IN THE COURT OF COMMON PLEAS OF LEBANON COUNTY
PENNSYLVANIA

CIVIL DIVISION

CORNWALL-LEBANON SCHOOL DISTRICT, Petitioner	:	NO. 2015-01556
v.	:	
CORNWALL-LEBANON EDUCATION ASSOCIATION, Respondent	:	

ORDER OF COURT

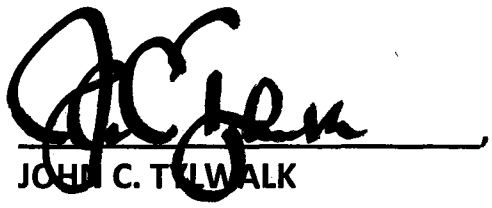
AND NOW, this 21st day of April, 2016, the following is the Order of this Court in accordance with the accompanying Opinion:

1. The Motion to Strike Certain Attachments to Petition submitted by Cornwall-Lebanon Education Association is GRANTED, in part, and DENIED, in part. All items with the exception of the Collective Bargaining Agreement, the Decision and Award of the Arbitrator, Exhibits "Dt 12," "Dt 19," "Dt23," "Dt24," "Dt26" and "Dt27", and those portions of the transcript and Arbitration Briefs which deal with the public policy argument asserted by Petitioner Cornwall-

Lebanon School District are stricken from the record for our consideration in this matter.

2. The Petition to Review/Vacate Arbitration Award Pursuant to the Pennsylvania Uniform Arbitration Act, 42 Pa.C.S.A. 7301 *et seq.* of the Cornwall-Lebanon District OF Cornwall-Lebanon District is GRANTED as the Court finds the existence of just cause to support the termination of the employment of Luke Todd Scipioni.

BY THE COURT:



_____, P.J.
JOHN C. TYLWALK

JCT/jah

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v.	:	
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APPEARANCES:

TIMOTHY SHEFFEY, ESQUIRE	**FOR CORNWALL-LEBANON**
REILLY WOLFSON	**DISTRICT**
ROBERT DANIELS, ESQUIRE	**FOR CORNWALL-LEBANON**
KILLIAN & GEPHART, LLP	**EDUCATION ASSOCIATION**

OPINION, TYLWALK, P.J., APRIL 21, 2016.

This is an appeal from an Arbitrator's award issued on August 16, 2015 with regard to the employment of Luke Todd Scipioni ("Scipioni"), who had been a high school teacher and basketball coach employed by Petitioner Cornwall-Lebanon District ("District"). The District and Respondent Cornwall-Lebanon Education Association ("Association") are parties to a Collective Bargaining Agreement

("CBA") relating to professional employees of the District. Scipioni is a member of the Association. The Association filed two grievances after Scipioni, a tenured Social Studies teacher, was suspended and subsequently terminated from his employment. The grievances were consolidated and grievance hearings were held before Arbitrator Ralph H. Colflesh, Jr. ("Arbitrator") on February 23, March 23, March 25, April 29, and June 2, 2015. After the parties submitted post-hearing Briefs on July 17, 2015, the Arbitrator issued his Decision and Award on August 16, 2015. The Arbitrator sustained, in part, and granted, in part, the grievances. Under the award, Scipioni would be reinstated to his position without back pay and without District contributions to his employment benefits during the time of his suspension.

The District filed a Petition to Review/Vacate the Arbitration Award ("Petition") with this Court, arguing that the reinstatement of Scipioni was against established well-defined public policy. In support of its Petition, the District submitted an appendix containing all materials which were before the Arbitrator, including the CBA, the arbitration hearing briefs, the exhibits presented at the hearings, and the transcripts of the arbitration hearings. The Association filed an Answer to the Petition simultaneously with a Motion to Strike Certain Attachments to the Petition ("Motion"). In its Motion, the Association seeks to

strike all the documents contained in the appendix to the Petition except for the CBA. We have had the benefit of the parties' Briefs and Oral Argument on the Petition and the Motion and both matters are presently before us for resolution.

