SUPERIOR COURT OF NEW JERSEY
LAW DIVISION MERCER COUNTY
CIVIL PART

LUCILLE DAVY, COMMISSIONER, NEW JERSEY DEPARTMENT OF EDUCATION,	:	Docket No.: MER-L-
Plaintiff,	:	CIVIL ACTION
v.	:	
BARBARA TRZESZKOWSKI, KEANSBURG BOARD OF EDUCATION, and, KEANSBURG SCHOOL DISTRICT,	:	
Defendants.	:	

PLAINTIFF'S BRIEF IN SUPPORT OF DECLARATORY JUDGEMENT

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PRELIMINARY STATEMENT

Plaintiff, New Jersey Commissioner of Education, Lucille Davy brings this suit seeking a declaratory judgment that the $556,290.00 "severance" provision of defendant Barbara Tzeszkowski's employment contract with defendant, Keansburg Board of Education is null and void as a matter of public policy. Plaintiff is not a party to that contract. However, Plaintiff has a significant interest at stake in this matter because she is charged with the authority to ensure a thorough and efficient education to all school children in this State, including those in Keansburg, as well as with the authority to guard against misspending of public funds earmarked for educational purposes. Indeed, Keansburg is a former Abbott district and in the current school year received approximately $30 million in State Aid, disbursed under the Commissioner's authority. Thus, the Commissioner who had administrative oversight over former Abbott districts and continues to have oversight over such districts under the School Funding Reform Act has a uniquely critical concern over how Keansburg expends those funds.

Public contracts such as this employment contract must be fair, just, reasonable and advantageous to the public body that is a party to the contract and payments under them must bear a reasonable relationship either to a reduction in salary or deferred compensation or to the rendition of service under the contract. Effectuation of the "severance" provision and other terms of

Tzeszkowski's contract will mean that Tzeszkowski is to be paid $740,876 over the next five years - an amount that exceeds three times her final annual salary as superintendent - but the children of Keansburg and the taxpayers of the State will receive no services from her during those five years. The outrageously excessive "severance" payment under the contract does not bear any relationship to any reduction in salary or deferred compensation while Tzeszkowski was serving as superintendent because it is calculated on all of her service, most of which was spent in non-superintendent positions. Nor does it bear any relation to her position or provision of services as the Keansburg superintendent. In addition, the "severance" provision lacks a preliminary requisite for any contract to be proper, i.e., valid consideration. For all of these reasons the "severance" provision must be declared null and void as a matter of public policy since it is so far outside the realm of fairness and reasonableness, and as a matter of law.

STATEMENT OF FACTS

The Keansburg School District ("Keansburg") is a K-12 school district comprised of two primary schools, one middle school and one high school with an enrollment of approximately 1800 students. Verified Complaint, ¶¶ 5,6. Compared to other K-12 districts in the State, Keansburg's per-pupil spending falls within the fifteen highest spending districts in all of New Jersey. Id. at ¶12. Keansburg was formerly designated as an "Abbott" district.[1] Ibid. As such, for the 2007-2008 school year, Keansburg received over $31 million dollars in State aid, which accounted for approximately 77 percent of its school budget. Id. at ¶ 10. The year prior to that, Keansburg received over $34 million dollars in State aid, which accounted for 80 percent of its school budget. Id. at ¶ 9. Additionally, Keansburg was approved for close to $33 million dollars in state aid for the 2008-2009 school year, which accounts for approximately 78 percent of its school budget. Id. at ¶ 11.

On or about February 25, 2004, defendants Barbara Trzeszkowski ("Trzeszkowski") and the Keansburg Board of Education ("Board")[2] entered into an employment contract effective July 1,

[1] The designation of "Abbott" districts was eliminated by the enactment of the School Funding Reform Act ("SFRA"), N.J.S.A. 18A:7F-43.

[2] The current Board of Education is comprised of the following members: Ann Marie Best, Christine Blum, Yolanda Ann Commarato, Cindy Etzkorn, Judy Ferraro, Robert Ketch, Kimberly Kelaher-Moran,

2003 through midnight of June 30, 2008. Id. at ¶¶ 15, 16, Exhibit A, § 13. The contract sets forth the following pay scale for the duration of the contract as follows:

> a. Effective July 1, 2003, the Superintendent's salary shall be increased by 5.63% to equal $141,770.
>
> b. Effective July 1, 2004, the Superintendent's salary shall be increased by 5.65% to equal $149,780.
>
> c. Effective July 1, 2005, the Superintendent's salary shall be increased by 5% to equal $157,269.
>
> d. Effective July 1, 2006, the Superintendent's salary shall be increased by 5% to equal $165,132.
>
> e. Effective July 1, 2007, the Superintendent's salary shall be increased by 5% to equal $173,389.
>
> [Id. at ¶ 15,16, Exhibit A, § 13.]

