

DOCKET NO. 370-LH-0711

SOUTH SAN ANTONIO ISD	§	BEFORE HEARINGS EXAMINER
Petitioner	§	
v.	§	SANDRA GARCIA HUHN
	§	
RONALD DURBON	§	TEXAS EDUCATION AGENCY
Respondent	§	

RECOMMENDATION OF THE CERTIFIED HEARING EXAMINER

Background and Statement of the Case

South San Antonio Independent School District (“SSAISD” or the “District”) is the Petitioner herein and has proposed the termination of Ronald Durbon’s (“Respondent”) employment contract during the term of the contract for good cause pursuant to Texas Education Code, §21.211 and 21.212(d) and Board Policy DFBA (LEGAL).

SSAISD is represented by James M. Heidelberg of the law office of Escamilla, Poneck & Cruz, LLP. Respondent is represented by Jimmy Parks, Jr.

Respondent was employed by SSAISD under a term contract for the 2008-2009, 2009-2010, 2010-2011, 2011-2012, and 2012-2013 school years. Respondent was employed as the District’s Superintendent. On July 12, 2011, the SSAISD Board of Trustees (the “Board”) voted to propose termination, for good cause, of Respondent’s contract.

In its notice to Respondent, the Board cited thirty general reasons underlying its proposed action. As a practical matter, the allegations can be grouped into two categories: 1) Respondent’s failure to initiate an adequate investigation into whether his son, Gary Durbon,

Athletic Director for the District, or someone else using Gary Durbon's computer accessed pornography on a school District computer; and 2) Respondent's relationship with the Board .

First, SSAISD alleged Respondent failed to initiate an adequate investigation into whether his son or someone else had accessed inappropriate pornographic websites on a District computer. SSAISD further alleges that Respondent, upon first learning in October of 2008 that his son's computer may have accessed inappropriate materials, failed to take adequate steps to ensure that SSAISD policies regarding inappropriate access were enforced, and instead, took various self-serving steps, including instructing subordinates to delete official District records evidencing inappropriate computer access, in order to protect his son. Respondent and his son became the subject of media attention when it was learned that his son may have accessed pornographic websites.

Secondly, as to Respondent's relationship to the Board, Petitioner contends Respondent created antagonism between himself and the Board by his speech and conduct which destroyed his working relationship with the Board and adversely affected SSAISD's operation. Specifically, Respondent filed a lawsuit to seek a Temporary Restraining Order against two Board members. Additionally, Respondent filed a police report with the San Antonio Police Department alleging official oppression by a Board member. Respondent also published a letter to the editor in the San Antonio Express News critical of a Board member. Petitioner also contends Respondent sent a letter to the Texas Education Agency (TEA) accusing the Board of micro-management, governance and requesting that TEA investigate the Board. Further, Respondent made statements to the public and press that were contrary to maintaining a positive and professional relationship with the Board. Lastly, Petitioner alleged Respondent interfered with the lawful posting of a Board meeting agenda.

For the above stated reasons the Board voted to propose the termination of Respondent's contract and placed him on administrative leave with pay pending the District's investigation.

Respondent denies the District's allegations and timely contested the proposed termination and a certified independent hearing examiner was assigned to this matter pursuant to §21.251 *et seq.* of the Texas Education Code.

FINDINGS OF FACT

After due consideration of the evidence submitted by the parties, stipulations agreed upon by the parties, the record and matters officially noticed, in my capacity as duly appointed Independent Hearing Examiner, I make the following findings of fact which have been proven by a preponderance of the evidence (citations to evidence are not exhaustive but are intended to indicate some of the basis for the particular finding of fact):

General Findings of Facts

1. SSAISD granted Respondent a term contract for the 2008-2009, 2009-2010, 2010-2011, 2011-2012, and 2012-2013 school years. [Petitioner's Exhibit 20]
2. SSAISD employed Respondent as a Superintendent from 1990 until his retirement in 1998. SSAISD rehired Respondent in July of 2005 as Superintendent. [Transcript, Oct. 10, 2011, p. 97, Line 11 – p. 98, Lines 5]
3. Respondent's contract with Petitioner states that "the Board may dismiss the Superintendent at any time for good cause in accordance with Texas Education Code Sections 21.211, 21.212(d) and Board Policy."
4. Petitioner's Board Policy DFBA (LEGAL) states that "[t]he Board may terminate the Superintendent's term contract and discharge the Superintendent at any time for good cause as determined by the Board. *Education Code 21.211(a), .212(d).*"
5. The Board provided Respondent with a letter on or about July 12, 2011 giving him notice

of the proposed termination of his contract. [Petitioner's Exhibit 16]