This appeal is brought pursuant to the Pennsylvania Uniform Arbitration Act, 43 Pa.C.S.A. §7301 *et seq*. The standard for a common pleas court's review of an arbitration award is the essence test, a two-pronged test under which an award must be upheld if (1) the issue as properly defined is within the terms of the collective bargaining agreement, and (2) the arbitration award can be rationally derived from the terms of the collective bargaining agreement. ***State System of Higher Education (Cheyney University) v. State College University Professional Association,*** 743 A.2d 405 (Pa. 1999). However, even if the arbitrator's award meets the essence test, an award may be vacated if it contravenes a well-defined, dominant public policy, as ascertained by reference to laws and legal precedents, and poses an unreasonable risk that the public policy will be undermined if the award is implemented. ***Colonial Intermediate Unit #20 v. Colonial Intermediate Unit #20 Education Association,*** 109 A.3d 371 (Table) (Pa. Commw. 2015). Here, the District concedes that the Arbitrator's award satisfies the essence test, but contends that the award should be vacated because it falls within the "public policy" exception.

The proper application of the public policy exception to the essence test is a pure question of law; our standard of review is *de novo,* and our scope of review is plenary. ***Philadelphia Housing Authority v. AFSCME,*** 52 A.3d 1117 (Pa. 2012), citing ***Dechert LLP v. Commonwealth,*** 998 A.2d 575, 579 (Pa. 2010); ***Franklin Regional District v. Franklin Regional Education Association,*** Nos. 114 C.D. 2015 and 147 C.D. 2015, citing ***Philadelphia Housing Authority v. American Federation of State, County, and Municipal Employees, District Council 33, Local 934,*** 52 A.3d 1117, 1121 (Pa. 2012).[1] However, common pleas courts are bound by an arbitrator's fact findings and those fact findings form the basis for a court's analysis of the applicability of the public policy exception. ***Franklin Regional District v. Franklin Regional Education Association,*** Nos. 114 C.D. 2015 and 147 C.D. 2015, citing ***Pleasant Valley District v. Schaeffer,*** 31 A.3d 1241 (Pa. Commw. 2011). Accordingly, a common pleas court may not consider and reinterpret discounted evidence or reweigh accepted evidence to determine whether a basis exists for applying the public policy exception. ***Id.*** Thus, although we must accept the findings of fact determined by the Arbitrator, we conduct a *de novo* review

[1] The ***Franklin Regional District*** case is an unreported Memorandum Opinion issued by the Commonwealth Court of Pennsylvania on January 7, 2016. It was submitted for our consideration by the Association via Application to File Post-Submission Communication after Oral Argument had been conducted. We granted the Association's Application by Order dated January 4, 2016. The Association posits that it is instructive in our decision as to what materials we may consider in rendering our decision. The Association may rely on it for its persuasive value, but it is not binding precedent on this Court. Pa.R.A.P. No. 3716.

with regard to the application of those fact findings to the legal basis for the public policies advanced by the District.

With regard to the Association's Motion, we agree that we are constrained from consideration of any items other than the Decision and Award of the Arbitrator, the CBA, and the exhibits and matters of law pertinent to the District's public policy argument since we are precluded from making our own factual determinations. For that reason, we will grant the Association's Motion, in part, and strike materials other than those from the record for our resolution of this appeal.

The parties stipulated that the main issue for determination by the Arbitrator was whether the District had just cause to suspend and fire Scipioni and, if not, what the appropriate remedy would be. As previously indicated, the Arbitrator determined that the District failed to establish just cause for Scipioni's termination and mitigated the remedy to suspension with certain penalties.

The CBA entered between the parties provides that "[n]o professional employee shall be demoted, suspended or discharged without just cause." (CBA, Exhibit "1," p. 15) In both grievances, the Association complained that the District's actions are in violation of this covenant. The District had advanced four bases for Scipioni's termination: Scipioni's downloading of illegal songs onto his

District-issued computer; the receipt, retention, and forwarding of emails containing disturbing language and images on his District-issued computer; an inappropriate relationship with a female student of the District; and his lack of candor when questioned by District officials about that relationship. The Arbitrator found no basis with respect to the downloading of music or Scipioni's relationship with the student. However, he did find Scipioni at fault with regard to several of the emails in question and for his failure to be truthful with District officials when asked about the relationship.