Also included in the contract is a "Separation from Service" clause which provides in pertinent part:

> 13. SEPARATION FROM SERVICE: The Superintendent shall receive the following as part of her compensation upon her separation from employment with the district:
>
> Upon the Superintendent's separation from service with the district, the Board will pay *all unused accumulated sick days at the per diem rate of the Superintendent's final annual salary.* Throughout the term of this employment agreement, the Superintendent's per diem rate shall be calculated at 1/240th of

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William Manoes, and James Merkel. Id. at ¶ 3.

her then current annual salary. *This benefit is payable in three (3) equal installments. The first payment shall be made on the date retirement becomes effective as denoted on her retirement application. The second and third payments will become due on July 1st of the next two calendar years.* The Superintendent at the time of retirement or her estate at the time of death during the Contract term shall receive full payment of vacation days to which she is entitled at her then per diem rate. It is recognized and agreed that as of *June 30, 2003* the Superintendent has *190.5* accumulated sick days and (0) accumulated personal day.

The payment for accumulated days shall be based on additions and subtractions from these days as they occur after June 30, 2003. In the last year, before retirement of the Superintendent, she can receive a cash payment for all of her dues and convention costs. This is to be at no additional cost to the Board and is not intended to increase the annual salary of the Superintendent.

Continued Coverage. Upon the Superintendent's retirement, the Board will provide coverage to the Superintendent and her family under the Board's dental and visual insurance plans at the Board's expense, provided that she is covered under the "State Health Benefit Plan", *This provision shall survive the termination and/or expiration of this employment contract unless otherwise agreed to in writing.*

Definition. *For the purposes of the Employment Contract, "separation from employment" shall be meant to include, but not be limited to, the Superintendent's separation from the district or to death, incapacity, retirement, contract non-renewal, and/or voluntary or involuntary resignation.*

Payment to Estate. If the Superintendent dies before her Employment Contract year is completed, payment for her unused, accumulated vacation and sick days shall be made to her

estate.

During the term of this contract, the Superintendent shall provide the district with not less than sixty (60) days notice of intent to resign and six (6) months notice of intent to retire. Notice shall be in writing to the Board President. *In the years 2003-04, 2004-05, 2005-06, 2006-07 and 2007-08,* should the Superintendent resign or retire within each of the contract years, in recognition of the loyal and continuous service of the Superintendent, the Board agrees to provide to the Superintendent a sum equal to one month's pay for each year of continuous service in the district if resignation/retirement occurs under the circumstances of this paragraph. *Severance pay under this section shall be made in five (5) equal installments. Payout would begin on July 15th after resignation retirement and continue on July 15th of each subsequent year of the five year installment.*

14. VACATION: The Superintendent shall be entitled to *28* days for the *2003-04* contract year, *29* days for the 2004-05 contract year, *30* days for the *2005-06* contract year and *31* days for *2006-07* contract year and 32 days for the *2007-08 contract years*. Vacation shall not be cumulative, but the Superintendent shall be compensated at her full per diem rate for any vacation days which have not been used on or before *June 30th* of each year of this agreement.

Unused vacation entitlement for the current year shall be submitted to the Board for payment by July 15th of each year of the Contract.

Unused vacation days shall be converted to a cash payment at the time of retirement or separation on the basis of the Superintendent's then current per-diem rate of pay. This benefit shall be payable to the Superintendent's estate should she die while still employed by the District.

> At any time during the term of this Contract, upon agreement by the Board, the Superintendent shall be paid for vacation days in lieu of taking such days at the Superintendent's then current per diem rate of pay.
>
> [Id. at ¶¶ 15, 18-20, Exhibit A, §§ 13-14.]

During the 2003-2004 school year, the time that the above-referenced contract was approved, the Keansburg Board of Education was comprised of the following members: James Cocuzza, Joseph W. Hazeldine, Patsy Acconzo, Jr., Annett Jacome, Patricia Hamilton, Edith L. Chimel, MaryAnn Franklin, Kimberly Kelaher Moran[3] and Andrew Murray. Id. at ¶ 4.