6. The District was provided with a letter on or about July 20, 2011 in which Respondent requested a hearing by an independent hearing examiner pursuant to Chapter 21 of the Texas Education Code. [Petitioner's Exhibit 17]
7. The parties agreed to an extension of time to reach a decision in this case. [Judicial Notice of the Agreed Extension of Sixty Day Timeline signed by the parties and signed by the Certified Hearing Examiner on August 16, 2011]
8. Respondent did not file special exceptions claiming that the notice of proposed termination failed to place him on sufficient notice of the charges against him. [Judicial Notice]
9. An evidentiary hearing was held on October 10, 11, 12, and 13, 2011 at Region 20 Education Service Center, 1314 Hines Avenue, San Antonio, TX 78208 [Hearing Tr. Volumes 1, 2, 3, 4]
10. Upon Respondent's request, an open hearing was held. [Judicial Notice]

Respondent's failure to initiate an adequate investigation into whether Gary Durbon, or someone else using Gary Durbon's computer accessed pornography on a District computer

1. In Petitioner's proposal for termination, Petitioner alleges Respondent failed to initiate an adequate investigation into whether Gary Durbon and or others accessed pornography on a district computer. [Petitioner Exhibit 16]
2. In 2008, the SSAISD Computer Technology Department was run by Director Sandra Soto ("Soto"). Adam Galvan ("Galvan") and Mary Welch ("Welch") were two employees in the technology department. Both employees worked with filtering programs for the internet including Lightspeed and Vericept. Galvan was employed as a system specialist and Welch as a Network Administrator.[Deposition of Adam Galvan, Petitioner's Exhibit 66, p. 6, line 20 through p. 10, line 10; p.19 line 8-25]

3. Welch managed the servers and e-mail system, was familiar with the firewall, kept the website up to date and created user accounts. [Mary Welch Deposition, Petitioner's Exhibit 67, p. 14, line 10-25]
4. A firewall protects the inside network from the outside and blocks certain types of protocols. Filters block certain websites, including pornographic websites and inappropriate access by students and staff. SSAISD upgraded the filtering program from the BESS system to Lightspeed. [Mary Welch Deposition, Petitioner's Exhibit 67, page 15, line 2 through page 16, line 14]
5. The Lightspeed program filters inappropriate sites so they cannot be viewed by students and employees. Lightspeed was put into place at SSAISD in 2006. [Deposition of Adam Galvan, Petitioner's Exhibit 66, p. 6, line 20 through p. 10, line 10]
6. Lightspeed reports identify categories that are being searched on Google to give District officials an opportunity to identify if inappropriate content of a sexual nature is being searched. [Deposition of Adam Galvan, Petitioner's Exhibit 66, p. 16, lines 1 through p. 19, line 4]
7. While in the course of their duties, starting in August and September of 2008, Galvan and Welch ran Lightspeed Reports on Gary Durbon's computer and found websites were being accessed that were inappropriate and not allowed. [Deposition of Adam Galvan, Petitioner's Exhibit 66, p. 20, line 3 through p. 22, line 8]
8. In August 2008, a 46-page Vericept Report of adult sites accessed by Gary Durbon's computer during the period commencing on August 4, 2008 shows adult content was searched. [Deposition of Adam Galvan, Petitioner's Exhibit 66, p. 48, line 11 through p. 50, line 7; Petitioner's Exhibit 32]
9. In September of 2008, a Lightspeed System Report for Suspicious Search Engine Queries, which is the same as Google searches, confirmed searches conducted from September 19 - 27, 2008 on Gary Durbon's computer and showed thirteen searches for "sexy Latina" on September 26, 2008, and five searches for "nasty girls" on September 19, 2008. [Deposition of Adam Galvan, Petitioner's Exhibit 66, p. 32, line 22 through p. 34, line 24; Petitioner's Exhibit 34]
10. In October 2008, a Lightspeed System, Central Office Suspicious Search Engine Report shows three entries on October 3, 2008 on Gary Durbon's computer, searching for "Jenna

