

Critical Choices in Superintendents' Contracts

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Editor's Note: The author is general counsel to the North Carolina Association of School Administrators. This report was prepared for the membership of that organization. Our thanks for permission to publish the report in this format in School Law Bulletin.

A SUPERINTENDENT'S CONTRACT should be judged by more than simply how favorable its provisions are. It should reflect careful choices of what issues are to be addressed in the contract and which are to be left to informal resolution or other processes. The contract should be sufficiently clear to avoid confusion but not be unnecessarily rigid. And perhaps most importantly, it should reflect an effective model of governance in the relationship crafted between the superintendent and board.

The North Carolina Association of School Administrators (NCASA) has not recommended the standardization of a model contract. NCASA recognizes the wide diversity of boards and the communities they serve, as well as the varied interests of superintendents, all of which come into play in developing a contractual relationship. This article is intended to help explain the various options that can be considered in the course of negotiating a superintendent's contract. Sixteen different items are discussed (for easier reference, see the numerical listing of topics sidebar). The presentation begins with a descriptive summary of each option, followed by general discussions of negotiation issues and legal standards and concluding with sample provisions related to the issue. The presentation should enable the reader to search for information on certain sample provisions and not necessarily read the article from beginning to end. Not every potentially important provision is addressed, but the critical choices of and opportunities for boards and superintendents are highlighted.

Unless otherwise noted, the sample provisions were taken from contracts on file with the Department of Public Instruction in January 2000 or in updated

contracts provided upon request. They were selected because they illustrate certain choices made with regard to the substantive issues addressed here. Some sample provisions are better crafted than others.¹

Items Related to Board-Superintendent Relations

Summary

The provisions that establish the working relationship between the board and the superintendent may be the most critical elements of a superintendent's contract. The contract can set the stage for effective governance and a healthy relationship between the board and the superintendent. It can be used to establish the authority of the superintendent over school district operations, the process for resolving complaints received by board members, and the degree of the superintendent's autonomy in pursuing professional development and professional relationships outside the school district.

Negotiation Issues

The board and the superintendent (or superintendent candidate) may each want to enlist an attorney in drafting provisions related to board and superintendent relations. NCASA recommends that the superintendent engage an experienced attorney because boards

1. Please check the NCASA Web site at <http://ncasa.eastnet.ecu.edu/> for any updates or new types of provisions that illustrate additional issues or approaches.

of education use attorneys on a regular basis. However, even when attorneys are involved, the board and the superintendent should openly discuss the issues that are addressed in these provisions. This is an opportunity to make sure that the board and the superintendent agree on the main points of their working relationship and are comfortable discussing them with each other. The parties should share an understanding of how all board members, including members elected after the contract is in effect, will be informed about its provisions and their impact on board operations.

The superintendent (or superintendent candidate) and the board also should be careful to take into account any board policies already in place that relate to the board-superintendent relationship. Such provisions could include a description of the superintendent's authority to take personnel actions, to establish administrative procedures, or to act in the absence of an expressed policy. Other provisions might describe the superintendent's authority to enter into contracts or to approve change orders. NCASA encourages superintendent candidates to review the district's policy manual in order to get a better understanding of the full working relationship established by the board.

1. Superintendent Duties and Authority

Legal Standards

Boards have specific statutory authority to establish duties for the superintendent. Section 115C-47(15) of the North Carolina General Statutes (hereinafter G.S.) provides that the "local boards of education shall prescribe the duties of the superintendent as subject to the provisions of G.S. 115C-276(a)." Under that section, "All acts of local boards of education, not in conflict with State law, shall be binding on the superintendent, and it shall be his duty to carry out all rules and regulations of the board." Note that the law does not require the specification of duties to be consistent with effective board-superintendent relations. It is, instead, up to the board and the superintendent to establish an effective relationship. The contract is the superintendent's best opportunity to participate as an equal partner with the board in establishing his or her duties and authority.

Sample Provisions

Sample Provision 1 establishes standards for board members:

1. *The Board members shall, as individuals, do no act that will prevent the Superintendent or his subordinates from properly performing the work of the Schools.*

In their dealings with the Superintendent, the board members shall deal through Board action.

Sample Provision 2 limits a board's broad statutory authority to prescribe superintendent duties and is consistent with effective governance and contractual expectations:

2. *The Board may, from time to time, prescribe additional duties and responsibilities for the Superintendent; provided, however, that*
 - (i) *the Board shall not without the Superintendent's written consent, adopt any policy or by-law which impairs the duties and authority specified above; and*
 - (ii) *all additional duties and responsibilities prescribed by the Board shall be consistent with those normally associated with the position of Chief Executive Officer of a school. This provision shall remain in full force and effect during any period of suspension.²*

2. Staff Organization

Legal Standards

With respect to staff organization, hiring, and firing, several statutory provisions apply:

It shall be the duty of the superintendent to recommend and the board of education to elect all principals, teachers, and other school personnel in the administrative unit. [G.S. 115C-276(j)]

and

The superintendent . . . shall participate in the firing and demoting of staff, as provided in G.S. 115C-325. [G.S. 115C-276(l)]

and

Subject to local board policy, the superintendent shall have the authority to assign principals to school buildings. [G.S. 115C-276(q)]

This last provision [G.S. 115C-276(q)] is unusual. In most instances, the statutes delegate authority to the board, and the board can then delegate that authority to the superintendent. In this provision, however, the statute confers on the superintendent the authority to assign principals, unless the board determines otherwise. (In some of the sample provisions below, boards have exercised their authority to require board approval for the assignment of principals.)

2. Association for the Advancement of International Education (AAIE), *Model Employment Contract for Heads of American/International Schools* (New Wilmington, Pa.: Thompson House, Westminster College, July 1993).

Sample Provisions

Although boards have the authority to require board approval for staff reorganizations, NCASA strongly recommends that superintendents be given full authority to make staff changes, including the authority to assign principals. This is one of the most important responsibilities of a superintendent, and to the extent allowed by law, he or she, as chief executive officer, should have complete discretion to organize the administrative staff.

Sample Provision 3 gives full authority to the superintendent:

3. *He shall be the chief executive officer of the Board; shall direct and assign teachers and other employees of the schools under his supervision; shall organize, reorganize and arrange the administrative and supervisory staff, including instruction and business affairs, as best serves the _____ Schools System; shall select all personnel subject to the approval of the Board.*

Sample Provisions 4, 5, and 6 restrict this authority in various ways:

4. *The Employee shall have freedom to organize, reorganize and arrange the administrative and supervisory staff, including instruction and business affairs, principal and assistant principals in any manner or fashion, which in the Employee's judgment best serves the _____ School System; provided such action is not inconsistent with the policies of the Employer and/or inconsistent with law. It is agreed that such policies shall include the Employer's approval of the organization chart of the administrative and supervisory staff and the creation or elimination of any subsequent positions for which certification is required. . . . It is understood and agreed by the Employer that individual board members have no authority to make any commitment or take any action regarding personnel except to make such referrals to the Employee and in their capacity as a member of the Board while in session.*
5. *The Superintendent shall have complete authority to organize the administrative, supervisory, and clerical staff in any manner or fashion, which in his judgment best serves the _____ School System. The Superintendent shall also have complete authority to assign all currently employed principals and assistant principals. The responsibility for selection, placement, transfer of other classified or certificated personnel shall be vested in the Superintendent subject to approval by the Board. The Superintendent shall have authority to immediately accept, on behalf of the Board, resignations of personnel upon receipt of notice of resignation.*
6. *The Superintendent shall direct and assign teachers and other employees of the school system under his supervision; he shall organize, reorganize, and arrange the administrative staff, including program services and operations, as best serves the school system, subject to the approval of the Board;*

he shall recommend the employment and discharge of all personnel subject to the approval of the Board . . .