Trzeszkowski began her employment with the Board on or about January 1970 as a teacher. Id. at ¶ 2. She worked in the district for 38.5 years, serving as Superintendent for approximately nine (9) of those years. Ibid. Trzeszkowski notified the Board of her intent to retire on or about May of 2007.[4] Id. at ¶ 28. Trzeszkowski's retirement is effective July 1, 2008. Ibid.

On or about April 28, 2008, Keansburg entered into an employment contract with Nicholas Eremita to serve as

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[3] This is the only 2003-2004 Board member who also remains a current Board member.

[4] In addition to receiving over $110,000 per year for five years pursuant to the "severance" provision, Trzeszkowski stands to receive an annual pension in the amount of $103,889.88 for life. Id. at ¶29.

Superintendent of Schools effective July 1, 2008 through June 30, 2011. Id. at ¶ 24, Exhibit B, § 2. The contract sets forth the following pay scale for the duration of the contract:

> a. Effective July 1, 2008, the Superintendent's salary shall be $160,000.
>
> b. Effective July 1, 2009, the Superintendent's salary shall be increased by 4% to equal $166,400.
>
> c. Effective July 1, 2010, the Superintendent's salary shall be increased by 4% to equal $173,056.
>
> [Id. at ¶ 22, Exhibit B, § 4.]

Thus, in addition to paying Trzeszkowski's current annual salary of $173,389; a "severance" payment in the amount of $556,290 over five years; $170,137 for unused sick days to be paid in three equal installments; and $14,449 for unused vacation days; id. at ¶ 26, Keansburg is also scheduled to pay to its new superintendent a salary in the amount of $160,000 for the 2008-2009 school year.

LEGAL ARGUMENT

POINT I

A DECLARATORY JUDGEMENT THAT THE CONTRACT IS NULL AND VOID SHOULD BE ENTERED.

The Declaratory Judgments Act, N.J.S.A. 2A:16-51 et seq., authorizes courts to declare rights, status and other legal relations so as to afford litigants relief from uncertainty and insecurity. Chamber of Commerce v. State, 89 N.J. 131, 140 (1982). To maintain such an action, there must be a "justiciable controversy" between adverse parties, and plaintiff must have an interest in the suit. Ibid. As demonstrated below, these two requirements are satisfied.

First, it is beyond question that the plaintiff, Lucille Davy, Commissioner of Education, has a significant interest in this lawsuit. The Commissioner exercises control over the supervision and administration of public schools in the State. N.J.S.A. 18A:4-23. Moreover, the Commissioner is statutorily empowered to ensure that all school funds are effectively and efficiently utilized to ensure achievement of the Core Curriculum Content Standards by New Jersey's public school students. Appropriations Act FY 2008, L. 2007, c.111; N.J.S.A. 18A:7F-60. Additionally, as to districts formerly known as "Abbott districts," the Commissioner has a heightened regulatory and oversight role so that the extraordinary amounts of parity and supplemental funding provided to the Abbott districts is directed to improving student outcomes. See e.g.,

N.J.A.C. 6A:10-1.1 et seq.; Abbott v. Burke, 149 N.J. 145, 189 (1997)("Abbott IV"); Abbott v. Burke, 153 N.J. 480, 492 (1998)("Abbott V"). Given that Keansburg was formerly designated as an Abbott district, in recent years, Keansburg has received a significant amount of publicly funded State aid. See Verified Complaint, ¶¶ 9-11. Thus, the Commissioner in her oversight role clearly has a significant interest in obtaining a judicial declaration that the "severance" provision in Trzeszkowski's contract, supported by public funds over which she has an oversight role, is excessively generous and, as such, violates the public policy of the State.

The second requirement to invoke the court's jurisdiction under the Declaratory Judgment Act – a "justiciable controversy" between adverse parties - also is amply satisfied. Pursuant to the contract at issue, on July 15, 2008, Trzeszkowski is scheduled to receive the first of five, equal, annual "severance" payments totaling $556,290. Through this action, the Commissioner is standing in the shoes of all citizens in the State as parens patriae, particularly in the shoes of the school children of Keansburg whose educational needs she is appointed to protect, and seeks to stop Trzeszkowski from receiving this "golden parachute" at the expense of those children as well as the taxpayers.