Jameson” whom Galvan believes is a porn star. Gary Durbon’s computer also searched for “—xecomdrbrosspenis” on October 15, 2008 at 3:55 p.m., and at 4:05 p.m. for “penile enlargement”. On October 17, 2008, it performed nine searches for “Latina sex”, and on October 20, 2008 for “girls gone wild” at 3:04-3:06 p.m. [Adam Galvan Deposition, Petitioner’s Exhibit 66, p. 34, line 25 through p. 35, line 19; Petitioner’s Exhibit 35]

11. A 71 page report related to Gary Durbon’s computer, shows that someone using Gary Durbon’s computer was attempting to access websites that were being blocked by Lightspeed on October 23, 2008. [Deposition of Adam Galvan, Petitioner’s Exhibit 66, p. 35, line 22 through p. 37, line 23; Petitioner’s Exhibit 36]
12. Lightspeed blocked an adult image (jpg) from the website of sandeewestgate.com. The reason it was blocked was because it was pornography. [Deposition of Mary Welch, Petitioner’s Exhibit 67, p. 49, line 4 through p. 50, line 9; Petitioner’s Exhibit 31]
13. In the fall of 2008, Galvan called Respondent on his cell phone to arrange a meeting to discuss information he had concerning the access of pornography on Gary Durbon’s computer. The meeting took place at a local Burger King Restaurant [Petitioner’s Exhibit 66 p54 line 14-25; Deposition of Ronald Durbon, Petitioner’s Exhibit 65, p. 105, line 22 through p. 106, line 9]
14. During the same meeting Galvan showed Respondent Google searches and a report of blocked websites attributed to Gary Durbon’s computer for the month of October, 2008. Galvan gave Respondent hard copies of the reports. [Adam Galvan Deposition, Petitioner’s Exhibit 66, p. 51, line 10 through p. 58, line 7]
15. Respondent admits Galvan showed him computer reports pertaining to Gary Durbon’s computer in October of 2008. [Petitioner’s Exhibit 47; Deposition of Ronald Durbon, Petitioner’s Exhibit 66, p. 101, line 22 through p. 102, line 4, Petitioner’s Exhibits 31, 33-37]
16. Respondent asked Galvan who else knew about the information in the reports. Galvan stated Welch and Soto. [Petitioner’s Exhibit 66 p57 line3-6]
17. Respondent does not instruct Galvan to conduct an investigation. [Petitioner’s Exhibit 66, p59 line14-16]
18. Respondent meets with Gary Durbon about the information provided to him by Galvan and shows him the reports he was given. Gary Durbon denies accessing pornographic material.

- Respondent took him at his word. [Ronald Durbon Deposition, Petitioner's Exhibit 65, p. 110, line 25 through p. 112, line 24; deposition testimony of Gary Durbon]
19. On or about November 2008, Galvan speaks to Respondent again and Respondent informs him he has spoken to his son and his son said "it wasn't him". [Exhibit 66 p58 line 22-25]
 20. Respondent admits he did not investigate the allegations against his son. [Petitioner's Exhibit 48; Ronald Durbon Deposition, Exhibit 65, p. 102, line 12 through p. 104, line 18]
 21. SSAISD's Electronic Communications policy regarding acceptable use of computers was in effect in the summer of 2008 and remains in effect. The policy prohibits access of materials that are abusive, obscene, sexually oriented, etc. [Petitioner's Exhibit 18; Deposition of Ronald Durbon, Petitioner's Exhibit 65, p. 106, line 16, through p. 108, line 22]
 22. In October 2009, Respondent instructs Robert Gardner, Interim Technology Director, to initiate password protection on computers by user names and passwords. [Respondent Exhibit 10]
 23. Gary Durbon confirms no investigator on behalf of the school ever spoke to him about the computer access [68 p.14 line 22 - p. 15 line 1]
 24. Gary Durbon confirms he was never informed by anyone other than his father, either in writing or by conversation, that there were pornographic images on his computer [Petitioner Exhibit 68 p.14 line 10 -16]
 25. In early 2009, Galvan and Jose Luna ("Luna"), Network Administrator, while discussing Gary Durbon's alleged access to pornographic material, express frustration that no action has been taken. Galvan and Luna conclude that Administration will not address the issue, because Gary Durbon's direct supervisor is his father. Galvan and Luna decide to report information to Connie Prado ("Prado"), Board President.[Petitioner Exhibit 52 p. 3 section 7]
 26. Early 2009, Galvan prints reports and copies of email correspondence between him and Soto. Luna delivers them to Prado. Luna asked Prado to keep their names confidential because they feared their positions with the District would be endangered if Respondent found out they had turned information over to a Board member. [Exhibit 52]
 27. An Anonymous letter is sent to Board members Prado and Karyn Tomlinson ("Tomlinson") alleging a cover up. [Exhibit 54]