3. Referral of Complaints

Summary

Board members often receive complaints from the public, parents, or school employees regarding some element of the operation of the school district. Maintaining proper roles in the handling of these complaints is an important dynamic in the board-superintendent relationship. The superintendent's contract is an opportunity to clarify this relationship and process. It is important for all board members, including board members who join the board after the contract is implemented, to be aware of the contractual requirements.

Negotiation Issues

Referral of complaints does not have to be addressed in a contract: It can be a part of board policies. However, the process will be easier to enforce if this issue is included in the contract. A superintendent candidate may want to review board policies to see if any processes are required for the referral of complaints and to make sure that these procedures do not conflict with any contract provisions.

Legal Standards

The general statutory framework allows complaints about administrative decisions to be appealed directly to the board. For example, G.S. 115C-45(c) provides the right for anyone to appeal, to the board, all decisions of school personnel.

Sample Provisions

Sample Provision 7 establishes the basic expectation of how complaints received by board members will be addressed:

7. *The Board, individually and collectively, shall promptly refer all criticisms, complaints, and suggestions called to its attention to the Superintendent for study and recommendation and shall refrain from individual interference with the administration of school policies except through Board action.*

4. Attendance at Board Meetings

Summary

Superintendents typically attend board meetings and committee meetings. This issue should be addressed in the contract to ensure that the superintendent is properly involved.

Numerical List of Items

Items Related to Board-Superintendent Relations

1. Superintendent Duties and Authority
2. Staff Organization
3. Referral of Complaints
4. Attendance at Board Meetings

Items Related to Salary and Other Income-Related Provisions

5. Salary Increases
6. Tax-Deferred Annuities
7. Options for Further Compensation of Time
8. Other Benefits Related to Salary
9. Performance Payments
10. Performance Evaluation
11. Transportation Expenses

Items Related to the Contract Itself

12. Unique Position
13. Contract Term, Resignation, Renewal
14. Interim Contracts for Retirement-Eligible Superintendents
15. No-Cause Terminations/Severance Pay Agreements
16. Attorney Fees

Negotiation Issues

The issue of attendance does not have to be addressed in the contract; however, NCASA recommends that it be included. The superintendent or candidate should determine how important it is to protect this right contractually.

Legal Standards

By law, the superintendent serves as *ex officio* secretary to his or her board of education. Specific duties also are established: "As secretary to the board of education, the superintendent shall record all proceedings of the board, issue all notices and orders that may be made by the board, and otherwise be executive officer of the

board of education."³ The question sometimes arises whether implicit in this responsibility is the right of the superintendent to attend all board meetings or whether the board could choose for someone else to serve as secretary. There is no specific statutory language on the issue, and it has not been addressed by the courts. However, it seems clear that the board can exclude the superintendent from a closed session wherein the board's evaluation of the superintendent is discussed. In regard to other matters, the state attorney general has provided an opinion that the superintendent's presence at all board meetings is implicitly required by virtue of the superintendent being *ex officio* secretary.⁴ In another well-reasoned letter, Robert P. Joyce, an Institute of Government faculty member (and editor of *School Law Bulletin*), has written that the board could bar the superintendent from attending a closed session.⁵

Sample Provisions

Sample Provision 8 brings clarity to the issue of the superintendent's right to attend board meetings.

8. *The Superintendent shall have the right to attend all Board meetings and all Board committee meetings, except a meeting called to discuss the Superintendent's evaluation, and he shall have the right to provide administration recommendations on each item of business considered by the Board and its committees.*

Items Related to Salary and Other Income-Related Provisions

Summary

Boards face few legal obstacles in providing a compensation package designed to attract and retain a high-quality superintendent. The obstacles tend instead to be fiscal or political. Even fiscally constrained boards can, however, consider what assurances they can give to superintendents regarding salary. Boards and superintendents also have options in considering benefits that supplement the salary base.

Negotiation Issues

The ability and willingness of boards to use local funds varies significantly across the state. NCASA does

3. Section 115C-276(b) of the North Carolina General Statutes (hereinafter G.S.).

4. Op. Att'y Gen. "Letter to J. White," president, Jones County Voters' League (July 17, 1991).

5. "Letter to A. Locklear" (June 22, 1992).

not recommend any particular salary approach and respects the differences in communities, although adequate compensation is essential for a long-term relationship.

NCASA intends to provide additional information about salary and benefits in future reports. Superintendents are encouraged to use this information in order to evaluate an offer. In addition, superintendents and superintendent candidates should review the contracts of prior superintendents of the district in order to determine how the board has addressed salary in the past. While boards may of course choose to do more, such review will at least give the candidate a sense of the board's—and the community's—history on the issue. For many school districts, amendments to contracts establishing salary increases also are available. A review of these amendments provides helpful historical information on the board's willingness to provide salary increases over the term of the contract. (These contracts are available from NCASA.)

Legal Standards

Legal requirements establish some minimum requirements for the use of state funds but do not hinder a board in using local funds to supplement salary or other benefits. Local boards have discretion in using state funds for the superintendent's salary within the salary range given for each size category of school based on the number of students. They may then add local funds for additional salary. The following statute establishes the legal parameters for the superintendent's state salary.

The salary of the superintendent shall be in accordance with a State standard salary schedule, fixed and determined by the State Board of Education as provided by law; and such salary schedule for superintendents shall be determined on the same basis for both county and city superintendents and shall take into consideration the amount of work inherent to the office of both county and city superintendents; and such schedule shall be published in the same way and manner as the schedules for teacher and principal salaries are now published.⁶

5. Salary Increases

Sample Provisions

Although boards have the right under the law to increase the superintendent's salary by using local funds, many contracts explicitly embody this right, as in Sample Provision 9. The assurance not to reduce aggregate

annual salary is the more significant element in this provision.

