

IN THE MATTER OF THE ARBITRATION OF

STEVE GOLDSCHMIDT,

Claimant,

v.

RESPONDENT'S ARBITRATION
BRIEF

PORTLAND PUBLIC SCHOOL DISTRICT
NO. 1, MULTNOMAH COUNTY, *a/k/a*
PORTLAND PUBLIC SCHOOLS,

Respondent.

INTRODUCTION

On February 9, 2005, Superintendent Vicki Phillips terminated the employment of Steve Goldschmidt, the Portland Public School District's ("the District") Executive Director of Human Resources. Phillips concluded that Goldschmidt had grossly neglected his duties to the Human Resources department and to the District, and that it was in the best interests of the District to sever the employment relationship. Because Goldschmidt's contract was terminated "for cause" as defined in his contract, the District did not pay severance pay to Goldschmidt.

Goldschmidt brought this action asserting that the District's refusal to pay him severance is a breach of his contract, as well as a wage claim based upon the district's refusal to pay severance, claims for defamation and "false light" invasion of privacy, denial of procedural due process under 42 U.S.C. § 1988, denial of substantive due process (liberty interest) under 42 U.S.C. § 1983, and denial of equal protection under 42 U.S.C. § 1983. Goldschmidt seeks severance benefits under the contract, statutory penalties for the withholding of "wages," damages for lost earnings and reputational injury, and attorney fees.

REDACTED

I. Goldschmidt's Performance.

By most reports, Goldschmidt's performance in his early years with the District matched the expectations and goals of the Board. Goldschmidt served under the direction of the interim Superintendent, Jim Scherzinger, and he made several changes within the Department itself, in the Department's policies and procedures, and in the Department's (and therefore District's) relationship with the various unions. Goldschmidt undertook difficult and often hostile negotiations and he supported and drove initiatives to "take back" several prior concessions made to the various unions, all with full Board support.

Even during Scherzinger's tenure, however, issues regarding Goldschmidt's leadership and management style arose. on a number of occasions brought to Scherzinger's attention issues between senior managers (including Goldschmidt), who demonstrated a consistent and persistent lack of interest in working collaboratively with other senior managers. By the conclusion of his term as interim Superintendent, Scherzinger believed that the needs, requirements, and expectations of the District for the Human Resources Department and its leader had changed fairly dramatically. Scherzinger ultimately concluded that Goldschmidt should be removed as the Executive Director for Human Resources to allow for further change and growth in the Department. Scherzinger, however, declined to act on his determination, given his imminent departure from the Superintendent's position. Rather, he chose to allow the incoming Superintendent, Vicki Phillips, to draw her own conclusions.

The District hired Phillips to be the new Superintendent in mid-2004, with her formal tenure commencing in late August 2004 when she arrived in Portland. For several months prior to that time, she interacted with senior managers at the District, including Goldschmidt, on a limited basis as she began to undertake the transition to Superintendent.

II. Dr. Phillips' Initial Impressions.

Shortly before Phillips arrived in Portland to assume her responsibilities as Superintendent, she spoke with [REDACTED] about the challenges facing the District. In his role as the Superintendent's "right hand," providing assistance on special projects, strategic planning and other matters, [REDACTED] was in a unique position to observe and comment upon the various situations Phillips would face upon her arrival.

[REDACTED] told Phillips that he believed there were three significant issues that would require her immediate attention: (1) the question of educational leadership in the District; (2) looming budget issues; and (3) the deteriorating relationship between HR and the rest of the organization. Farver explained that the relationship between HR and the other departments was not one of teamwork or cooperation, that HR functioned in an insular and uncooperative manner, was hierarchical to the point of inefficiency, that necessary information did not flow freely from or through HR, and that there was extremely low morale within HR that spilled over into other departments.

Notwithstanding [REDACTED] observations, Phillips chose to make her own judgments, and arrived in Portland with an open mind. Within a relatively short period of time, however, she observed a number of problems with HR stemming directly from Goldschmidt and his primary assistants, [REDACTED] and [REDACTED]. Among other issues, Phillips discovered that HR was unable to provide data in response to the most basic requests regarding the status of the workforce (such as leave data, absences, vacancies, use of substitutes). She also learned that HR was unwilling or uninterested in finding solutions to help the Central Office and HR become more efficient and more effective. As the issues with HR continued to mount, Phillips grew increasingly concerned. On a number of occasions, she spoke to Goldschmidt about her concerns, and about issues regarding [REDACTED] and [REDACTED].