28. Summer or fall of 2009 Welch is promoted to Director of the SSAISD technology department. [Exhibit 67 p77 line p. line 7-12]
29. August 2009, Welch has her first conversation with Respondent concerning the allegations against Gary Durbon. The conversation occurs after reports surface in the media that Gary Durbon was accessing pornographic material on his school computer. [Petitioner Exhibit 67 p.12-15]
30. Respondent meets with Welch in her office and she expresses concern because of what is being said in the media. She tells Respondent that she has reports that confirmed pornography was being accessed through Gary Durbon's computer. Welch shows the reports to Respondent and shows him the time periods where there was continuous activity from Gary Durbon's IP address. [Exhibit 67 p.79 line 1- p. 80 line 4]
31. During the meeting, Respondent asks Welch if they can verify that it was Gary Durbon's computer. Welch said she could. Respondent then asked if she could verify that Gary Durbon was sitting behind the computer and she said she was unable to determine that. [Petitioner's Exhibit 67 p. 81 line 7 -13]
32. In September 2009, Respondent directs Welch to prepare a letter stating she could not prove, with absolute certainty, who accessed the pornographic sites on Gary Durbon's district computer. Welch prepares a letter as directed but prepares a generic letter about the process and does not name Gary Durbon specifically. [Petitioner's Exhibit 51 line 10] [Exhibit 67 p.99 -100]
33. Respondent does not ask Welch to conduct an investigation. [Mary Welch Deposition, Petitioner's Exhibit 67, p. 79, line 8 through p. 83, line 4]
34. Respondent repeatedly asked Welch who leaked to Prado that pornographic materials were being accessed on Gary Durbon's computer [Petitioner Exhibit 51 section 11]
35. On September 14 2009, Anthony Smith, Detective with the San Antonio Police Department (SAPD), Vice Unit, begins an investigation on the allegations against Gary Durbon. The investigation is initiated by Board members Prado and Tomlinson. Detective Smith was charged with determining whether there was evidence Gary Durbon committed a crime. [Petitioner's Exhibit 54; Petitioner's Exhibit 57 p. 6 line 3-4]
36. Welch informs Respondent that she was interviewed by Detective Smith. [Petitioner's Exhibit 51 section 14].

37. In September, following the investigation by SAPD into Gary Durbon's website access, Welch receives a call on her cell phone from Respondent. Respondent was angry and yelling and demanded to know who contacted Prado about the pornography on Gary Durbon's computer and why. Respondent says words to the effect of "I will do whatever it takes to protect my son". [Petitioner's Exhibit 51 section 15]
38. Prado meets with Respondent in the presence of Yuhunter Woodard, Human Resources (HR) Director and Tomlinson and states she has been provided a report about pornographic information on Gary Durbon's computer, and directs Respondent to investigate. [Hearing Transcript, Vol. 2, p. 191, line 20 through 192, line 13]
39. The HR Department was never given the responsibility of conducting an investigation regarding the misuse of Gary Durbon's computer or other computers within the school district. [Hearing Transcript, Vol. 2, p. 193, line 14 through p. 196, line 23]
40. During November or December 2009, Respondent is upset and calls Galvan into his office and asked if he talked to Prado's lawyers and if he had given a deposition. Galvan denies speaking to Prado's attorneys and giving a deposition. [Petitioner's Exhibit 66 p90 line 5-25]
41. Welch (knowing she plans to leave the District and concerned that the data concerning Gary Durbon's computer may disappear) removes the drivers from the hard drive of the Vericept server and places them in a vault in care of the HR Department. [Petitioner's Exhibit 67 p. 94 line 24 – p. 95 line 19]
42. At the hearing on this matter, Expert David Thompson and Ann Dixon were qualified as expert witnesses. [Petitioner's Exhibits 63 & 64]
43. Expert testimony confirms the allegations of inappropriate pornography material in the context of a public school is an extremely serious allegation; that is, the school district should "drop everything" when the health, safety and welfare of students is at stake and there appears to be a pattern over multiple days of inappropriate access. [Hearing Transcript, Vol. 2, p. 45, line 4 through p. 46, line 8]
44. Expert testimony confirms when the pornography concern was brought to the Respondent's attention, the Respondent asking "can you prove whether my son did it" and asking his son "did you do it" were insufficient responses in accordance with the Respondent's responsibilities. [Hearing Transcript, Vol. 2, p. 45, line 4 through p. 46, line 8]