9. *The Board retains the right to increase annual salary paid to the Superintendent from local funds as a supplement at any time during the term of the contract and agrees not to reduce the aggregate annual salary as stipulated in this section.*

Sample Provision 10 provides for automatic increases:

10. *In addition, Superintendent shall receive a guaranteed 5% increase each and every year after the first year for the term of this contract, which would include all salary increases enacted during the term of this Contract by the General Assembly of North Carolina for state public school employees. Should the General Assembly grant in excess of 5% Superintendent would receive this.*

Another approach is to link the superintendent's salary to that of other administrators or teachers. This may be one way for superintendents to benefit from legislatively mandated salary increases for other administrators. Sample Provisions 11 and 12 show different approaches to making this connection. Boards or superintendents that want to pursue these options should work with their attorneys and finance officers to make sure that the options are considered and understood:

11. *The annual compensation (salary and any bonuses) for the Superintendent shall at no time during the term hereof be less than \$10,000.00 greater than that of the next highest paid administrator in the _____ School System.*
12. *Annually, the Superintendent's state salary and local salary supplement shall be adjusted to reflect the highest percentage increase paid annually to any administrative category by the General Assembly of the State of North Carolina.*

6. Tax-Deferred Annuities

Sample Provisions

Sample Provision 13 is found in many contracts but is not necessary in order for superintendents to be able to direct salary to an annuity:

13. *The Board, at the request of the Superintendent and in accordance with State law, shall withhold and transfer an amount of salary annually or semi-annually or monthly, said amount to be determined by the Superintendent, permitting the Superintendent to participate, if he so desires, in a tax-deferred annuity program of his choosing.*

Tax-deferred annuities are an increasingly popular way to provide additional income to the superintendent. Sample Provisions 14 through 18 show different

6. G.S. 115C-272.

approaches for contracts to take in providing this benefit to superintendents:

14. *In addition to the aggregate annual salary specified above, the Board shall establish for Superintendent a Supplemental Retirement Pay Agreement in conformity with the provisions and requirements of Section 457 of the Internal Revenue Code and shall make contributions monthly during the term of this contract to the Superintendent's deferred compensation account in the amount of \$250.00. At Superintendent's election, up to \$3,563.00 of his aggregate annual salary may be placed into this Retirement Account.*
15. *The Board, at the request of the Superintendent and in accordance with state law, shall withhold and transfer an amount of salary annually or semi-annually or monthly, said amount to be determined by the Superintendent, from the Superintendent's annual salary into any tax-favored annuity or retirement program chosen by the Superintendent. The Board shall match the Superintendent's contribution to any such tax-favored annuity or retirement program, with the Board's matching contribution being subject to an annual limit of three percent (3%) of the Superintendent's aggregate annual salary, or any lesser limitation imposed by law.*
16. *In addition to the compensation described above, the Board will make an investment of \$6,000.00 annually in a tax-deferred annuity or other investment program to be selected by the Superintendent.*
17. *In consideration of the exemplary performance of the Superintendent and the fact that his retirement will be adversely affected due to his employment out of the State of North Carolina for a number of years, the Board agrees to make a one-time contribution in the amount of five thousand dollars (\$5,000.00) to a Section 403(b) of the Internal Revenue Code program of the Superintendent's selection.*
18. *The Board, at the request of the Superintendent and in accordance with State law, shall withhold and transfer an amount of salary annually or semi-annually or monthly, said amount to be determined by the Superintendent, permitting the superintendent to participate, if he so desires, in a tax-deferred annuity program of his choosing. The board further agrees to pay the Superintendent's contribution to the North Carolina Teachers' and State Employees' Retirement System; provided, however, that such contribution shall not exceed six percent (6%) of his annual aggregate salary. In addition, the Board agrees to pay the sum of Five Thousand Dollars (\$5,000.00) per year to a retirement plan of the Superintendent's choice. The said payment shall be made on the first day of July each year during the term of this contract; provided, however, in the event this contract shall terminate, or the Superintendent resigns during the year following the payment of the sum to the annuity plan, then and in that event, the Superintendent agrees to reimburse the board on a pro rated basis an amount equal to the sum represented by the remaining months in that year during which the Superintendent was not employed.*

In other states, tax-deferred annuities have been used as an incentive for superintendents to remain with the school district by establishing a vesting schedule. Sample Provision 19 uses such an approach and would be legal in North Carolina:

19. *As an incentive to encourage the Superintendent to remain employed as Superintendent with District, District agrees to open a joint savings account in the name of the District and the Superintendent, with the District contributing \$_____ per year to the savings account and the Superintendent matching same on an after-tax basis. The Superintendent shall always be vested in one hundred percent (100%) of the Superintendent's contributions and earnings thereon. The Superintendent shall initially have no vested interest in the District's contribution and earnings thereon. In the event the Superintendent leaves the employment of District for any reason on or after the completion of the second year, but prior to the completion of the third year of employment, the superintendent shall be vested in twenty-five percent (25%) of the District's contribution and earnings thereon.*

In the event the Superintendent leaves the employment of the District for any reason on or after the completion of the third year, but prior to the end of the fourth year of employment, the Superintendent shall be vested in fifty percent (50%) of the District's contribution and earnings thereon.

In the event the Superintendent remains employed by District for at least five years, the Superintendent shall be vested one hundred percent (100%) in the District's contributions in the savings plan and earnings thereon.⁷

Similar provisions could be written for annuities and various schedules of vesting could be provided.

7. Options for Further Compensation of Time

Summary

Some contracts in North Carolina provide ways for superintendents to be compensated for their time beyond the state vacation days and rollover provisions. While additional leave days that would affect the retirement system cannot be given, some creative options are identified below.

Negotiation Issues

Boards likely will vary in their ability to provide additional compensation for time and their interest in doing so, just as superintendents are likely to have different perspectives on whether this is an issue they want

7. Texas Association of School Administrators, *The Texas Superintendent's Contract: Reference Manual and Drafting Guide* (Austin, Tex.: TASA, 1989).

included in the contract. Because this is a new area for contract negotiation, the prior history of the board is unlikely to be useful.

Legal Standards

State law specifies that “included within [superintendents’] term of employment shall be annual vacation leave at the same rate provided for State employees.”⁸ Superintendents also have the ability to accumulate annual leave within limits as follows:

Vacation days shall not be used for extending the term of employment of individuals and shall not be cumulative from one fiscal year to another fiscal year: Provided, that superintendents may accumulate annual vacation leave days as follows: annual leave may be accumulated without any applicable maximum until June 30 of each year. On June 30 of each year, any superintendent with more than 30 days of accumulated leave shall have the excess accumulation converted to sick leave so that only 30 days are carried forward to July 1 of the same year . . . An employee shall be paid in a lump sum for accumulated annual leave not to exceed a maximum of 240 hours when separated from service due to resignation, dismissal, reduction in force, death, or service retirement.⁹

Sample Provisions

Some contracts provide that superintendents will be compensated for vacation time not used. The number of days for which the superintendent will receive compensation varies as illustrated in Sample Provisions 20 and 21:

20. *In order to provide essential services to the Board which might not otherwise be provided, the Superintendent may not be able to use all of his earned vacation in a year and/or be unable to schedule vacation at a desirable time. In consideration of such circumstances, the Board annually on June 30 shall compensate the Superintendent in an amount equal to a maximum of five (5) vacation days accumulated beyond the state limit, computed at 1/222 of the Superintendent’s aggregate annual salary.*
21. *Each June 30 the Superintendent will receive compensation (at his daily rate of pay) equivalent to the value of any unused annual leave beyond the amount allowed to be accrued by the State. This compensation shall be a supplement and shall not be in lieu of any other uses of this leave as determined by the State Board of Education.*