POINT II

THE SEVERANCE PORTION OF THE CONTRACT SHOULD BE DECLARED NULL AND VOID BECAUSE IT IS PLAINLY AGAINST PUBLIC POLICY.

In addition to receiving a final annual salary that exceeds $170,000 and an annual pension that exceeds $100,000 for life, Trzeszkowski is scheduled to receive $740,876 in fringe benefit payments for "severance," unused sick days and unused vacation days. As explained below, the "severance" provision which accounts for $556,290 of the $740,876 plainly violates public policy. The practicable effect of the "severance" provision is that Trzeszkowski will receive a payment over the next five years that is more than three-times her final salary as superintendent. Accordingly, the "severance" provision is so outrageously excessive to Trzeszkowski at the expense of the school children of Keansburg and the taxpayers of the State that the contract violates public policy and should be declared null and void.

In accordance with the sections 13 and 14 of Trzeszkowski's contract, she is scheduled to receive (1) a "severance" payment in the amount of $556,290 to be paid in five, equal, annual installments beginning on July 15, 2008; (2) $170,137 for 235.5 unused sick days; and (3) $14,449 for 20 unused vacation days. Verified Complaint, ¶ 26.

Initially, it must be noted that the "severance" provision extends beyond the traditional meaning and purpose of

severance pay. Severance pay has been defined as "a form of compensation for the termination of the employment relation, for reasons other than the displaced employee's misconduct, primarily to alleviate the consequent need for economic readjustment but also to recompense ... for certain losses attributable to the dismissal." Adams v. Jersey Central Power & Light Co., 21 N.J. 8, 13-14 (1956); Accord Black's Law Dictionary 1374 (6th Ed. 1990).[5]

The "severance" provision, however, provides Trzeszkowski with $556,290 notwithstanding that Trzeszkowski's employment relation is terminating as a result of Trzeszkowski's decision to retire. Further, given that Trzeszkowski is retiring and stands to receive an annual pension in the amount that exceeds $100,000 for life, it cannot be said that the severance payment will "alleviate the consequent need for economic readjustment" or "recompense [Trzeszkowski] for certain losses attributable to [her] dismissal." Adams, supra, 21 N.J. at 13-14.

In addition to defying the traditional purpose of severance, the amount of the "severance" payment bears no relation to any reduction in salary or deferred compensation on the part of

[5] Because this "severance" pay is being paid to Trzeszkowski upon retirement, as opposed to dismissal, it could be characterized as an impermissible attempt to supplement her pension. See Fairlawn Educ. Assoc. v. Fairlawn Bd. of Educ., 79 N.J. 574 (1979). Defendant, Board of Education lacks the authority to enrich or supplement defendant Tzeszkowski's State pension, id. at 581, and the severance portion of the contract should be declared null and void.

Trzeszkowski while she served as superintendent. While severance has been referred to as a form of deferred compensation, Botany Mills, Inc. v. Textile Workers Union, 50 N.J. Super. 18, 30 (App. Div. 1958), in light of Trzeszkowski's $173,389 salary as Superintendent, it cannot be reasonably argued that Trzeszkowski deferred any portion of her salary in prior years in order to receive the $556,290 "severance" payment.

Additionally, the payment of one-month at the rate of Trzeszkowski's final salary as superintendent for each of the 38 years that Trzeszkowski was employed in Keansburg, the majority of which was spent in non-superintendent positions presumably at much lower salaries, has no rational relationship to Trzeszkowski's past or present services as Superintendent. The past services provided by Trzeszkowski in non-superintendent positions were fully compensated by the then-existing employment contracts and/or collective bargaining agreements. The severance payment, however, was calculated by using the total number of years that Trzeszkowski worked in Keansburg without regard to her position. In other words, although Trzeszkowski only served as superintendent for a portion of her employment with Keansburg, the severance payment was calculated by multiplying one-twelfth of Trzeszkowski's final salary as superintendent ($173,389) by the total number of years that Trzeszkowski worked in Keansburg. Given that the $556,290 "severance" payment bears no relation to the quality of services

that Trzeszkowski performed as Superintendent[6] or the numbers of years that Trzeszkowski was employed as Superintendent, the provision violates public policy and should be declared null and void.