III. HR Fails to Provide Information for the ITAX Audit.

Perhaps the most striking example of Phillips' concerns was HR's utter failure to respond to a request for information by Multnomah County and City of Portland auditors for the audit mandated by the Multnomah County Income Tax (the "ITAX"). As part of the ITAX, the auditors were required to provide a report to confirm the appropriate use of the ITAX funds by the Districts which received ITAX funds.

The auditors repeatedly requested and were promised data from HR (with Schwartzrock as the primary contact) starting in the summer of 2004 and continuing through the fall. No information, however, was forthcoming. Instead, the auditors were stonewalled. The Multnomah County Senior Auditor and her senior assistant will testify that they received no information from the HR Department when crucial requests were made as a part of the audit, they were repeatedly brushed off, told that the data was inaccessible for various reasons, and were treated rudely and were ignored.

Ultimately, the auditors concluded that based on HR's failure to provide any data, the District was unable to appropriately account for the use of ITAX funds, and the auditors informed the District that they would not include the District in the Audit Report. Exclusion of the District from the published audit of the ITAX funds—when the District was and is the biggest recipient of those funds—would have been disastrous for the continuation of the ITAX, which was the subject of a repeal proposal in an upcoming election.

When the auditors came to the District offices to meet with Phillips and explain the situation, months after they began requesting information and assistance from HR, they encountered [REDACTED] outside Phillips' office. [REDACTED] had a long-standing relationship with the auditors, having worked with them in various capacities for a number of years, and he was gravely concerned by the issues they presented. Given the negative response from HR, and in light of the significance of the information requested, [REDACTED] and [REDACTED] spoke with

the auditors and offered to provide the information on an expedited basis. The auditors agreed to provide an extension and [REDACTED] worked tenaciously (without assistance from Human Resources) to provide the requested information, which had long been available within the District, allowing the District to be incorporated in the Audit Report.

Goldschmidt's response to the information provided to the auditors was to question the accuracy of the information [REDACTED] provided. Some of the information [REDACTED] had provided, under extraordinary time constraints after HR had ignored the issue for months, was in fact off by a minor degree and was corrected. Goldschmidt and [REDACTED], however, also undertook to question the auditors' methodology—again, months after the auditors began requesting information from HR. When Goldschmidt requested a meeting with the auditors and provided a list of questions in advance, the tone of his memo was such that the auditors declined to attend the meeting, concluding that a meeting would not be productive and that, in fact, the memo from Goldschmidt reflected the very basis of the problems: that HR under Goldschmidt's leadership was unwilling to provide information on anyone else's terms, without resistance, and in a helpful manner. Given HR's uncooperative attitude, and the near complete destruction of the relationship between the District and the County Auditors, the District was included in the Audit Report only because of [REDACTED] longstanding relationship with the City and County Auditors, [REDACTED] tireless work to provide the requested information, and because Phillips personally stepped in and promised that the District would do better in the future.

Goldschmidt's response to the auditors and his questioning of their methodology—in their area of expertise, no less—was characteristic of his performance in other areas as well. Phillips observed that he was dismissive of and questioning of the conclusions of the Annenberg Report, a comprehensive study of the Central Office that was not favorable to HR (or to a number of other departments.) Similarly, Phillips observed that Goldschmidt was dismissive of data straight from other systems, such as eSIS (the District's electronic student information

system which contains all key student data), if it did not conform with his own views and perceptions.

IV. Interactions with the Senior Management Team.

Phillips also became displeased with Goldschmidt's interactions with the senior management team. She noted in several meetings that he, [REDACTED], and [REDACTED] were openly disrespectful of others and of others' viewpoints, and very early on in her tenure she was forced to confront him about the disrespect and to mediate various conversations. She noted that he was disinclined to be collaborative, preferring to exchange memoranda with people rather than discussing problems face to face. On at least one occasion, when she requested that he discuss a situation in person, he refused, saying that it was a waste of his time.