Another approach is to provide “compensatory time” that is used like vacation time but is not accumu-

lated and does not have any impact on salary, as provided in Sample Provision 22:

22. *The Board recognizes that the Superintendent does and will commit to the services of the _____ School System many hours of additional time, above and beyond those necessary for the completion of his duties, including time spent locally and outside of _____ representing the Board, often at night and on weekends. As additional compensation for these extra work hours, the Board shall permit the Superintendent to take compensatory time off from his normal schedule up to and including forty (40) hours per year. Any and all compensatory time shall be taken prior to the Superintendent using any of his annual vacation days, with each eight (8) hours of compensatory time constituting one (1) full work day. Any such hours of compensatory time which are not used during the year in which they are earned shall be forfeited and may not be accumulated or carried over to the following fiscal year, nor shall they be carried over at the termination of the Superintendent’s employment.*

Yet another approach is to leave an open-ended provision for compensation for compensatory time. Sample Provision 23 does not provide any assurances that such payments will be made. It does, however, provide some flexibility to the Board for recognizing a superintendent’s hard work, either during the contract or at the end of the contract:

23. *The Board may elect to compensate the Superintendent for any compensatory time that may be accumulated at any time during the duration of this contract either through remuneration or crediting his accumulated vacation and/or sick leave.*

The board can use local funds to provide additional compensation for time. However, this provision could be better worded to make it clear that the board cannot add additional vacation or sick leave days that could affect the superintendent’s status in the state retirement system.

8. Other Benefits Related to Salary

Summary

The range and type of benefits provided to superintendents vary considerably from district to district. In addition to considering “how much,” NCASA encourages superintendents to consider benefits from other perspectives. One issue is whether the benefit is considered a part of salary. If it is, then it likely will be taxable. It also could contribute to the base salary for purposes of computing benefits in the state retirement plan. Another issue is the ability to shift benefits or to take the benefits as additional income. Some flexibility may be

8. G.S. 115C-272(b)(1).

9. G.S. 115C-272(b)(2).

useful if the superintendent anticipates that his or her needs may change over the time of the contract.

Negotiation Issues

As with other salary issues, the availability of additional benefits is likely a matter of the board's resources and philosophy. What is reasonable to seek may depend, in addition to the superintendent's qualifications, on the school district's resources and the community's attitude toward compensation. One option is to seek some of the benefits during contract renegotiations after a successful stint of employment. However, the superintendent should at least address those benefits that are important to him or her as a part of initial negotiations.

Legal Standards

Superintendents receive all state-funded benefits accorded to other public school employees. Local boards have discretion to use budgeted local funds to provide additional benefits.

Sample Provisions

This section is not intended to reflect the range of possible benefits or the amount of benefits provided to superintendents. NCASA intends to provide this type of information to superintendents/candidates in future reports.

Note that Sample Provision 24 specifically states that the additional medical payments are considered a part of salary:

24. *In addition to health insurance as set out above, the Board agrees to pay a maximum sum of Fifteen Hundred Dollars (\$1,500.00) for the uninsured medical, dental, and eye care bills of Superintendent and his spouse, during the term of this contract. . . . For the term of this contract in order to enhance retirement base, any sums received as additional medical payments under this provision shall be received as salary.*

Sometimes referred to as an "inclusion of costs" clause (because the board covers the costs of taxes along with the benefits), Sample Provision 25 is useful to superintendents if the benefits provided are taxable as additional salary. (For example, a monthly travel allowance to cover a superintendent's travel expenses incurred in performing official duties is most likely taxable as additional income.):

25. *The Board shall reimburse the Superintendent for the tax consequences to him which result from the inclusion of costs of the benefits provided for herein.*

Sample Provision 26 is an example of providing flexibility to shift the costs of benefits to additional salary:

26. *As an inducement to forego retirement or other options which may become available to the Superintendent, the Board will enable the Superintendent to select from among those benefits provided herein (other than those mandated by State law or regulation) and to transfer the costs of those benefits, to be received by her instead as additional salary compensation in lieu of those benefits effective on or after July 1, 1999. Any additional salary the Superintendent receives through exercising this option shall not be considered a part of her aggregate salary for any other provision of this contract.*

9. Performance Payments

Summary

Performance payments are a relatively new provision in most superintendent contracts. The structure of the performance payment varies considerably. In addition to the amount of the bonus, key differences are (1) whether the performance payment is based on objective goals or a subjective evaluation by the board; (2) whether the superintendent is involved in establishing the goals; and (3) whether the contract specifies any process for determining whether performance payments should be made. Numerous articles that have been written on performance payments provide further insight into whether and how performance payments should be incorporated into a superintendent's contract.¹⁰

Negotiation Issues

A well-written provision on performance payments is critical in order to minimize potential confusion or conflict in implementation. Negotiation should not be limited to the amount of the potential payment; it also should include the process for determining whether the performance payment has been earned.

10. A useful sampling includes: Bill Graves, "Putting Pay on the Line," *The School Administrator* (Feb. 1995): 8; Tibbett L. Speer, "The Color of Money," *The Executive Educator* (July 1996): 17; Kevin Bushweller, "Eyes on the Prize," *American School Board Journal* (Aug. 1999): 18; Theodore J. Kowalski, "Critiquing the CEO," *American School Board Journal* (Feb. 1998): 43; Cindy Holdway Clegg, Texas Association of School Boards, "More Than a Matter of Money: Superintendent Compensation Packages Vary According to District Needs," *TASB Governance in Action Series* (Mar. 1998) (http://www.tasb.org/tasb_store/lonestar/1998/march/money.html); Max E. Pierson and Doug Blair, "Performance Contracting for Administrators: Proceed with Caution," *Illinois School Board Journal* (Jan.-Feb. 1998) (<http://www.iasb.com/files/j8010203.htm>).

The negotiation provides a good opportunity for the board and superintendent or candidate to agree on how goals for the operation of the school district will be established.

Legal Standards

There are no specific legal requirements regarding performance payments. There are, of course, limitations on using various funding sources. For example, local funds may be restricted to certain categories of use.

Sample Provisions

The following provisions illustrate the range of performance payments and how they are provided. The provisions do not necessarily reflect the range of bonus amounts. Superintendents or candidates may contact NCASA for more information on the amounts of bonuses.

