

In the matter of the employment of
DON KELLER

HEARING OFFICER'S REPORT AND
RECOMMENDATIONS TO THE
BOARD OF DIRECTORS

INTRODUCTION

The Board of Directors of Sage International Charter School appointed the Hon. D. Duff McKee, senior district judge (retired), Boise, as the hearing officer for the above captioned matter by resolution of the Board of Directors. The matter was scheduled to come before the hearing officer for evidentiary hearing on Wednesday and Thursday, October 26 and 27, 2016, and for final arguments on Tuesday, November 1, 2016, all pursuant to notice and agreement of counsel. All parties appeared and participated in all proceedings before the hearing officer, with Brian Julian and Amy White, of Anderson Julian and Hull, Boise, appearing for and representing Sage International School, and Sarah Q. Simmons, of Strindberg & Scholnick, Boise, appearing for and representing Don Keller. On Tuesday, November 1, 2016, at the conclusion of the last day of hearing, the hearing officer declared the record closed with the captioned matter and all issues therein submitted for decision.

Now, therefore, being duly advised in the premises, the hearing officer makes and enters the following report to the board of directors on his findings of fact, conclusions of laws on the issues presented and his recommendations for disposition as follows:

REPORT AND ANALYSIS

A. Overview

It is clear from the evidence and materials submitted to me that Don Keller is quite a remarkable individual. Several witnesses commented upon the seemingly impossible task of bringing the Sage school from its inception in 2010 to a fully operating K-12 charter school in the span of a few years. The school now operates a fully credentialed International Baccalaureate program with over 1,000 students and a waiting list. It is widely recognized and has achieved national acclaim for its accomplishments. Don Keller has been the leader of this effort from its inception, and it is an astonishing story.

However, the nature of the operation is clearly changing. It is maturing from one of fledgling development where innovation and quick reaction to problems were the key to progress, to an established operation where stability, predictability and continuity are beginning to rule the day. The emphasis is no longer the struggle for mere existence and the clawing out a pathway for growth, but is now refocusing upon promoting continuity and stability and ensuring a smooth operation. The demands upon management are changing from one of unending reaction to the multitude of problems of the day to a more deliberative agenda of fortifying the organizational structure, adding depth to the bench, anticipating issues, and planning the workouts for expected contingencies.

As an enterprise settles in, the management demands change with it. Where innovative ideas, fresh solutions and individual attention to every detail may be the hallmark of the start-up or fledgling operation, as the operation transitions, the occasion for reactive innovation has to give way to planning, establishment and review. Once the

entity has grown to the point where its place in the continuum is assured, every twist and turn can no longer require the attention of top management. If every hiccup receives a fresh solution from the very top, there will never be continuity to the operation. Instead, management must focus on the establishment of machinery to take care of the routine; continuity and stability become the hallmarks of good management, and eventually top management will find that it no longer works the problems but rather just tends to the machinery.

Therein the rub. Very often the entrepreneur, the visionary, the creative individual who brought the venture into being, who nursed it through its formative time and fledgling years, and into the sunlight of success, then suddenly founders when the operation begins to transition into maturity. One long-time friend and client who was a wizard at starting companies but hated running them observed that the reason the visionary entrepreneur is terrible at running an established company is because running an established company correctly is boring. The work of planning and anticipating and preparation is dreary, and the best days are the smoothest days, where everything goes as planned and there are no surprises. But to the true entrepreneur, or visionary, these days may also be depressing – for there is nothing for them to do; nothing calling for their peculiar talents for innovation and imagination and fast reaction.

So, in the worst of cases, if this type of individual is still running the show, they go looking. They start tinkering. Or helping out. Or getting into someone else's backyard and adjusting here and there. The problem of course, is that this isn't maintaining the machinery that is supposed to be making everything run smoothly, this is customizing it, and pretty soon the company is back to where only one person knows how the thing

works. Continuity and planning are gone, stability gives way to ad hoc remedies, reaction to problems and innovative solutions on the fly rather than planning and routine begin to fill the day -- and the problems needing attention will begin to fly. This individual might be happy because he is again innovating and using his imagination, and, in his mind, solving the problems of the day. And in many instances the operation may appear to be sailing right along.

But in reality, things are usually beginning to come apart. Everyone around visionary leader is being driven to distraction. Morale falters. Things are not getting done. Necessary planning is lacking. No one knows where the boundaries are, or who is supposed to be doing what, or where the operation is headed. The operation will eventually suffer.