In reaching his determination, the Arbitrator noted the following facts relevant to our resolution of this matter. Scipioni was the head basketball coach of the Cedar Crest High School girls' basketball team for the 2003-2004 school year. Late in the season, a senior-year member of the team ("AH"), was experiencing problems at home and related to the coaching staff, including Scipioni, that she had been subjected to sexual abuse by her stepfather. The matter was reported to and handled by law enforcement authorities.

During the school year, AH and Scipioni had significant communications and interactions which culminated in a sexual encounter on the night of AH's

graduation ceremony.[2] The two continued their sexual/romantic affair throughout the summer following AH's graduation until she left for college in or about that August or September. There were also "an intense number" of phone calls and text messages exchanged during the summer months. (Arbitrator's Decision and Award, p. 3) Even after AH left for college, they engaged in communications about how much they loved and missed each other. Scipioni made several statements in which he admitted the affair to his wife. AH also admitted the affair to her sister and, later during the investigation of this matter, to District Superintendent Dr. Philip Domencic. Rumors of an inappropriate relationship between AH and Scipioni began circulating around the District and Scipioni ceased coaching basketball, citing "family pressures." (Arbitrator's Decision and Award, p. 3)

In or about May 2010, Scipioni met with Dr. David Helsel, who was then the high school principal. Scipioni was upset that the School Board had declined his request to participate as the boys' basketball coach. Dr. Helsel advised Scipioni that the Board was concerned with rumors of his relationship with a former player and asked whether he was sure that he had never done anything with AH; Scipioni replied "no." (Decision and Award of Arbitrator, p. 12) When asked

[2] AH turned eighteen years of age in May 2004.

again whether anything happened with AH, Scipioni again told Dr. Helsel "no." (Decision and Award of Arbitrator, p. 12) Scipioni admitted to Dr. Helsel that he had been "too close" with AH due to her family problems and that the situation had caused him marital strife.

During the summer of 2014, Dr. Domencic received a call from an anonymous female who offered to provide information regarding the relationship between AH and Scipioni. After receiving the call, Dr. Domencic instituted an investigation during which he interviewed AH, Scipioni, AH's stepfather, and Jennifer Hartman, Scipioni's estranged wife ("Hartman"). Hartman advised that she had suspected that AH and Scipioni were having an affair during the last half of the 2004 school year and that she found messages about their sexual liaisons on Scipioni's computer during the summer of 2004. When she had confronted Scipioni, he admitted that he had a sexual affair with AH. When Dr. Domencic met with AH on July 1, 2014, she wept and admitted to having a sexual relationship with Scipioni sometime in 2004 after her eighteenth birthday when she was no longer a student. When Dr. Domencic questioned Scipioni about his relationship with AH, Scipioni answered that they had been "friends." When asked whether they had ever had a sexual relationship, Scipioni refused to answer and his Association representative ended the interview, indicating the need to

consult with an Association attorney. Dr. Domencic then suspended Scipioni without pay based on his lack of cooperation.

Shortly thereafter, Dr. Domencic arranged for Scipioni's District-issued computer to be searched for evidence of his relationship with AH. During examination by the District's Director of Technology, numerous inappropriate emails, as well as sixty-one downloaded songs which contained no indication of licensure, were found. The District posited that this misuse of his District computer, along with his inappropriate relationship with AH and his deceit during the investigation of that relationship, constituted immoral conduct which justified his suspension and termination.

At the Arbitration hearings, Scipioni continued to deny the relationship and AH recanted her prior admissions regarding the affair. The Arbitrator noted that during the time of the hearings, AH stayed in the home of William Rakow, a retired District psychologist, and his wife. At the time, AH, who was married with two children, was experiencing problems in her marriage due to her participation in this case. Dr. Rakow testified that Scipioni visited AH in his home when he and his wife were away on a trip and this was verified by AH. The fact of this meeting led the Arbitrator to the conclusion that AH was attempting to protect Scipioni just as he was trying to protect himself.