Note that Sample Provision 27 calls for objective goals agreed upon by the board and the superintendent but does not specify the amount of the bonus:

27. *In addition to the local supplements set forth above, the Board agrees to pay the Superintendent an unspecified amount to be set by the Board each year based on the Superintendent's achievement of objective goals agreed upon by the Board and the Superintendent each year.*

Sample Provision 28 ties the performance bonus into the evaluation process. Note that the amount of the bonus increases each year, providing an incentive for the superintendent to remain with the school district:

28. *In addition to the aggregate annual salary paid the Superintendent, Superintendent may receive from local funds an annual bonus of up to \$2,000.00 after completion of the first year; \$4,000.00 after completion of the second year; and \$6,000.00 after completion of the third year, the payment of which will be contingent upon the Board's annual evaluation of the Superintendent's performance pursuant to Paragraph ____ herein.*

Sample Provision 29 establishes the standards and the process to be used for determining the goals:

29. *In addition to the Superintendent's aggregate annual salary provided in Section ____ above, he shall be eligible for performance-based compensation in an amount equal to ten percent (10%) of his aggregate annual salary during each year of this Contract. The Superintendent shall earn such performance-based compensation by reaching or exceeding specific goals to be agreed upon by the Board and Superintendent no later than September 15, 1999, and by no later than August 15 of each year thereafter, for each fiscal year.*

The Board and the Superintendent shall consult prior to establishing any such goals, which shall be reasonable, attainable, and challenging. The Board shall determine how such compensation shall be awarded at the time annual goals are established. To the extent practicable, depending upon goals selected, the Board shall determine by June 30 of each year the goals that have been attained and the amount of performance-based compensation to be paid during that fiscal year.

Sample Provision 30 allows the superintendent to present the goals to the board. Note the specificity in describing the amount of bonus to be received:

30. *At the beginning of each school year the Superintendent shall identify four specific goals. These goals will be presented to the Board as the goals for the Superintendent. If the Superintendent achieves three or more of these goals, he will receive from local funds a bonus of four percent (4%) of his total salary for each school year in which the goals are met. In the event that the Superintendent achieves only two of the stated goals, he shall receive only 50 percent (50%) of the amount outlined above; if he achieves only one goal, he shall receive only 25 percent (25%) of the amount outlined above.*

Sample Provision 31 ties into the School-Based Management and Accountability Program (generally known as the ABCs).¹¹ By using standards from the ABCs, the provision eliminates subjective judgments about whether goals have been met:

31. *The Board agrees it will pay the Superintendent an additional lump sum payment on or before July 15 after the conclusion of the preceding school year subject to the conditions and performances hereinafter set forth, said additional lump sum payment, if available to be determined as follows:*
- (i) *The sum of \$500.00 for each school operated by the Board that meets the state exemplary growth or gain as defined by the North Carolina State Board of Education's ABC's of Public Education, but not recognized as a "School of Distinction" or a "School of Excellence";*
 - (ii) *the sum of \$750.00 for each school operated by the Board of Education that is recognized as a "School of Distinction" by the North Carolina State Board of Education within the ABC's of Public Education, but not recognized as a "School of Excellence";*
 - (iii) *the sum of \$1,000.00 for each school operated by the Board that is recognized as a "School of Excellence" by the North Carolina State Board of Education within the ABC's of Public Education;*
 - (iv) *The Board agrees to pay the Superintendent an additional amount each year from \$0.00 to \$5,000.00*

11. G.S. 115C-105.20 to -105.40.

based upon the Board's evaluation of the Superintendent's achievement of objective goals set by the Board and superintendent each year. The Board and the Superintendent shall set these objective goals for the Superintendent's performance no later than July 31st of each year. Provided, however, that the objective goals for the July 1, 1998 to June 30, 1999 school year shall be set by the Board and the Superintendent by November 30, 1998. The Superintendent shall be entitled to this compensation for the July 1, 1998 through June 30, 1999 school year based upon the Board's evaluation of his achievement of the goals set for the July 1, 1998 to June 30, 1999 school year as set on or before November 30, 1998.

10. Performance Evaluation

Summary

The literature on performance evaluation encourages establishing specific criteria and objective measures for evaluation, but the contractual provisions actually in place for superintendents in North Carolina vary in both the criteria used and the formality of the process. Boards and superintendents have latitude in how to approach evaluation. Informal processes allow for frequent feedback and exchange, which is ideal in a healthy board-superintendent relationship. On the other hand, they do not provide much structure for boards that may be split on how to approach evaluation or that are less knowledgeable about evaluation processes. Formal evaluations offer procedural protections for some of these issues but may seem unnecessarily rigid to a board and superintendent who have a close working relationship. Maintaining the confidentiality of formal written evaluations also may become a concern.

Negotiation Issues

Performance evaluation is a critical issue to be addressed between a board and the superintendent. There is no requirement that it be addressed in the contract, but the contract is the best opportunity for a superintendent or superintendent candidate to reach agreement with the board on the evaluation process to be used. Even if attorneys are used in drafting provisions, NCASA encourages superintendents to talk directly with their boards about evaluation expectations.

Legal Standards

There are no specific statutory requirements for evaluating superintendents, unless a certain proportion of schools are designated as low-performing. In that instance, G.S. 115C-333 requires the board to evaluate the

superintendent and submit the results to the State Board of Education. The law does not specify the kind of evaluation to be used.

Sample Provisions

Although Sample Provision 32 provides for an informal evaluation, it sets expectations for informing the superintendent of inadequacies:

32. *The Board shall provide the Superintendent with periodic opportunities to discuss Superintendent-Board relationships and shall inform her, at least annually, of any inadequacies perceived by the Board.*

Sample Provision 33 is still an informal process, but it goes a step further in establishing procedural protections if there are inadequacies:

33. *The Board shall provide the Superintendent with periodic opportunities to discuss Superintendent-Board relationships and shall inform her, at least annually, of any inadequacies perceived by the Board. The Superintendent shall be provided reasonable opportunity to correct such failures or inadequacies as indicated by the Board.*

Sample Provision 34 is much more formal. Note the role of the superintendent in developing goals and in the evaluation process:

34. *The Board and the Superintendent shall develop together a plan for evaluation of the Superintendent's work. The plan shall emphasize goals of the board for which the Superintendent is expected to provide leadership. Semi-annually, the Board, in executive session with the Superintendent, shall evaluate the Superintendent and shall provide a Board-approved statement of feedback information and direction, which shall be maintained as a confidential part of the Superintendent's personnel file. The plan for evaluation of the Superintendent's work shall be updated and redeveloped at least annually, with allowance for modifications resulting from the semi-annual evaluation sessions. The Superintendent is responsible for setting the evaluation date and notifying the Board that an executive session will be convened for the purpose of evaluating the Superintendent.*

In the absence of written criticisms, reprimands, or suggestions for improvement made in official executive session, the performance of the Superintendent will be deemed satisfactory.

The Superintendent has the obligation to formally evaluate the Board, in executive session, in terms of its adherence to policy and its compliance with the specific provisions of the Superintendent's contract.

11. Transportation Expenses

Summary

Transportation provides an example of how differently an issue can be treated in various contracts—from a simple statement that transportation will be provided to an exhaustive explanation of how and what transportation expenses will be paid by the board. Some of the options include providing a leased car, paying a monthly car allowance, or reimbursing the superintendent for mileage and other expenses. Like other benefits, reimbursement for transportation expenses can be included as part of the superintendent's salary for tax and retirement plan purposes, or a method of reimbursing actual expenses can be established in the contract.

Negotiation Issues

Reasonable transportation expenses should be paid by the board. NCASA discourages arbitrary caps on travel reimbursements. As long as the expenses are reasonable and are incurred in the performance of official duties, the expenses should be covered. If the board and superintendent choose to agree to a leased car, the provisions should be clear on who can use the car, whether or not it is for personal as well as official use, and who is responsible for maintaining insurance and keeping up with maintenance and repairs.