Similarly, although union representatives could be expected to dislike a hard approach to negotiations, the unions in the District reported the negotiations and other contacts as being disrespectful and hostile in the extreme. Phillips learned of several instances in which Union representatives believed that they had been lied to, and of even greater concern, that the District's position had been significantly and intentionally misrepresented by HR. One representative reported that on more than one occasion Goldschmidt verbally abused her and that he had thrown her out of his office in a highly disrespectful manner. Based on the information provided to her by the Union representatives and those negotiating on behalf of the District, Phillips concluded that Goldschmidt's conduct significantly contributed to, if not caused, the unnecessarily time-consuming negotiations and deterioration of labor relations.

V. HR's Lack of Responsiveness to its Constituents.

In addition, the perception of HR within the District—by teachers, principals, and staff—was a source of significant problems, and one that was frequently brought to Phillips' attention. Many principals reported that they dealt with HR only when necessary, and that they were frustrated and angry at the processes employed by HR and with how they were treated. Among

their concerns, principals listed a lack of support, that District HR representatives were essentially unreachable because they did not answer their phones and their voice mailboxes were almost always full. When principals were able to leave a message, their calls were not returned. Principals also reported that even when they could reach their HR representatives, the representatives could not provide information, but had to confirm answers with management prior to passing along the answer. Principals further reported that HR would simply hand down "edicts" regarding hiring and other processes, without any explanation or input. In short, HR was widely viewed as obstructionist, unhelpful, and downright unpleasant. One principal joked that he had his staff had concluded that the District's Human Resources department was neither human nor resourceful.

In addition, Phillips was concerned about the insular and "turf protecting" mentality of the HR department under Goldschmidt's leadership, and about the poor communication from the department. HR personnel were discouraged from in any way talking freely with those outside the Department. On one occasion, when Phillips requested that an HR representative attend a particular external event, [REDACTED] instructed the representative that she was not to discuss HR at all during the external meeting. Likewise, many principals and others reported that it was impossible to speak directly with Goldschmidt, and that he did not respond to emails or other written contacts.

VI. The Hostile Work Environment Within the Human Resources Department.

The poor relationships under Goldschmidt's leadership between HR and outside departments was not limited to external interactions. Poor relationships were also characteristic of the inter-departmental environment and morale. In late August 2004, Phillips spoke briefly with [REDACTED], who in mid-August had resigned from her position as the Compensation and Benefits Manager in the HR Department. A different position had opened up for which [REDACTED] had been recommended. Phillips inquired as to whether [REDACTED] would consider the position and

██████ replied that she would not consider the position under HR's current leadership. Although ██████ declined to elaborate at that time in response to Phillips' inquiry, she sent a letter to Phillips approximately two weeks after her last day in the HR Department and explained that the work environment was the primary reason for her departure:

"The issue that prompted my leaving the district was in part the job content but more importantly the atmosphere of the department. I can sum it up best by saying that it is the most unhappy and unhealthy work environment I have ever experienced

"While Steve tends to have less direct interaction with the Human Resources staff than Karen, his actions (or non-actions) condone Karen's behavior which sets the tone for the hostile environment. It is a department run by fear and intimidation. It is about control, blaming, criticism, belittling, public humiliation and negative feedback. It is one where initiative is squashed, ideas are shunned and independent thinking is discouraged. People are afraid to make a mistake, afraid to stand up for their thoughts or ideas for fear of public humiliation and afraid for their jobs if they make Karen or Steve angry. Even asking for a simple clarification from Karen is something that staff will whisper about and try to avoid by pawning off on others because they don't want to experience her abruptness or insulting rebukes. This behavior does not promote a productive team when they are working in fear of every move

"There is a complete lack of respect for basic human dignities of individuals and the values demonstrated by the department's leadership are deplorable"

Phillips was both disturbed by the issues in ██████ letter, as they were beginning to become a recurring theme.