This is a broad illustration, but I see much in the evidence and exhibits presented to me to indicate that this is the heart of the problem. Don Keller may be a brilliant visionary to get one of these schools started and up and running. But at some point, the operation of the school must change from one of growth and innovation where the end result is the goal and any means of getting there are justified, to the more stable form of establishment where process becomes as important as the result, with continuity, predictability and foreseeability being the essential ingredients. The entrepreneurial innovator must change along with the operation or he must get out of the way.

Once the process of transition begins, he must resist the temptation to get involved in every problem, to tinker and adjust every detail personally, and to keep a string or rein on every item of happening. He must become satisfied to be a supervising administrator, to sit back and set objectives for others to reach, establish methods for

others to implement, and to see to the establishment of machinery so that everything will run on time, same today as yesterday, with the ideal being that everybody knows exactly what to do in every situation that can arise. And then he must leave it alone; he must quit tinkering and adjusting and allow the processes that have put in place to work. Changes now should come slowly and carefully, only after deliberation and consideration, with care for whole operation, in collaboration the operators most affected and with assurances that the effort is not a change just for the sake of change. He must do this and all the while maintain sufficient communications with a board so they feel they are being kept fully informed and advised.

If the entrepreneur cannot accept these changes, he is well advised to turn the company over to someone else, and go find a new project requiring his skills at innovation and imagination. Or he will eventually be asked to leave, whether he likes it or not.

B. The Board's Complaints

The charges in this case are more particularly described in a document, "Amended Notice of Recommendation of Possible Immediate Discharge," signed by the chairman of the board of Sage International School and dated October 11, 2016. At hearing, the charges were organized into five problem areas covered by the proof in this case. Two relate to allegations of improper reporting of circumstances based upon an allegedly improper interpretation of state law and regulation, and are covered in parts C and D below; two relate to allegations of violations of board policy and state law in monetary areas, covered in parts E and F below; and one alleges a management failure in an area alleged to be covered by state law, covered in part G below.

Keller's employment is by contract which is subject to the provisions of Idaho Code § 33-513, providing broadly that any contract prepared under this area of the law (administration of schools) may not be terminated except for cause. Cause is then defined as any material violation of board policy, any material breach of the rules of the state board of education, any material violation of law, or any grounds that would constitute a basis for revocation of the certificate of a teacher. The issues to be decided in this case are whether the charges can be sustained by the facts, and if so, whether the sustained charges advanced by the school are true and sufficiently material under the contract to warrant termination of employment.¹ The burden of proof is on the school, which it must sustain by a preponderance of the evidence.

The five problem areas covered by the charges advanced by the school are as follows.

C. The Reporting on Hours of Instruction

Idaho Code § 33-512(1) requires that schools teaching grades 9-12 provide a minimum of 990 hours of instruction per year for grades 9-11 and a minimum of 979 hours for grade 12. There are some exceptions and deductions not relevant here, but the statute is clear in mandating the instructional hours which must be available. The school is required to report to the State department of education with a complete calendar and calculations of days and hours of instruction being taught.

In December of 2014, Keller proposed and the board approved a change in the school calendar from a five day week to a four day week. This necessitated overhauling the daily class schedule so that the required 990 hour minimum could be maintained. It appears from emails that a number of individuals were involved in this project, including

[REDACTED]

[REDACTED]. The upshot was that a detailed calendar marked with all the school days, and a bell schedule showing the instructional periods, class breaks, and lunch period, as distributed through each of the four days of class, and a statement of the instructional hours covered for each of the grades taught was finally prepared and delivered to the State department of education in the late spring, along with the representations that the referenced materials indicated the required 990 minimum hours, with allowed adjustments, for the high school grades

The calculations for total instructional hours are fairly straight forward. Determine the number of instructional hours for each of the four days, then multiply by the number of that day in the year's school calendar, then add up to totals. The only tricky part comes in determining the hours of instruction that may be included in the school day. Apparently, only mandatory class time is supposed to be included; breaks between classes, lunch periods and any optional or non-class time are to be excluded.

However, in order to make the numbers come out to 990 hours total for high school classes for the Sage School , it was necessary to count the zero hour in the morning bell schedule (7:40 am to 8:30 am) and the office hours for instructors in the afternoon (3:30 pm to 4:00 pm). With these times included as instruction time, the total hours for high school students would meet the 990 hour requirement.