Legal Standards

There are no statutory requirements related to transportation reimbursements.

Sample Provisions

While no details are specified, Sample Provision 35 provides full transportation for the superintendent:

35. *The Board shall provide transportation for the Superintendent as such might be required for the performance of the Superintendent's duties, as herein before set forth, during the term hereof.*

Sample Provision 36 sets a limit on transportation costs that will be paid by the board:

36. *The Board shall provide the Superintendent with transportation and per diem required in the performance of official duties during his employment under this contract in an amount not to exceed \$5,000 annually.*

Sample Provision 37 provides a monthly travel allowance that is treated as salary and reimbursement with a cap for out-of-county travel:

37. *The Board shall pay the Superintendent an allowance of Four Hundred Seventeen Dollars (\$417) monthly*

for travel within _____ County. The Superintendent shall be reimbursed for automotive and transportation expense incurred for travel outside _____ County at the mileage rate then applicable to all other employees of the Board. However, the total amount reimbursed for out-of-county travel and meetings as set forth above shall not exceed the sum of Ten Thousand Dollars (\$10,000.00) per year without Board approval. Superintendent shall file itemized expense statements with the finance officer of the Board to obtain reimbursement for out-of-county travel expenses. For the term of this contract, in order to enhance retirement base, all travel supplement will be received as salary.

Sample Provision 38 is clear on the use of the vehicle and the payment of operating expenses:

38. *At the request of the Superintendent, the Board will provide a vehicle for his exclusive use. The vehicle may be used by the Superintendent in the performance of official school business and for his own personal use; provided, however, no one other than the Superintendent may operate the vehicle for purposes other than official school business. The expenses of insurance, maintenance, and repair of the vehicle shall be paid by the Board, except when the cost of repairs is not paid by insurance and the need for repairs is caused solely by personal use.*

Sample Provision 39 establishes the type of vehicle to be provided and the expectations for maintenance:

39. *In light of the administrative and professional duties of the Superintendent, the Board shall lease for the Superintendent a Pontiac Bonneville automobile, or such vehicle as may be mutually agreeable to the parties, or at the Superintendent's election, shall provide to the Superintendent an automobile allowance equal to the full cost of the lease (including maintenance fees) of a leased vehicle in compensation for the in-county automobile travel required in the performance of his official duties as Superintendent.*

Items Related to the Contract Itself

12. Unique Position

Summary

In some North Carolina contracts, the superintendent is characterized as a *unique position* in order to clearly establish that the superintendent cannot be transferred to another position. Other states characterize the position as unique in order to establish tort damages for damage to career if the contract is breached. (See Item 15 for more information on damages for termination of contract.)

Negotiation Issues

In general a superintendent will want the right to remain in the superintendent position unless he or she consents to another arrangement. To protect this right, it is best to have the contract specifically acknowledge that the position is unique and that the superintendent cannot be reassigned without consent.

Legal Standards

The contract controls the relationship. There are no specific laws on the reassignment of superintendents.

Sample Provisions

Sample Provision 40 establishes the unique position of superintendent:

40. *This is an agreement for the performance of professional services as Superintendent by the Superintendent, who shall not be assigned to any other position or have his duties reassigned to others without his consent.*

Sample Provision 41 is an out-of-state provision that uses the unique position to establish tort damages that typically would be higher than breach of contract damages:

41. *The parties acknowledge and agree that the position and responsibilities of the Superintendent are unique; that they require special education, training and experience; that the position and office of Superintendent occupy a separate and distinct professional status within the field of public education. The Superintendent, therefore, desires the uninterrupted opportunity to perform and to advance in his/her chosen profession during his/her term of service to the District under this agreement; similarly the District recognizes this unique professional position and status and agrees that any termination of the Superintendent's employment prior to the expiration of his term of this agreement will necessarily cause substantial damage to the Superintendent in his/her career as a professional public school administrator, as a direct and foreseeable consequence of such termination or attempted termination.*

The parties further acknowledge that damage to the Superintendent resulting from a termination or attempted termination would by necessity be impractical and extremely difficult to fix in actual amount. Therefore, the parties agree that in the event of a breach of this agreement by the District whereby the Superintendent is terminated prior to the expiration of the term of this agreement, the liquidated amount of such damages presumed to be sustained from any such breach shall be as follows, depending on the contract year in which the breach occurs:

*More than 3 years remaining
under unexpired term: \$ _____*

*More than 2 years remaining
under unexpired term: \$ _____*

*More than 1 year remaining
under unexpired term: \$ _____*

*One year or less remaining
under unexpired term: \$ _____¹²*

13. Contract Term, Resignation, Renewal

Summary

A contract must address the superintendent's term of employment (one to four years). In addition, it can provide processes for extending the contract and for resignation or nonrenewal. Clarity on these issues can improve board-superintendent relations and allow the board and superintendent to plan for the future.

Negotiation Issues

Establishing how often and when the board will consider extending the contract can be a crucial provision of the contract. Requiring resignation notice from the superintendent is reasonable, as is requiring nonrenewal notice from the board. The negotiation may be over the amount of notice required.

Legal Standards

G.S. 115C-271 provides that contracts must be for a period of one to four years, ending on June 30 of the final year of the contract. The contract may be extended or renewed at any time after the first twelve months of the contract with the superintendent's written consent. However, if new board members have been elected or appointed, a board cannot act to extend or renew the current superintendent's contract until after the new members have been sworn in. There is no legal requirement that a superintendent must give notice that he or she does not intend to accept an extension to the contract.

A superintendent who leaves during the period of the contract is technically in breach of contract. The board could seek compensatory damages, although this rarely, if ever, happens. Such damages, if the board sought them, would likely be the additional costs related to obtaining an interim superintendent and a permanent replacement.

There is no statutory requirement that a board must give notice of intent not to renew the contract. For a notice requirement to be legally binding, it must be a part of the contract.

¹². Association of California School Administrators, *Superintendent Contract Guidelines and Sample Contract Language* (Sacramento, Calif.: ACSA, May 1998).