The unreported decision of the Honorable Burrell I. Humphreys, A.J.S.C. in Board of Higher Educ. & Hollander v. Board of Trustees of Hudson County Comm. Coll. & Sheil, Docket No. W 30492 (Ch. Div. 1988)("Sheil"),[7] teaches that some public employment contracts for high level education officials can be so "extremely generous" so as to violate the public trust. Courts must set aside such contracts as a matter of public policy. Sheil, supra, at 7, 21, 24-25; Vasquez v. Glassboro Serv. Assoc., Inc., 83 N.J. 86, 89 (1980)(No employment contract can be sustained if it is inconsistent with the public interest or detrimental to the public good.)

In general, contracts that are wholly extravagant are plainly unreasonable and violate public policy and thus, courts should be vigilant to stop such extravagence by public bodies who are spending taxpayers' money. Sheil, supra, at 31. See also

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[6] Trzeszkowski's employment contract also allowed for additional merit increases "based on the Superintendent's progress toward achieving the district goals." Verified Complaint, ¶ 17.

[7] Pursuant to R. 1:36-3, a true copy of the unpublished opinion in has been appended to this brief and furthermore the undersigned is unaware of any other relevant unpublished opinions including any such opinions adverse to the position of the State.

Thompson v. City of Atlantic City, 190 N.J. 359 (2007)(state courts have the power to invalidate an agreement that is contrary to public policy). In Sheil, supra, Sheil was given a lengthy contract to serve as president of the Hudson County Community College. The terms of the contract, and especially the various forms of compensation and compensation upon termination were so exceptionally favorable and "so far beyond the accepted range" of terms found in comparable contracts "as to bring into question the degree to which the Board considered its broad responsibilities to exercise adequate control" over the school "as well as its fiduciary responsibility to the public." Sheil, supra, at 19. Judge Humphreys characterized the severance terms, which included payment for unused sick, vacation and sabbatical time, as a "golden parachute" and noted that "[p]ublic education is strapped for funds. A community college can ill afford paying the president for two years and 232 days in which the president does not work . . ." Id. at 30-31. Such a "golden parachute," while it may be acceptable in the private sector cannot be tolerated in the public sector. Id. at 30.

The facts presented in the instant matter are even more egregious than those in the cases cited for several reasons. First, Trzeszkowski's "severance" package is even larger than the package which was held to be null and void in Sheil. If the contract terms here are given effect, even without counting the

amount paid for unused sick and vacation days, upon retirement Trzeszkowski will be paid $556,290, an amount that exceeds three-times her final salary over a five-year period, yet she will not be working at all during that period of time. With the addition of the unused sick and vacation pay, she will be paid $740,876, an amount that exceeds four-times her final salary during the same period of time. This compensation is in addition to her annual pension that will exceed of $100,000. That pension aside, to pay some $556,290 in public funds and receive no services in return is simply an unconscionable burden on the citizens of Keansburg and the State.

Second, Trzeszkowski was the superintendent in a former Abbott district that received substantial public financial aid to assist Keansburg in its limited ability to fund the education of its students. For a school board to so outrageously enrich a former superintendent through this type of "golden parachute" at the expense of the children of Keansburg and the State taxpayers is not only contrary to public policy and unconscionable but it violates the fiduciary duty and loyalty that the Board owes to the public. See Visotcky v. City Council of the City of Garfield, 113 N.J. Super. 263, 266 (App. Div. 1971)("The members of the board of education of a municipality are public officers holding positions of public trust. They stand in a fiduciary relationship to the people whom they have been appointed or elected to serve.").

So too, here the severance payout will be made in the amount of $556,290 over the next five years extending long beyond the expiration of the contract. As such, the contract far exceeds the term of the original Board members who approved this contract. See N.J.S.A. 18A:12-11. This is plainly improper and is markedly similar to the contract at issue in Sheil which presented the same affront to public policy. It is a well established principle of common law that a contract made by a governmental body, acting in its governmental capacity cannot extend beyond the term of its body of officers. State v. Layton, 28 N.J.L. 244 (Supreme Ct. 1860); Sheil, supra, at 15. It has been held that a continuously existing public body may bind its successors in office with a contract if the provisions of the contract at the time of execution were "fair, just and reasonable and advantageous to the board." See Valvano v. Board of Freeholders of Union County, 75 N.J. Super. 448, 451 (App. Div. 1962). However, for all of the reasons set forth herein, the severance clause here was plainly not "fair, just and reasonable and advantageous to the board." To the contrary the severance provision here is outrageously extravagant and an unreasonable expenditure of public monies.