Zero hour is a class period where optional courses are offered for students who wish; attendance is not mandatory, and the classes are not required for graduation. Office hours are times the teachers are required to be available at the end of the day to meet with students and others concerning their classwork.

Keller testified that in his opinion, the zero hour and the teacher's office hour at the end of the day may be included as instruction hours for reporting purposes to the state board. He explained that office hours may be scheduled, at the instructor's option, as a time for tutoring or mentoring particular students. However, other testimony indicated that while the instructor is obligated to maintain office hours, and to be available to meet with students, the tutoring and mentoring by the student are optional and not required. No extra credit is given for mentoring. (I note that Keller explains in other material that the office hour time was intended as "student-free teacher-prep time," (Exhibit 3K) which seems inconsistent.) The testimony further indicated that state policy did not recognize zero hour periods as part of the minimum instructional hour requirement.

Several staff members testified that Keller told them that he was discussing this with the state to get waivers for Sage school. However, in his testimony at hearing, he testified that he did not discuss this with anyone at the State department of education, and he did not explain to his board that the issue was not clearly spelled out in the law or state policy, but was his interpretation of what should be allowed.

Apparently, someone suggested to the state that the hours being reported were not right and the state department made an inquiry. [REDACTED] was instructed, apparently by Keller, to reply to the inquiry. Interestingly, the reply from [REDACTED] to Julie Oberle at the state board (Exhibit 3-I) does not include copies to anyone.

I would expect that a formal reply to a state inquiry about an earlier report would be prepared by the person who prepared the initial report, which I understand here was [REDACTED]. I understand it was prepared under Keller's directions, in particular how the instructional hours were to be calculated, but [REDACTED] was the one who put it together.

I would also expect the response to the state's inquiry to be circulated for comment to everyone who's rear end may be anywhere close to the flames, and then copied to everyone with fingerprints on the project, as well as to the governing board. Here, it would have been at a minimum, comments from Don Keller, [REDACTED] [REDACTED] [REDACTED] with copies of the final response going to all of these plus to the chairman of the board.

The explanation for the state written by [REDACTED] in this email does not make sense, and appears to be inconsistent with the initial report prepared by [REDACTED]. It does not mention the inclusion of the zero hour or specifically the office hours, the daily reference to an 8:30 to 12:30 period with one class break is the kindergarten schedule, not the middle school or high school schedule, and the explanation of the lunch break is incomplete. The upshot is that it does not appear that [REDACTED] correctly reported to the state what the calculations consisted of in response to the inquiry about high school hours.

The board was not advised that the state department had inquired about the accuracy or sufficiency of the hours report. When the actual instruction hours were eventually re-added, without including the zero hour or the after school office hours, it was found that the total instructional hours which complied with state regulations barely exceeded 890— almost 100 hour short of the minimum hours required by statute. In the correction report to the state department, it is reported that the correct hours of instruction as taken off the actual bell schedule and calendar and correctly calculated were only 891.1 (with 22 hours of professional development), whereas the original report had been 990.85 hours. (Exhibit 41)

The testimony appears clear that Don Keller promoted the change to the four day week, and insisted on retaining the seven hour day. He pushed for including the zero hour and the office time as instructional hours. While others actually prepared the material for submission to the state, they were acting on Keller's instruction.

Keller told others he was working with the state to get his views on what could be included in the instruction hours, when in fact he had not discussed any of these issues with the state authorities. Keller assured the board that these matters were acceptable to the state, when in fact they had not been cleared in advance. When the state did inquire, Keller instructed [REDACTED] on how to respond, then did not include anyone in on the response sent. Keller specifically did not inform the board that the inquiry had been received, or that a response had been made, nor provide the board with copies of anything. The response [REDACTED] submitted was not adequate.

I would observe that Keller's approach here is common to the situation referred to in the overview. The innovator or entrepreneur in the fledgling operation "solves" the problem without collaboration and on the fly, with the expectation that in a rapidly developing, expanding or evolving situation, by the time one gets back to it, the situation will have changed sufficiently that mistakes in the original solution are irrelevant. It is characteristic, too, to see tasks parceled out almost randomly, without tracking the follow-ups, and without ensuring that all interested parties are kept in the loop. As the organization matures, this approach leads to trainwreck. The situations no longer evolve, and problems that are ignored begin to fester. The need for collaboration and delegation becomes critical, especially where problems that beg for long term policy decisions to guide future planning continue to receive Band-Aids slapped on just to get by.