The Arbitrator dismissed the charges regarding Scipioni's music downloads as he found a lack of convincing evidence that Scipioni deliberately downloaded copyrighted material. The Arbitrator found that the subject emails and images on Scipioni's District computer were "simply examples of crude, vulgar, jejune humor, more typical of adolescents than adult professionals" and that "[i]mportantly, not one is pornographic" (Decision and Award, p. 19). He found only four of the images which "would reasonably trouble the District:" He described these as follows:

> One is a Black dialect image captioned "Why Does poor People be Poor?" as though all poor people are Black. The others depict young women of likely high school age. One of those is of a girl leaning over an instructor's desk with the caption "Booty. The difference between getting an A and just barely passing." A second shows a young woman in a roadway with the caption "Play Dumb. If she looks TOO young ... just assume she is 18." And the third shows what looks like a high school girl in a micro mini skirt in a hallway lined with lockers with the caption "Every Male Teacher That Day contemplated the consequences."

(Arbitrator's Decision and Award, p. 19) Despite the numerous other similar images/quotations, the Arbitrator found only these four to be of such a nature as to warrant some sort of discipline, although not termination.

With regard to Scipioni's relationship with AH, the Arbitrator first recognized that "the District has a compelling interest to assure its staff are not acting inappropriately with students. The enforcement of that interest requires

investigative efforts, which, in the case of suspected acts during a student's enrollment in the District, would logically include acts even after the potential victim has left the District." (Arbitrator's Decision and Award, pp. 23-24) In addition, he noted

> "it was completely reasonable for the District to suspect there had been an untoward relationship *during* AH's school days since it is uncommon for such relationships to mature without a gradual advance. It was for that reason the District had every right to investigate and question its employees, including Mr. Scipioni, about his post-graduation connections with AH. Having established those, the District could logically move to an investigation of whether there was any illicit relationship while AH was a student. The fact that the District was unable to procure evidence of a pre-graduation relationship is immaterial. What matters is that it had the right to question Mr. Scipioni, and as its employee Mr. Scipioni owed the District a duty of honesty."

(Arbitrator's Decision and Award, p. 24)(emphasis in original)

The Arbitrator accepted the testimony of the various witnesses who testified that a sexual affair between AH and Scipioni did in fact occur. Hartman recounted Scipioni's confession that he had first become intimate with AH on the evening of her graduation from the high school in a parking lot of a nearby swim club where Scipioni was on the Board of Directors and where he had helped AH procure a summer job. AH's sister, Ms. Carhart, testified that prior to graduation, AH had told her that the two had planned to, and did have a sexual encounter on the night of her graduation. There was also evidence of internet communications

between the two which discussed their relationship. The pair also continued to communicate after AH was away at college. Despite his finding that a post-graduation sexual/romantic relationship existed between the two, the Arbitrator found no culpability on the part of Scipioni since it occurred after graduation. The Arbitrator did find that Scipioni failed to fulfill his duty to respond to the questions posed to him by District officials with honesty and candor, but opined that these "falsehoods" were "somewhat excusable and understandable." (Arbitrator's Decision and Award, p. 25) Nonetheless, the Arbitrator determined that Scipioni should be penalized in some manner for this dishonesty.

In conclusion, the Arbitrator stated that "[g]iven these considerations, I believe the punishment for Mr. Scipioni's failure to meet his obligations to the District, taken in concert with his otherwise good and lengthy record with the District, should afford him a second chance, albeit one with a serious contingency and penalty." (Arbitrator's Decision and Award, p. 25) He therefore mitigated Scipioni's termination to a year-long suspension without pay or District contributions to any benefits for the 2014-2015 school year. Scipioni was to be reinstated for the 2015-2016 school year, with certain contingencies.