In November 2004, the Board sought to implement a new District policy pertaining to administrative contracts. Board Member Julia Brim Edwards and Phillips met with Goldschmidt to discuss with him the possibility of re-negotiating his contract. Under the new policy pertaining to administrative contracts, as well as various Board initiatives, there were a number of issues with Goldschmidt's contract which, if allowed to remain in effect, would have rendered his contract and a number of the provision in the contract different from the contracts held by his peers and colleagues. While Goldschmidt offered to re-draft those portions of the contract that pertained to some benefits which were no longer applicable—housing allowance, car allowance,

and similar provisions—he was unwilling to discuss or consider re-negotiating other portions of the contract.

In December 2004, a temporary employee in HR, [REDACTED], approached Phillips and requested a meeting with her regarding the situation in the HR Department. Phillips, Board Member David Wynde, and [REDACTED] met, and [REDACTED] articulated several areas of concern, both with HR's internal practices and protocols, but more significantly regarding the work environment. Like [REDACTED] had only two months earlier, [REDACTED] reported a work environment that evidenced a complete and utter disregard for basic human dignities. Phillips expressed her interest in hearing from others in HR, and in late December 2004 or early January 2005, [REDACTED] and several of her co-workers in HR again met with Phillips and David Wynde.

Phillips and Wynde were surprised and dismayed at the things they learned in that meeting. They noted that the meeting consisted of long-time employees of the District as well as employees hired under Goldschmidt, employees with many years of HR experience, and employees newer to the area. Regardless of status or experience, the employees reported startlingly similar concerns: the department was a center of hostility, ill-will, and abusive treatment of staff and other senior administrators. Employees were required to keep logs of contacts between HR and individuals (principals and otherwise), were discouraged and even forbidden from making any decisions or displaying initiative, and were subjected to humiliation, belittling, and condescending lectures by [REDACTED] and [REDACTED]. Employees declined to speak at staff meetings, because they were afraid to call attention to themselves and did not wish to risk being humiliated or retaliated against. Indeed, just prior to the confidential meeting with Phillips and Wynde, the HR employees took the time to leave the building, move their cars, and return surreptitiously, so that the HR management would not know that they were in the building. Employees were subjected to vacation black-out periods which were not subject to any kind of consideration or negotiation, despite repeated intervention by supervisors familiar with

workload and workflow. Employees reported that family matters and emergencies were irrelevant; one employee reported being called at home and instructed not to get too involved in a family member's funeral arrangements, because she was needed at work. An employee who had informed her supervisor of her mother's death was called at home two days later with a request that she report to work. When she did so solely to discuss her bereavement leave, [REDACTED] was unavailable to meet with her for nearly a day and a half, and then denied much of her request for bereavement leave. When this same employee returned to work in January and requested to use some of her many accumulated hours of comp time on an intermittent basis for grief counseling, her request was ignored.

VII. The Board's Difficulties with HR Under Goldschmidt's Leadership.

The Board similarly had difficulties interacting with Goldschmidt and with the Department under his leadership. Several Board members were troubled by HR's failure to respond to inquiries regarding diversity or the existence of a diversity or affirmative action plan. When a position was approved to provide assistance for the Board office, the position went unfilled (indeed, was ignored) for months due to lack of attention from HR, despite repeated requests for assistance. Board member Lorenzo Poe recalls that not a week would go by without a complaint about Goldschmidt and/or HR's mistreatment of employees, failure to respond to information requests, or poor interactions with the Unions. Wynde, having attended the meetings with Adams and Phillips, believed that the only way to resolve the situation with HR was to dismiss Goldschmidt.

VIII. The District Discharges Goldschmidt for Gross Neglect of Duty.

Based on all that Phillips had learned, particularly during December 2004 and January 2005, she reached the conclusion that Goldschmidt's performance was, in fact, the essence of "gross neglect." Phillips applied the standard definition of "gross neglect" as a failure to substantially perform the duties expected of the job. She also noted that Goldschmidt declined to