For all the foregoing reasons, the $556,290 "severance" provision contained in the contract is completely contrary to public policy and must therefore be declared null and void.

POINT III

THE "SEVERANCE" PROVISION OF THE CONTRACT SHOULD BE DECLARED NULL AND VOID BECAUSE IT DOES NOT ENSURE THE EFFECTIVE AND EFFICIENT EXPENDITURE OF PUBLIC FUNDS.

The New Jersey Supreme Court has charged the Department and, thereby the Commissioner, with the responsibility to implement firm administrative controls to ensure that state funds are expended in an effective and efficient manner to maximize educational benefits to students. See Abbott IV, 149 N.J. at 189; Abbott V, 153 N.J. at 492. In turn, districts are obligated to "ensure economies and efficiencies are being attained in the delivery of programs and services." N.J.A.C. 6A:10-2.1(b). The Commissioner is prohibited from disbursing funds to any district until she is satisfied that all educational expenditures will be spent effectively and efficiently to enable students to achieve the core curriculum content standards ("CCCS"). Appropriations Act FY 2008, L. 2007 c.111; see also N.J.S.A. 18A:7F-60. The Commissioner is further authorized to take "any affirmative action as is necessary to ensure the effective and efficient expenditure of funds" for the implementation of all Abbott v. Burke programs, as well as by all school districts. Ibid. Thus, it is well within the Commissioner's authority and it is her clear duty to prevent inefficient expenditures of funds by districts. The Appropriations Act and N.J.S.A. 18A:7F-60 make clear that expenditures by school districts must be directly tied to the ultimate goal of enabling

students to achieve the CCCS. Therefore, those expenditures made by districts which do not relate to maximizing educational benefits to students cannot be deemed effective or efficient and should be prevented.

By agreeing to the "severance" provision, the district, in part, used State funds to inappropriately bestow upon Trzeszkowski a monetary windfall. The "severance" provision contractually binds Keansburg to pay $556,290 to Trzeszkowski over the next five years, in addition to paying a yearly salary to the incoming superintendent. Using public funds to give Trzeszkowski $556,290 after her separation from the district is clearly not an effective or efficient expenditure as it bears no relationship to the goal of enabling the students of Keansburg to achieve the CCCS. It further does nothing to maximize the students' educational benefits as contemplated by the Court in Abbott IV and Abbott V. This expenditure serves only to benefit Trzeszkowski. As such, this provision cannot be deemed an effective and efficient use of public funds.

Moreover, with no contemporaneous consideration for the payouts in each of the five years following her retirement, the "severance" provision certainly cannot be deemed an effective and efficient use of funds as it diverts dollars from the classroom and just as critically reduces the remaining allowable expenditures for administrative costs in the district. N.J.A.C. 6A:23-8.2(b)

requires that districts' advertised per pupil administrative costs do not exceed the lower of: (1) the district's adjusted pre-budget year per pupil administrative costs or (2) the per pupil administrative cost limit for the district's region. N.J.A.C. 6A:23-8.2(a) further requires that districts include all administrative costs in their annual budget submissions, which would include any severance packages, buyouts or bonuses offered to administrative staff. Thus, as administrative costs are capped by N.J.A.C. 6A:23-8.2(b), paying $556,290 would greatly reduce the amount of funds that could otherwise be available for valid and needed administrative costs that directly benefit the students. Plainly put, this extraordinarily rich "severance" provision inhibits the district from doing the very job it was created to do – educate Keansburg's children in a cost effective and efficient manner.

POINT IV

THE SEVERANCE PROVISION LACKS CONSIDERATION AND CONSEQUENTLY IS NULL AND VOID AS A MATTER OF LAW.

The "severance" provision allows for severance for all of Trzeszkowski's years of continuous service in the district, without regard or correlation to the position or title that she held during those years. At the time that Trzeszkowski and the Board entered into the contract, the Board knew or should have known that Trzeszkowski had already accrued a total of approximately 34 years

of continuous service in the district. Verified Complaint, ¶ 23. Because the contract did not qualify when Trzeszkowski could resign or retire and receive the severance payout, Trzeszkowski could have been eligible for the payout immediately after the contract was entered into and could have sought the payout as soon as the contract was entered into in February 2004. Verified Complaint, ¶ 24. Based upon Trzeszkowski's current salary and pursuant to the "severance" provision, Trzeszkowski is entitled to receive $556,290 as the payout based upon her years of continuous service.