A school system has a duty to create and maintain a safe environment for its students. ***Westmoreland Intermediate Unit No. 7 v. Westmoreland***

Intermediate Unit No. 7 Classroom Assistants Educational Support Personnel Ass'n, PSEA-NEA, 977 A.2d 1205 (Pa. Commw. 2009), vacated and remanded on other grounds, 66 A.3d 250 (Pa. 2013), aff'd 72 A.3d 755 (Pa. Commw. 2013). Under Pennsylvania law, school authorities stand *in loco parentis* over children while they are in attendance at school. ***Axtell v. LaPenna,*** 323 F.Supp. 1077 (W.D. Pa. 1971); 24 P.S. §13-1317. School personnel perform an essential mentoring role and serve as role models for their students. ***Westmoreland Intermediate Unit No. 7 v. Westmoreland Intermediate Unit No. 7 Classroom Assistants Educational Support Personnel Ass'n, PSEA-NEA,*** *supra.*

It is a clear public policy that students should be protected from sexual discrimination in any form. ***Slippery Rock University v. APSCUF,*** 71 A.3d 353 (Pa. Commw. 2013). Professional employees are subject to termination for engaging in an amorous affair with a student. ***Sertik v. School District of Pittsburgh, 584 A.2d 390*** (Pa. Commw. 1990). A school district has a duty to protect its students from inappropriate sexual conduct, as defined by the Public School Code, by its personnel:

> "Sexual misconduct" shall mean any act, including, but not limited to, any verbal, nonverbal, written or electronic communication or physical activity, directed toward or with a child or a student regardless of the age of the child or student that is designed to establish a romantic or sexual

relationship with the child or student. Such prohibited acts include, but are not limited to, the following:

(1) sexual or romantic invitations;

(2) dating or soliciting dates;

(3) engaging in sexualized or romantic dialogue;

(4) making sexually suggestive comments;

(5) self-disclosure or physical exposure of a sexual, romantic or erotic nature; or

(6) any sexual, indecent, romantic or erotic contact with the child or student.

24 P.S. §2070.1b

As noted by the Arbitrator, the obligation to protect students and regulate teacher/student interaction includes the right to investigate alleged incidents and question its employees. A school employee owes a duty of frankness to a superior and is obliged to cooperate and may be dismissed due to insubordination and lack of frankness, candor and intellectual honesty. ***Board of Public Education, Philadelphia v. August,*** 177 A.2d 809 (Pa. 1962). A public employee owes undivided loyalty to his employer and may not act in a way which compromises his honesty and integrity, or in conflict with the employer's

interests. ***Shiomos v. S.E.R.S.,*** 626 A.2d 158 (Pa. 1993); ***Barnett v. Penn Hills School District,*** 2015 WL 5436932 (Pa. Commw. 2015).

Based on such authorities, we agree with the Arbitrator that it is a well-defined public policy of this Commonwealth that a school district must ensure the safety of its students, including protection from inappropriate sexual/romantic behavior by its teachers. As noted by the Arbitrator, the District had a compelling interest in conducting its investigation into this relationship, and Scipioni owed a duty of honesty which he breached by failing to provide truthful responses to the questions posed to him during the investigation.

That being said, it is there that we part ways with the decision and award fashioned by the Arbitrator. For though we must accept the Arbitrator's factual findings, we are not bound by his application of the law surrounding public policy to those findings. After reviewing the public policies enunciated by the various sources, along with the Arbitrator's findings of fact, we are in disagreement with the application of those principles to the factual determinations.

The Arbitrator acknowledged a public school teacher's obligations of loyalty and honesty to his employer, as well as a school district's duty to protect its students from untoward behavior on the part of its teachers. He found that Scipioni had an above average amount of communications and interactions with

AH prior to her graduation and that the relationship became intimate the night of the graduation ceremony. The Arbitrator noted that under these circumstances, it is unlikely that such a sexual relationship would ensue without some prior development. In fact, the Arbitrator found credible the testimony of Ms. Carhart who testified that prior to graduation, AH had described plans to meet for consummation of the relationship on the night of her graduation ceremony. Scipioni also admitted to his wife that on the same evening as the graduation ceremony, the two met in a swim club parking lot and became intimate.

We disagree with the Arbitrator's assessment of these factual circumstances with regard to the District's obligations to its students. The Arbitrator found no culpability on the part of Scipioni for his relationship with AH. The Arbitrator opined that a post-graduation relationship is beyond the reach of the District's authority to regulate the conduct of its teachers toward students. In some circumstances, we would agree with this conclusion. However, we do not believe that the law can be applied to the facts in a vacuum, for the entirety of this situation should have been considered in the evaluation of Scipioni's conduct.