participate or prioritize participation in the Senior Management Team's responsibilities for the vision and mission of the District. Phillips considered the failures of Goldschmidt and HR under his leadership to carry out the management of the HR functions (including those related to recruitment plans, diversity programs, position controls, responses to the County and City Auditors, and collaboration with other Senior Team members), and also the fact that the basic premise for an HR Department, that being one of ready communication with all parts of the Team, was wholly unmet. She was mindful of the fact that the job description for the Executive Director position included among its primary duties the responsibility to enhance the morale of District employees, a duty quite obviously unperformed. As Phillips had had a number of conversations with Goldschmidt about issues and concerns in HR, and about problems with [REDACTED]'s and [REDACTED]'s management skills, it became clear that further conversations would not lead to any changes in the department, as none had yet been forthcoming. Phillips also believed that given the extraordinarily high level of fear, lack of trust, and lack of respect for HR, the only possible response for the District, and the only way to effectuate the best interests of the District, was by terminating Goldschmidt's employment as well as that of two primary managers who had implemented his authority as Executive Director.

On February 9, 2005, Phillips met with Goldschmidt and informed him that his continued employment was not in the best interests of the District, and declined to engage in further discussion. Phillips handed Goldschmidt a letter stating that his discharge was for "gross neglect of duty." Goldschmidt was allowed time to collect personal belongings, and then left the building.

Shortly after Goldschmidt's departure from the building, Dr. Phillips sent an email to District staff:

Dear PPS,

Effective immediately, I have severed the employment relationship between the District and Steve Goldschmidt, former Executive Director of Human Resources. In addition, I have placed Karen

Schwartzrock and Dianna Hanlon on paid administrative leave through June 14, 2005. At that point, their employment with the District will cease. Karen Schwartzrock was the Assistant Director for Human Resources and Dianna Hanlon was the Teacher Staffing Coordinator.

Please know that we will support the current Human Resources Department staff during this transition in meeting the needs of the District and advancing our student achievement goals. Within the next several days, we will communicate with you about an interim organizational structure for the Human Resources Department. The interim structure will ensure that our schools, co-workers, and future employees receive the outstanding service they deserve in order to support the delivery of the best education possible for Portland's children.

Vicki Phillips.

Phillips and the District subsequently responded to inquiries from the press with a statement confirming that Goldschmidt's employment had been terminated, and that no severance would be paid:

I have determined that it is in the best interest of the District to sever the employment relationship between the District and Steve Goldschmidt, effective immediately. Mr. Goldschmidt's position was Executive Director of Human Resources. No severance has been paid to Mr. Goldschmidt.

Mr. Goldschmidt's legal recourse is binding arbitration, pursuant to his contract, should he choose to pursue that route.

In addition, I have also placed Karen Schwartzrock and Dianna Hanlon on paid administrative leave through June 14, 2005. At that point, their employment with the District will cease. Karen Schwartzrock was the Assistant Director for Human Resources and Dianna Hanlon was the Teacher Staffing Coordinator.

I cannot discuss these issues in any more detail as they involve confidential personnel matters. Our focus is and will continue to be on student achievement.

We will provide the resources necessary to the Human Resources Department to meet the needs of our staff and, most importantly, advance our student achievement goals.

Vicki Phillips.

Aside from confirming the termination and noting that no severance had been paid, the statement to the media declined to provide further information, and specifically did not include any information as to the reasons for the termination, noting that it was a confidential personnel matter.

DISCUSSION

REDACTED

The Oregon Administrative

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Regulations providing standards for "Competent and Ethical Performance of Oregon Educators" define "gross neglect" and contain a list of various actions which may constitute gross neglect. OAR 584-020-0040(4). The overwhelming evidence and testimony of the witnesses will demonstrate that Goldschmidt's performance demonstrates a (1) substantial deviation from professional standards of competency set forth in OAR 584-020-0010 through 584-020-0030 (OAR 584-020-0040(4)(n)); and (2) substantial deviation from professional standards of ethics set forth in OAR 584-020-0035 (OAR 584-020-0040(4)(o)).