45. Expert testimony confirms the Respondent's responsibility to the district required a diligent, thorough directive to carry out a full investigation at that time, and because it involved a close family member, the Respondent should have enlisted competent outside experts to conduct the investigation to see whether his son accessed the materials or who else might have done the accessing. [Hearing Transcript, Vol. 2, p. 46, line 9 through 47, line 14, p. 81, lines 2-19]
46. Expert David Thompson did not see any evidence that the Respondent did a serious investigation, as he would have expected to see in that circumstance. [Hearing Transcript, Vol. 2, p. 46, line 9 through 47, line 14, p. 81, lines 2-19]
47. Expert testimony confirms Board policy requires that the Respondent keep the Board informed of significant developments or issues in the district, and such an allegation would qualify as requiring that the Board be advised. [Hearing Transcript, Vol. 2, p. 46, line 9 through 47, line 14, p. 81, lines 2-19]
48. Expert testimony confirms that there are laws and district policies about accessing inappropriate pornographic material and it is expected to see those diligently enforced, as schools belong to the public and prohibiting access to pornography in the workplace is an important matter to maintain trust within our communities. [Hearing Transcript, Vol. 2, p. 48, lines 7-21]
49. Expert testimonies confirm that if Respondent heard for the third time in 2009 of allegations that someone was accessing pornography on a computer, Respondent should have made this a matter of immediate priority for corrective action. [Hearing Transcript, Vol. 2, p. 148, lines 8 through 15]
50. Expert testimonies confirm that the position of superintendent of a school district and his duty to the district, students and taxpayers takes precedence over familial feelings. [Hearing Transcript, Vol. 2, p. 50, line 1 through p. 51, line 1]
51. In the past, superintendents at SSAISD have hired outside investigators because the HR department should conduct impartial investigations that are objective. [Hearing Transcript, Vol. 2, p. 193, line 14 through p. 196, line 23]
52. Expert testimony confirms to have a transparent investigation of Gary Durbon, Respondent should not do the investigation. [Hearing Transcript, Vol. 2, p. 193, line 14 through p. 196, line 23]

Respondent's Relationship with the Board

1. The Board President called a special Board meeting to be held on Monday, March 28, 2011 and posted her own agenda. [Hearing Tr. Vol. 2, p. 209]
2. On March 28, 2011, Respondent and Gary Durbon filed a lawsuit requesting a Temporary Restraining Order (TRO) and Temporary Injunction against Board member Prado and Tomlinson. Respondent requested the court prohibit Prado and Tomlinson from “directly/indirectly participating or voting as Board members of the South San Antonio Independent School District on the agenda items set for Monday, March 28, 2011”. [Petitioner's Exhibit 21]
3. Respondent admitted to signing the affidavit supporting the lawsuit and the request for a TRO against two Board members. [Hearing Tr. Vol. 1, p. 139]
4. On March 28, 2011, Board members Prado and Tomlinson were served with the court order at the Board meeting. [Exhibit 21]
5. Petitioner admits that the objective of the lawsuit and request for TRO was to keep trustees Tomlinson and Prado from attending the Board meeting. [Hearing Tr. Vol. 1, pp. 147, 149]
6. As a direct result of the lawsuit and issuance of the TRO, a quorum of the Board was not met, and the Board meeting was cancelled. [Hearing Tr. Vol. 1, p. 150]
7. On March 29, 2011, Respondent filed a police report with SAPD alleging official oppression by Prado. [Exhibit 11]
8. On March 30, 2011 Respondent is instructed by his attorney to advise SSAISD Trustees that a criminal investigation complaint has been filed against Prado for official oppression and they are now afforded protection under the Whistle blower statue regarding actions for retaliation. [Exhibit11]
9. On March 31, 2011, a Bexar County District Judge grants an Order dissolving the Temporary Restraining Order and Plea to the Jurisdiction. [Exhibit 22]
10. On April 2, 2011 a news article critical of Respondent is published in the San Antonio Express News. [Exhibit 24]
11. On April 4, 2011, at a special called Board Meeting, SSAISD Trustees, vote to place Respondent on administrative leave with pay. Motion passes 4-3. [Exhibit 60]
12. Respondent received an administrative leave letter with written directives. [Exhibit 12]