Sample Provisions

Sample Provision 42 provides for considering extension or renewal each year:

42. *After each annual evaluation, provided in accordance with paragraph 2 above, but no sooner than July 1, 2000, the anniversary date of this Contract, the Board will consider whether to extend the Contract term for an additional twelve (12) month period. Extension or renewal of the Contract shall be undertaken only by resolution of the Board and pursuant to N.C. GEN. STAT. 115C-271.*

Sample Provision 43 is a fairly standard provision for notice to the board if the superintendent is going to unilaterally terminate the contract:

43. *The Superintendent may, at his option, and upon a minimum of ninety (90) days advance written notice to the Board, unilaterally terminate this contract. In the event of such termination the Superintendent shall continue to render his services and shall be paid his regular compensation as provided herein, up to the date of termination, but no severance allowance shall be paid to him.*

Sample Provision 44 requires notice of nonrenewal from the board:

44. *The Board agrees to notify the Superintendent no later than 180 school days before the expiration date of this Employment Contract the intent of the Board regarding the renewal and/or the extension of this Employment Contract or the issuance of a new Employment Contract. The Superintendent shall place this item on the Board's agenda prior to the expiration of the 180-day period.*

Sample Provision 45 is an example of mutual obligations for notice of intent not to renew:

45. *In the event either party desires not to renew this contract for an additional period of time beyond June 30, 2004, such party will notify the other on or before January 31, 2004.*

14. Interim Contracts for Retirement-Eligible Superintendents

Summary

Another approach to concluding a relationship between a board and a superintendent who is eligible for retirement is to provide an interim contract for the last year; that is, for his or her final year of employment, the superintendent's status would be *interim*. An interim superintendent contract in the last year likely will allow the superintendent to continue receiving salary while also beginning to receive retirement benefits. The board benefits from the opportunity to begin its search for a new superintendent and reduce its costs in benefits.

Negotiation Issues

Interim contracts can create win-win situations. The amount of compensation should be the maximum the superintendent is entitled to receive and still be eligible for retirement benefits. This is computed by determining the total compensation in the twelve months preceding retirement and applying the indexing computation defined by G.S. 135-3(8)c. The interim contract should be clear about what benefits apart from compensation will be provided, such as professional development and travel reimbursement.

The superintendent may want to negotiate for more personal leave days in order to explore other career possibilities. The board, preparing to make a transition, might want to negotiate for additional flexibility in determining or controlling the interim superintendent's responsibilities that are not regulated by state law. With the agreement of both parties, the contract can specify an end date or provide for month-to-month renewal of the contract.

Legal Standards

Some legal standards apply to any temporary or interim superintendent. The interim superintendent is subject to the same approval process and must possess the same educational qualifications as required by law for a regular superintendent. Also, the interim superintendent is paid within the categories for superintendent pay established by the General Assembly. These requirements are established in G.S. 115C-275, a statute that specifically addresses superintendent vacancies.

The law does not, however, define *interim*. Its regular meaning indicates something that occurs between events. In this context, presumably, the interim period runs until the hiring of a superintendent under a regular contract, which, as discussed above, must run for a period of one to four years. A legal question may arise whether an interim contract can last a year or more. The statute on superintendent contracts, G.S. 115C-271, provides that "contracts of employment for a period of less than one year shall be governed and limited by G.S. 115C-275," which is the statute on vacancies in the superintendent's office. Does this mean that interim contracts must be for less than one year and all contracts lasting a year or more are considered regular contracts governed by G.S. 115C-271? That would be one way to piece together the statutes, but it likely would result in awkward transitions. It would not work well, for example, if the current superintendent is starting as interim superintendent July 1 and is expected to continue until the end of the fiscal year. Without clear

guidance from the General Assembly or the courts, boards and superintendents should be able to enter into one-year interim contracts in good faith when the board is using the time to hire a superintendent under a regular one- to four-year contract.

When the superintendent is entering into an interim contract because he or she intends to draw retirement benefits while at the same time drawing a salary for the interim year, then statutory standards related to the Teachers' and State Employees' Retirement System also apply. (See generally G.S. 135-1 *et seq.*) Any person participating in the retirement system who is eligible for retirement can retire and draw benefits while providing services and receiving a salary on a temporary, interim, or contractual basis for an employer that is part of the retirement system (such as the very school system for which the retiree has been working).

There is a limit on the amount of compensation that can be earned in any calendar year of the greater of \$20,000 or 50 percent of the compensation in the twelve months preceding retirement. As it works out, for a one-year interim contract, a superintendent can receive full compensation. For example, if the superintendent made \$100,000 in the prior twelve months, then he or she can make \$50,000 from July 1 to December 31 and \$50,000 from January 1 to June 30. (Note that these figures do not reflect the indexing that also is done by the state in calculating the compensation.) There cannot be any increase from the prior year's compensation without the retirement benefits being jeopardized, except that the computation of the twelve months of compensation may be slightly higher as a result of the indexing process defined by statute. [G.S. 135-3(8)c.]

Sample Provisions

Sample Provision 46 establishes the opportunity for an interim contract:

46. *Retirement Incentive Supplement: If the Superintendent informs the Board of his intention to retire at least 60 days before the expiration of any fiscal year covered within the contract, he may, at his discretion, convert this contract to an interim contract for the next full fiscal year (June 30). Since it is in the best interest of the School District to assure a smooth transition to a new superintendency through an interim contract, the Board shall pay a local retirement incentive supplement to the Superintendent, no later than May 15 of the year of retirement, in the amount specified hereafter. The additional supplement shall be the equivalent of the last year of the contract's payment for: (a) local supplement (\$18,000); (b) travel (\$7,200); (c) professional memberships and expenses (\$600); (d) salary*

difference for adjustment to over 10,000 students enrollment (\$9,800); (e) 12 days pay for local leave provision (approximately \$5,000); (f) estimated expense reimbursements (\$8,500).

During the interim year of the contract the Superintendent shall receive no compensation in any of the above categories except those expenses incurred for attending meetings while traveling with members of the Board of Education (i.e., those sponsored by NCSBA and NSBA as well as others). All other benefits provided to School District and all remaining terms of the employment contract shall be applicable to the Superintendent during the interim contract. If in the event the Superintendent fails to fulfill the full one-year term of the interim contract, he shall repay the Board one-twelfth of the net receipts of the incentive supplement for each month of the contract not fulfilled.

Sample Provision 47 from an interim contract establishes the pay level and number of personal leave days:

47. *The interim Superintendent shall receive each of the following: The maximum sum the interim Superintendent is entitled to receive and remain eligible for full retirement benefits under applicable regulations of the Teachers' and State Employees' Retirement System . . . : One day per month for personal leave and eight additional days for use as personal leave during the one-year term of this Contract.*

15. No-Cause Terminations/Severance Pay Agreements

Summary

When a board terminates its contract with the superintendent without cause, this often is referred to as a "no-cause termination" or a "unilateral termination." It also is a breach of contract. The remedy for a breach of contract is the full value of the remainder of the contract less the duty to mitigate damages. In unusual cases, the termination also may give rise to tort damages for damage to the superintendent's reputation or career. If a board terminates without cause, a superintendent can sue for contract damages or, alternatively, if it applies, for tort damages. Another option is to specify in the contract what compensation the superintendent will receive if the contract is terminated. This amount—termed "liquidated damages" or "severance pay"—could be more or less than what would be given as a matter of law for terminating the contract.

Negotiation Issues

It is not essential to address no-cause terminations in the contract because legal remedies are already available. A superintendent may choose to do so, however, in

order to negotiate for higher damages than likely would be obtained by litigation or in order to avoid attorney fees, court costs, and the inconvenience of court action. Furthermore, a superintendent may prefer to end the relationship quickly in order to move on without further controversy and potential damage to his or her reputation. Similarly, a board may want to resolve the matter up front in order to minimize disputes among board members or with the superintendent at the time of termination. A contractual agreement on termination also would allow a board to move more quickly in finding a permanent replacement for the superintendent. A board could choose to negotiate for a contract provision calling for higher damages than the likely legal remedies in order to attract a superintendent. Or, of course, it may seek to negotiate for less than the legal remedy.