The regulations also incorporate various requirements for teacher competencies into the definition of "gross neglect." Specifically, Oregon law provides that violation of rules adopted by the Teacher Standards and Practices Commission relating to competent and ethical performance of professional duties "shall be admissible as evidence of gross neglect of duty or gross unfitness." ORS 342.175(5). Under those requirements, a competent administrator demonstrates skill in the use of assessment data, skill in the implementation of the district's evaluation programs, skill in providing equal opportunity, and skill in the use of employee techniques appropriate to the assignment and according to well-established standards which insure due process for the staff being evaluated. OAR 584-020-0020(3). Further, a competent administrator demonstrates "skills in managing the school, its students, staff and programs . . . and skills in planning and staff utilization." OAR 584-020-0025(3). Additionally, a competent administrator must demonstrate "skill in helping students, staff, parents and other patrons to learn about the school and its program; skills in communicating district and school goals to staff and public; willingness to be flexible in cooperatively working with others; and skill in reconciling conflict." OAR 584-020-0030(3).

Similarly, the case law surrounding "gross neglect" defines the term as "a willful act or an intentional failure by an employee to perform his duties in reckless disregard of the consequences as affecting his job or the efficiency of [his employer's] operations." *In re The*

Evening News Association and American Newspaper Guild, Local 22, 25 L.A. 912 (October 21, 1955); see also *In re Greater Cleveland Regional Transit Authority and Amalgamated Transit Union, Local 268*, 82 L.A. 518, 524 (March 5, 1984) (term 'gross neglect' implies total, or nearly total, disregard; an employee may be held to commit gross neglect of duty when he or she acts in a manner demonstrating little if any observance of responsibility.) The determination of "gross neglect" is a qualitative, not a quantitative determination, and one which must be examined on a case-by case basis. *In re The Evening News Association and American Newspaper Guild, Local 22*, 25 L.A. 912 (October 21, 1955). In weighing Mr. Goldschmidt's performance against this standard, the arbitrator should consider the natural, probable, and predictable impact of his negligence. *In re Greater Cleveland Regional Transit Authority and Amalgamated Transit Union, Local 268*, 82 L.A. 518, 524 (March 5, 1984).

Maxims of construction also favor the District on Goldschmidt's breach of contract claim. Under Oregon law, the circumstances under which an agreement was made, the discussion surrounding the terms, and the situation of the subject and of the parties, can be shown so that the arbitrator is placed in the position of those whose language the arbitrator is interpreting. ORS 42.220. In addition, any question in resolving an ambiguity should be resolved against the party responsible for drafting the ambiguous language. *Hoffman Construction Co. v. Fred S. James & Co.*, 313 Or. 464, 470-71, 836 P.2d 703 (1992). Because Goldschmidt himself suggested, arrived at, and inserted the terms "gross neglect," and also because he and his attorney were the primary drafters of his contract, the ambiguity inherent in the term's lack of further definition must be construed against Goldschmidt. As a result, the arbitrator should consider the plain and ordinary meaning of the term "gross neglect of duty" as defined in Oregon law and in the school-related context, as well as in the applicable case law from other jurisdictions.

Applying the appropriate definition of the term "gross neglect of duty," the evidence to be presented at the arbitration will show that Phillips reasonably and appropriately concluded that Goldschmidt's performance as the Executive Director of Human Resources demonstrated gross neglect of duty. Beginning in August 2004 with her arrival at the District, Phillips observed that Goldschmidt not only lacked skill in the use of data, he was unfamiliar with and uninterested in obtaining and utilizing data, on one occasion telling Phillips directly that she should not promise data to others, as it created more work for the HR department. Phillips also observed that Goldschmidt was unwilling to work cooperatively with others on a variety of fronts: within the HR department, internally with other District Managers, and externally with various members of the school community. Goldschmidt's performance and interaction with others, and the HR department under his leadership, not only did not exhibit skill in reconciling conflict, but seemed to exhibit skill in creating and fostering conflict in various situations. She received numerous complaints from principals, union representatives, and HR employees that they were treated poorly, without respect, ignored, and humiliated by the HR department under Goldschmidt's leadership. Phillips observed that Goldschmidt not only was unable to communicate district goals to others, but that in several instances he either communicated different goals or did not communicate the goals which she had discussed with him. In short, the evidence will establish definitively that Goldschmidt's performance as the Executive Director, and the performance of the department under his leadership, falls squarely within the definition of "gross neglect."

REDACTED

CERTIFICATE OF SERVICE