13. Respondent published a letter to the editor in the San Antonio Express News critical of a Board member. [Exhibit 26]
14. On July 12, 2011, Respondent is served with notice via a letter that the Board has taken action to propose the termination of his employment contract. [Exhibit 16]
15. Testimony from two experts confirms that Respondent failed to maintain the Board-Superintendent relationship and created antagonism between himself and the Board. [Hearing Tr. Vol. 2, p. 30, 41; Vol. 2, p. 347]
16. Respondent failed to perform as a prudent superintendent and caused serious repercussions, *to wit*, prevented the Board from conducting public business.
17. Respondent's actions constitute good cause for termination of Respondent's employment contract.

DISCUSSION

In this action Petitioner alleges 30 separate charges for the proposed termination of Respondent's contract. Petitioner acknowledges it did not meet its burden of proof on some of the allegations. These allegations can be grouped into two categories: 1) Respondent's failure to initiate an adequate investigation into whether Gary Durbon or someone else using Gary Durbon's computer accessed pornography on a school District computer; and 2) Respondent's relationship with the Board. The two categories are discussed below:

Respondent's failure to initiate an adequate investigation into whether Gary Durbon, or someone else using Gary Durbon's computer accessed pornography on a District computer

The facts prove by a preponderance of credible evidence that Respondent was informed on more than one occasion by employees of the District's technology department that pornographic material was being accessed through the computer assigned to Gary Durbon. Respondent first became aware of this in the fall of 2008 when Galvan approached him and produced documentation confirming pornographic material was being accessed through his son's

computer. Respondent exercised poor judgment when he took no steps to initiate an adequate investigation.

The only affirmative action taken by Respondent was to question his son about the allegations made against him. When Gary Durbon denied the allegations, Respondent took him at his word. The only other action taken by Respondent was to instruct his technology department to begin implementing password protection of SSAISD computers. These actions fall short of what is expected of a reasonably prudent superintendent. Further, Respondent failed to perform his duties with reasonable care, skill and due diligence as required by his employment contract when he failed to enforce the District's Electronic Communications policy regarding acceptable use of computers.

Several employees of the technology department were aware that pornographic material was being accessed through Gary Durbon's computer. When there was no action taken by Respondent to investigate the allegations, two employees of the technology department decided to provide the information to Prado. During this time, the allegations also became public. Once the allegations were revealed to the Board and the media, Respondent was approached by Welch who expressed concerns that the allegations were in the media and she was in possession of reports confirming pornographic material had been accessed through Gary Durbon's computer. Welch again showed Respondent documentation confirming the allegation. Once again, Respondent took no steps to investigate the matter but instead demanded to know who leaked the information to Prado and the media. Respondent also instructed Welch to author a document that would state she could not put Gary Durbon behind the computer at the time the pornographic material was accessed. Welch produced the document but made it very generic and explained the process but did not exonerate Gary Durbon. Respondent also questioned Welch about the police

investigation that was being conducted by the San Antonio Police Department in regards to the allegations against Gary Durbon. Contrary to what is expected of a reasonably prudent superintendent, Respondent's primary concern was the protection of his son rather than the best interest of the District.

Once Board members became aware of the allegations against Gary Durbon, a meeting was held with Respondent. During that meeting, in the presence of the HR Director and Tomlinson, Respondent was given a directive by Prado to investigate the allegations. At no time did Respondent say that there was a clear conflict of interest or that it was his recommendation an outside investigator or another investigator be assigned to the case. A reasonably prudent superintendent would have immediately removed himself from any investigation to avoid the perception of favoritism or bias.

Accessing pornographic material in a school setting is a serious offense and one that should be given extremely high priority. Respondent should have taken immediate and appropriate remedial action to ensure the access to pornographic material was stopped whether the alleged perpetrator was his son or someone else.