Because this provision is not supported by valid consideration, a prerequisite for the existence of a valid enforceable contract, the court should declare it null and void as a matter of law.

> No contract is enforceable, of course, without the flow of consideration -- both sides must "get something" out of the exchange. Friedman v. Tappan Development Corp., 22 N.J. 523, 533 (1956); 1 A. Corbin, Contracts § 110 (1963 ed.). "Consideration is the price bargained for and paid for a promise." Friedman, 22 N.J. at 535. Valuable consideration may take the form of either a detriment incurred by the promisee or a benefit received by the promisor. Novack v. Cities Serv. Oil Co., 149 N.J. Super. 542, 549 (Law Div. 1977), aff'd, 159 N.J. Super. 400 (App.Div.), certif. den., 78 N.J. 396 (1978); 1 Corbin, supra, §§ 121-122.
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> [Continental Bank of Pa. v. Barclay Riding Acad., 93 N.J. 153, 170 (N.J. 1983).]

The "severance" provision at issue here, calculated based upon Trzeszkowski's years of continuous service is simply not

supported by valid consideration because Trzeszkowski was immediately eligible to receive the payout based solely upon her previous years of service, i.e., work she had already completed. Moreover, Trzeszkowski did not complete that past work because of the inducement offered by this provision. These years of past work had already been performed long before the existence of this contract or this provision. Nor did she incur any new obligation as a result of this payout provision. Additionally, because Trzeszkowski already performed the work at issue, the Board at the time of entry into this contract received absolutely no promise or benefit which could constitute valid consideration. Thus, the provision lacks consideration and should be declared null and void.

As our courts have said:

> Consideration, by its very definition, must be given in exchange for the promise, or at least in reliance upon the promise. Accordingly, something which has been given before the promise was made, and, therefore, without reference to it, cannot, properly speaking, be legal consideration. Generally, the doctrine that past consideration is no consideration is well recognized and universally enforced. This has been the law from a very early day. This rule has its exceptions, but none embraces the instant case. One of the classes of cases in which, under the early English law, a past consideration has been regarded as sufficient, comprises promises in consideration of some act previously done by the promisee at the request of the promissor. 1 Williston on Contracts, 317-320, 326. As was said by Mr. Justice Holmes, in Wisconsin & M.R. Co. v. Powers, 191 U.S. 379, 386; 24 Sup. Ct. 107; 48 L. Ed. 229, 231: "But the other elements are that the promise and the

> detriment are the conventional inducements each for the other. No matter what the actual motive may have been, by the express or implied terms of the supposed contract, the promise and the consideration must purport to be the motive each for the other, in whole or at least in part. It is not enough that the promise induces the detriment, or that the detriment induces the promise, if the other half is wanting."
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> [Broad St. Nat'l Bank v. Collier, 112 N.J.L. 41, 45 (Sup. Ct. 1933), aff'd, 113 N.J.L. 303 E. & A. (1934).]

The contract provision at issue here did not obligate Trzeszkowski to perform any further work in order to receive the payout based upon her previous years of continuous service. In this respect, it did not obligate her to incur any detriment nor induce her to incur any detriment. In effect, the provision simply pays her a second salary, and an excessive one at that, for work that she already has performed.

So too, as previously stated there is no indication that the payout provision constitutes some form of deferred or other compensation to Trzeszkowski, that is, compensation that was earned during her preceding years of service and is merely being paid to her at the time of her retirement or resignation. The payout envisioned here at the rate of one month of her current salary for every year of her past continuous service is not linked in any real way to her past service or salary. Neither is it linked to her title or position during those years, the vast majority of which she did not hold the position of Superintendent. In short, there

is no valid consideration or other basis to support payment of this exorbitant benefit to Trzeszkowski.

For all of the above reasons, the "severance" provision of the employment contract whereby Trzeszkowski is entitled to receive one month's salary for each year of her continuous service is not supported by consideration. Accordingly, this court should declare this provision null and void as a matter of law.[8]

[8] In addition to the reasons set forth in Point II, the lack of consideration further supports the position that the "severance" provision is unfair and unreasonable, violates public policy and should be declared null and void.

CONCLUSION

For the foregoing reasons, the "severance" provision should be declared null and void.

Respectfully submitted,

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By: _____
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Dated: May 30, 2008