There also are reasons not to include severance pay in the contract. Perhaps the best reason is that potential litigation may deter a board or individual board members from hastily seeking termination. From this point of view, severance pay provisions may make it too easy for a board to terminate the contract rather than work through its issues with the superintendent.

Legal Standards

The summary above describes the legal standards for breach of contract and tort damages. There are some limitations on the type of severance pay and the sources of funds that should be considered as well. If the benefits are controlled by state law, there may be some limits on what benefits can be included as a part of severance pay. State law also prohibits a board from using any of the following funds in terminating a contract: state funds; local funds appropriated for teachers, textbooks, or classroom materials, supplies, and equipment; or funds acquired through donation or fund-raising, except funds raised specifically for this purpose or funds donated by private for-profit corporations. In addition, the board must notify the State Board and make public the funds used for the purpose of terminating the contract.¹³

There also are constitutional implications for how severance pay is addressed. The North Carolina Constitution includes what is called the “emoluments clause,” which states that “no person or set of persons is entitled exclusive or separate emoluments or privileges from the community but in consideration of public services.”¹⁴ This clause is interpreted to mean that public service

must be rendered for payments received. When severance pay provisions are included in the contract, they are considered part of the consideration offered to induce the superintendent to accept the position. As such, the severance pay, regardless of the amount, is not considered an emolument. If there is no provision in the contract, the board can still pay whatever it would be legally obligated to pay in contract or tort damages. In some cases, boards and superintendents want the relationship to end with a “voluntary resignation” rather than a board termination. Any severance pay or performance bonus in this situation faces a much more difficult constitutional hurdle, as illustrated in two North Carolina appellate court decisions, *Leete v. County of Warren* and *Myers v. Town of Plymouth*.¹⁵

Sample Provisions

Sample Provision 48 includes as part of severance pay all salary and benefits remaining in the contract without any duty to mitigate damages. This is more than the legal standard for breach of contract. Tort damages could potentially be higher:

48. *The Board shall pay to the Superintendent, as severance pay, all of the aggregate salary and benefits he would have earned under this employment contract from the actual date of termination to the termination date set forth in this employment contract.*

Sample Provision 49 has the same effect as Sample Provision 48 but is explicit in not requiring any reductions:

49. *The Board shall pay to the Superintendent, as severance pay, all of the aggregate salary and benefits he would have earned under this employment contract from the actual date of termination to the termination date set forth in this employment contract or any extensions hereof, with no reductions or setoffs of any kind or nature.*

Sample Provision 50 does not provide full payment of benefits as would be required for breach of contract, but it has the advantage of simple calculations of benefits, and it does not require mitigation of damages:

50. *The Board shall pay to the Superintendent, as severance pay, all of the aggregate salary plus twelve percent (12%) in lieu of other benefits he would have earned under this employment contract.*

Sample Provision 51 pays out salary but not benefits once the superintendent finds other employment. For

13. G.S. 115C-271.

14. N.C. CONST. art. I, § 32.

15. *Leete*, 341 N.C. 116, 462 S.E.2d 476 (1995); *Myers*, 135 N.C. App 707, 522 S.E.2d 122 (1999).

some boards and superintendents, this may seem to be a reasonable balance since the benefits likely will be provided by the new employer:

51. *In the event that the Superintendent obtains other employment, the payment of benefits as opposed to salary, will be discontinued.*

Some contracts provide for severance pay of salary but not benefits. This is less than the legal standard for breach of contract, but it is offset in Sample Provision 52 because there is no duty to mitigate damages.

52. *In the event of such termination, the Board shall pay the Superintendent as severance pay the aggregate annual salary . . .*

Some severance pay agreements provide salary but set an upper limit. This has a result comparable to requiring mitigation of damages because the full contract may not be paid out. Yet, as shown in Sample Provision 53, it offers an advantage over mitigation in that both parties know the upper limit of payment:

53. *In the event of such termination the Board shall pay to the Superintendent, as severance pay, all of the aggregate annual salary he would have earned . . . or two hundred fifty thousand dollars (\$250,000.00), whichever is less.*

Sample Provision 54 gives examples of severance pay provisions that include the duty to mitigate damages by finding another position. Note that one of the provisions provides more requirements or processes than the other:

54. . . . *provided, however, that in the event the Superintendent is employed by another school board or employer prior to the termination date of this contract, the said severance pay shall be reduced by the salary received by the Superintendent from that employer.*
- . . . *provided that the Superintendent provides monthly verification of his employment status during the severance period and that the severance pay shall be reduced by the amount of any salary the Superintendent receives from another employer during the severance period.*

16. Attorney Fees

Summary

Superintendents may incur attorney fees in the process of enforcing provisions in the contract. However, this author has reviewed no North Carolina contract that provides for the reimbursement of attorney fees. It is reasonable to seek reimbursement for attorney fees, but NCASA encourages superintendents to become familiar with their insurance coverage in the event it would apply in certain circumstances.

Negotiation Issues

Reimbursement of attorney fees does not have to be addressed in a contract. It is possible to seek reimbursement after a particular dispute. It will be up to the superintendent and the board to negotiate whether and to what extent attorney fees are to be included.

Legal Standards

Unless the superintendent is filing suit under a law that provides for reimbursement of attorney fees, no statutory requirements are applicable.

Sample Provisions

Sample Provisions 55 and 56, comprising several out-of-state provisions, show a range of possible ways to address the reimbursement of attorney fees. Note the differences in the scope of coverage:

55. *In the event of a bona fide dispute or controversy between the parties, arising under the terms and conditions of this agreement (excluding paragraph # _____ [due process] in which it becomes reasonably necessary for either party to consult and/or retain an attorney to determine and/or protect his or her legal rights or interest, the District shall reimburse the Superintendent for all reasonable attorney fees thus incurred, provided the Superintendent has prevailed in said dispute or controversy.*

or

In the event of a conflict arising out of the Superintendent's employment with the District making it necessary for the Superintendent to consult and/or retain an attorney to determine and/or protect his/her legal rights and interests, the District shall reimburse the Superintendent for all reasonable attorney fees and other costs.

or

Should it be necessary for the Superintendent to retain an attorney in order to enforce any provisions of this contract, the District agrees to pay reasonable attorney fees in addition to those costs and expenses to which s/he would otherwise be entitled.¹⁶

56. *The Superintendent shall be responsible for the payment of his own attorneys' fees in connection with the defense of any charges brought against him pursuant to paragraph "_____" of this Agreement; provided, however, that if the Superintendent is ultimately found not guilty of said charges, the Board shall reimburse the Superintendent for all attorney fees and expenses actually incurred in the defense thereof or in the defense or prosecution of other proceedings related thereto.¹⁷ ■*

16. ACSA, *Superintendent Contract Guidelines*, supra note 12.

17. AAIE, *Model Employment Contract*, supra note 2.