In conclusion, Respondent's failure to initiate an adequate investigation into the allegations of pornography in the school district constitutes good cause for termination of Respondent's employment contract and is contrary to the actions expected of a reasonably prudent superintendent. By failing to act after receiving information that pornographic internet sites were being accessed through his son's computer, Respondent breached his employment contract and trust with the Board. Both constitute good cause for termination

Respondent's Relationship with the Board

Unlike other employee terminations, the termination of a superintendent's contract can contain the additional element of superintendent/board of trustees' relations. *Trujillo v. Ysleta ISD*, No. 082-R2-199 (Comm'r Educ. 1999). As chief operating officer for the district, the superintendent is required to implement and carry out the policy of the board on a day to day basis. Tex. Educ. Code §11.201.

In March of 2011, Respondent took actions that significantly disintegrated his working relationship and trust with Board. Each of the following contributed to Respondent's failure to maintain a positive and professional relationship with the Board as directed by Board policy BJA (Local).

First, on March 28, 2011, Respondent and Gary Durbon filed a lawsuit requesting a TRO and Temporary Injunction against Board member Prado and Tomlinson. Respondent's intent was to keep them from participating in a Board meeting and carrying out the business of the district.

Secondly, on March 29, 2011, Respondent filed criminal charges of official oppression against Board President Prado. Respondent stated his actions were merely to document the actions of Board members. Respondent never pursued the charges any further.

Lastly, on July 28, 2011 Respondent wrote an article that was published by the local media discussing the allegations against his son, defending his son and also making disparaging remarks against Prado and a personal attack regarding her husband. In his defense, Respondent asserts he has a First Amendment right to speak out on a matter of public concern. The Fifth Circuit decision in *Kinsey v. Salado ISD*, 950 F.2d 988 (5th Cir. 1992) discusses at length the narrowing of a superintendent's First Amendment rights. The court noted that public employees who occupy policymaker or confidential positions fall much closer to the employer's end of the

spectrum, where the government's interests more easily outweigh the employee's (as a private citizen). Respondent's action was a violation of Board policy BJA (Local).

In conclusion, Respondent's actions are contrary to those of a reasonably prudent superintendent. The Board is entitled to a superintendent that can be trusted to act on behalf of the Board, in full compliance of Board policy and directives. *Trujillo v. Ysleta ISD*, No. 082-R2-199 (Comm'r Educ. 1999). The combination of the three above discussed incidents disrupted the business of the district and contributed to an antagonistic relationship with Board members. Respondent breached his employment contract and destroyed the legitimate expectation of a mutual trust relationship between him and the Board. Both constitute good cause to terminate his employment contract.

Petitioner has identified several other allegations which it considered to constitute good cause for the proposed termination of Respondent's contract. Petitioner has not met its burden of proof in regards to those allegations. The allegations include failure to post a school Board agenda, the Respondent exercising his right to seek outside counsel, the sending of letters of concern to TEA, and insubordination. Petitioner attempted to prove these allegations by argument of counsel and failed to produce sufficient documentary evidence or witness testimony to meet its burden of proof.

Conclusions of Law

After due consideration of the record, matters officially noticed, and the foregoing Findings, in my capacity as Certified Hearing Examiner, I make the following conclusions of Law:

1. Jurisdiction to hear this cause is proper under Texas Education Code section 21.251.
2. Petitioner's Board of Trustees is exclusively authorized to govern and oversee the

management of the District. Tex. Educ. Code §11.151.

3. Petitioner's governing body is comprised of seven trustees. [Judicial Notice]
4. A Board of Trustees may terminate a term contract at any time for good cause as determined by the Board. [Tex. Educ. Code §21.211 (a)(1)].
5. A Board of Trustees has authority to discharge a superintendent for good cause during the term of the contract. [Tex. Educ. Code §21.212 (d)]
6. Board policy DFBA (Legal) allows for termination during the contract period for good cause as determined by the Board.
7. "Good cause" for discharging a superintendent is defined as the employee's failure to perform the duties in the scope of employment that a person of ordinary prudence would have done under the same or similar circumstances. An employee's act constitutes good cause for discharge if it is inconsistent with the continued existence of the employer-employee relationship. An employee must not only fail to perform as an ordinary employee would, but the failure must be of a serious nature.¹
8. The Texas Commissioner of Education provides the following element of a superintendent termination: Unlike other employee terminations, the termination of a superintendent's contract can contain the additional element of superintendent-board of trustee relations. As chief executive officer for the district, the superintendent is required to implement and carry out the policies of the board on a day-to-day basis. An expectation exists that, as the board's

