintendent at school district expense (i.e., reimbursement for uninsured expenses).
- ❖ For purposes of compliance with the Americans with Disabilities Act, post employment medical examinations may not be compelled unless there's a reasonable basis to direct the examination (informed by a medical professional) in accordance with Ed. Law §913.

INDEMNIFICATION

- ❖ The contract usually contains a provision that the Superintendent will be afforded the indemnification provisions in the following statutory provisions:

Education Law 3023 – Negligent Acts

Education Law 3028 – Corporal Punishment

Education Law 381 Iv - Intentional Acts

Pub. Officers Law §18 – Civil Actions and Proceedings

[Note: Language may not be added to indemnify against punitive damages due to public policy restrictions under NY Law]

EQUIPMENT AND TRANSPORTATION

- ❖ The Superintendent is usually provided with a District owned computer for business use and a District paid for cell phone for business use and incidental personal use.
- ❖ Some contracts provide for the business use of a personal cellphone via monthly payment.
- ❖ The business use of personal vehicle for out of district travel is usually paid for at the current IRS mileage rate.
- ❖ Car allowances are common and usually range between \$400 and \$700 per month.