It is true that the Arbitrator found no facts to indicate that Scipioni actually engaged in any sexual acts with AH prior to the night of graduation. However, this is not a situation where a teacher/coach and a former student connected and

innocently entered a relationship after the former student had been out of school for some time. This sexual/romantic relationship had its roots firmly planted during the time that AH was a District student, with plans being made to consummate that relationship as soon as she had her diploma in hand. We do not believe that public policy condones such conduct. Despite the fact that no actual sexual encounters occurred prior to the graduation ceremony, we believe that the prior planning of a sexual/romantic tryst to occur shortly after the conclusion of the graduation ceremony conflicts with the District's interest and obligation to protect its students from being "groomed" and prepared for future sexual conduct by District personnel. Scipioni extended an "invitation" to AH within the meaning of Section 2070.1b(1), when he planned with her, while she was still a District student, to have a sexual encounter on her graduation night. It does not matter that they waited until after graduation for that plan to be carried out.

Moreover, although the Arbitrator discredited his findings of Scipioni's failure to be truthful with District officials as being human nature, the fact remains that the Arbitrator found that he did in fact lie on numerous occasions, both during the investigation and during the Arbitration hearings. Clearly, the policies underlying the duties imposed upon a school district and a teacher/coach

are in no way served by the acceptance of such behavior. Scipioni's conduct directly compromised the ability of the District to implement the public policy imposed upon it to protect its students and to fully investigate allegations of this nature.

We are also in discord with the Arbitrator's application of public policy with regard to the emails and images located on Scipioni's District computer. These items humorized and trivialized smoking, domestic violence, crimes of luring and kidnapping, pornography, referenced offensive sexual activities and "cybersex," depicted homosexuality and lesbianism in an unbecoming light, and made light of taking advantage of and engaging in sexual conduct with young females. The enactment of various legislation indicates the public policies against the type of conduct glamourized and encouraged by these images/quotations. For example, see, Protection from Abuse Act, 23 Pa.C.S.A. §6101 *et seq*; crimes against the luring of children into vehicles, sexual assault, and corruption of minors (18 Pa.C.S.A. §§2910, 3122.1 and 6301, respectively); Sale and Use of Tobacco (18 Pa.C.S.A. §6305/35 P.S. §1233.5) Although there is no evidence that any District students actually viewed these emails, we believe that they are reflective of Scipioni's disregard for the District's obligation to ensure that such subject matters are not present in the school environment in any manner. As such,

Scipioni has failed in his role as a mentor of District students and has compromised the District's ability to implement these statutory public policies.

We do acknowledge that, standing alone, the emails and images found on Scipioni's District computer would not justify a penalty greater than the suspension directed by the Arbitrator. However, when viewed in the context of the surrounding circumstances of this case, we cannot help but note that these evidenced Scipioni's rather cavalier attitude as to the type of behavior required of a public employee and the respect and protection owed to District students under the policies enunciated by numerous legal authorities. Although he may have retained and forwarded these emails and images in a joking manner, his conduct in doing so, when coupled with his relationship with AH and his dishonesty throughout this matter, contributes to our finding that a penalty more than suspension is warranted.

As such, we believe that the Arbitrator erred in mitigating the penalty to be imposed on Scipioni for his breach of his duties. The District points to ***Slippery Rock University v. APSCUF,*** 71 A.3d 353 (Pa. Commw. 2013) where a professor was terminated for making sexual remarks and comments to and about female students. After the professor filed a grievance, the arbitrator reinstated him. The reviewing court found that the professor's actions violated public policy to

protect students from sexual discrimination and that his reinstatement posed the risk that other female students would be subject to such actions in the future.

We likewise believe that termination is the best option here. This will serve to ensure that other students will not be subject to inappropriate conduct on the part of Scipioni in the future. Moreover, it is unreasonable to expect the District to subject its students to a teacher who has outright lied to both his principal and his superintendent and who has taken advantage of a District student to the extent that it not only impaired her wellbeing at the time of the affair, but also disrupted her college career and her life as a wife and mother many years later. This is not the type of mentor who should be permitted to be entrusted with the District's implementation of its duties to protect and serve its students.

For these reasons, we will enter an Order granting the District's Petition and vacating the arbitration award.