¹ *Kinsey v. Quinlan ISD*, No. 104-R2-598 (Comm'r Educ. 1998) citing *Lee-Wright, Inc. v. Hall*, 840 S.W.2d 572, 580 (Tex.App.-Houston [1st Dist.] 1992, no writ); *Brownsville ISD v. Saucedo*, TEA Case No. 015-LH-1002 (March 4, 2003).

employee, the superintendent can be trusted to act on behalf of the board, in full compliance of board policy and directives.²

9. Under Board Policy BJA (LOCAL), the superintendent's duties include "maintain a positive and professional relationship with the Board and the community". [Petitioner's Exhibit 40]
10. The standard of proof is the preponderance of evidence standard. [Texas Education code sec 21.256(e)]
11. Respondent's employment contract requires him to perform "as prescribed in state law, the job description, and Board policy as may be assigned by the Board" the superintendent shall perform those duties with reasonable care, skill and diligence, and the superintendent must comply with "all Board directives, state and federal law and rules, district policy and regulations as they exist or may hereafter be amended. [Petitioner Exhibit 20 p1-2]
12. The Fifth Circuit decision in *Kinsey v. Salado ISD*, 950 F.2d 988 (5th Cir. 1992) discusses at length the narrowing of a superintendent's First Amendment rights. The court noted that public employees who occupy policymaker or confidential positions fall much closer to the employer's end of the spectrum, where the government's interests more easily outweigh the employee's (as a private citizen). Respondent's First Amendment Rights did not protect him when he published a letter to the editor in the San Antonio Express News.
13. Respondent's failure to initiate an adequate investigation into allegations that pornographic material was accessed through Gary Durbon's computer upon receiving verbal and documentary evidence that the access of pornography was occurring in the school district destroys the legitimate expectations of the employer-employee relationship.
14. Respondent's failure to initiate an adequate investigation into allegations that pornographic material was accessed through Gary Durbon's computer, in violation of the District's

² *Trujillo v. Ysleta ISD*, No. 082-R2-199 (Comm'r Educ. 1999).

Electronic Communication policy regarding acceptable use of computers, was a violation of his employment contract.

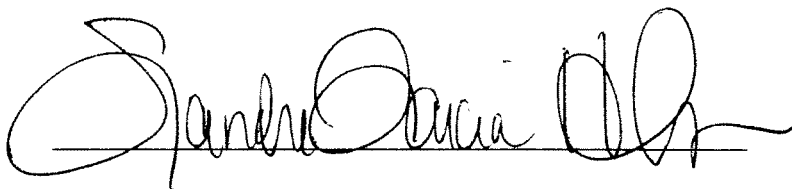
15. Respondent's failure to initiate an adequate investigation into allegations that pornographic material was accessed through Gary Durbon's computer destroyed the legitimate expectation of a mutual trust relationship between the Board and the superintendent.
16. Respondent's failure to initiate an adequate investigation that pornographic material was accessed through Gary Durbon's computer constitutes good cause for termination.
17. Respondent's filing of a TRO, filing official oppression charges merely to document the actions of the school Board without any intentions to pursue those charges, and sending a letter to the media created an antagonistic relationship with the Board. Respondent's failure to maintain a positive working relationship with the Board is a violation of Board policy BJA (local).
18. Respondent adversely affected the school district's operations in violation of his employment contract when his actions impeded the Board of Trustees from conducting public business by preventing two trustees from participating in a properly posted Board meeting.
19. The combination of Respondent's filing of the TRO, filing official oppression charges, and sending a letter to the media constitutes good cause for termination.
20. Respondent's actions are inconsistent with the continued existence of the employer-employee relationship, and are, therefore, good cause to discharge Respondent.
21. Petitioner has met its burden of proof.
22. Good cause exists to support the termination of Respondent's employment contract.

Recommendation

After due consideration of the record, matters officially noticed, and the foregoing Findings and Conclusions of Law, in my capacity as Certified Hearing Examiner, it is hereby

RECOMMENDED that the Board of Trustees of South San Antonio Independent School District adopt the foregoing Findings of Fact and Conclusions of Law and enter an order consistent therewith.

SIGNED AND ISSUED this 2nd day of November, 2011.

A handwritten signature in black ink, appearing to read "Sandra Garcia Huhn", written over a horizontal line. The signature is cursive and stylized.

Sandra Garcia Huhn,
Certified Hearings Examiner