The material errors here on Keller's part were in (1) failing to collaborate sufficiently within his own staff on the construction of the hours of instruction requirement at the outset, once the decision had been made to go to a four day week; (2) failing to collaborate with and get a buy-in from the state on the exceptions or waivers needed; (3) constructing, or directing that the hours of instruction totals be constructed, with parts that Keller knew had not been discussed with or approved by the state; (4) providing only 890 hours of instruction under the new four day class week, being almost 100 hours short of the mandatory minimum required by state law; (5) failing to be consistent in the preparation of the response when the formal inquiry was received, by referring it back to the original author, or at least involving the original author in the process; (6) failing to circulate the proposed response for comment to those directly involved with the implementation of it; and (7) failing to advise the board of critical steps in the process.

In my view, the board should have been advised from the outset that the hours of instruction requirement was going to need waivers or exceptions from the state, or that some changes to the seven hour day would be required to meet state law; but in any event, the board needed to be advised when the formal inquiry was received.

D. The Reports on Teacher of Record Designations

Approximately six times per year, each charter school submits a report to the state department of education listing exactly how many students are in attendance on a given day in each of the classes being taught, who each of the teachers for each of the classes are, and how are they credentialed. These reports are used by the state to calculate the amount of money to be allocated to the school for the school year. The funding is under a

formula which includes, as is relevant here, the specific credentials and qualifications of each teacher for the classes being taught. A teacher with a master's degree and twenty years' experience has a higher factor for funding reimbursement than a recent college graduate.

The problem lies in the fact that for full reimbursement, sometimes a certified teacher is not available. This can happen for a variety of reasons, and there are a number of acceptable fixes and work-arounds for most problems. In this case, however, it is alleged that Keller caused incorrect teacher of record reports to be filed with the state for four specific instances. The school alleges that these circumstances are not acceptable fixes or work-arounds to solve problems, but are plainly false reports, thereby exposing the school to serious problems with the state.

D.1. [REDACTED]

[REDACTED] had been a student teacher, and was hired to teach Spanish. She was a recent graduate of the College of Idaho with a minor in Spanish, so she was academically qualified to teach the course, but she did not have a teaching certificate. Keller thought all the necessary paperwork was available at the College of Idaho, so he instructed [REDACTED] to list [REDACTED] as a "Teacher of Record" anyway, even though she was not yet fully qualified. His thought was that she would soon be fully credentialed by the time of the next report, and the default would go unnoticed. In fact, she should have been listed as a student teacher with an "Alternate Authorization Plan" in place, which the board had approved and which would have been proper under the law.

For a variety reasons, [REDACTED] was unable to get the documents together for her teaching credential on time, and later reports continued to list [REDACTED] as teacher of

record, although she was not credentialed. [REDACTED] has since left the Sage school, without ever receiving her teaching credential. The consequence is that the teacher as reported did not have the qualifications as reported, and the funding formula would have been off by a slight amount. When sorted out, it is expected that the state may demand the return of the funding tied to the error in reporting.

The expert from north Idaho indicated under some circumstances, it might be appropriate to list a teacher as fully qualified if it was expected that the credentials would be available before the next report was due. But, he testified, transparency was essential, and the state department of education officials needed to be advised of exactly what was going on and why.

Keller's errors here were (1) listing [REDACTED] as teacher of record when she was not properly credentialed; (2) failing to follow through and either get her credentials from Colorado or correct the report and start a suitable alternative program in Idaho, and (3) failing to keep the State department of education fully informed. The major failing here is in not keeping the state advised of the situation; if the state had been advised and given its tacit approval, this would not have been a management problem at all, even though the textbook solution would have been to list [REDACTED] as an unlicensed teacher with an alternative path to licensure in place.

D.2. [REDACTED]

[REDACTED] was hired to teach "Environmental Systems in Society." She is fully qualified to teach this course academically, and has a teaching credential for math and science. The actual course is not listed or coded in the State department of education listings. Sage school was told to "pick something close" by someone at the department of

education. Instead, whoever prepared the report changed the teacher of record. The report submitted designated [REDACTED], [REDACTED] [REDACTED] [REDACTED] as the teacher of record for [REDACTED] class.

[REDACTED] had nothing to do with [REDACTED] class. There is no reason why the course could not have been listed and coded as a general science course for the state report, which would have been within [REDACTED] credential. This is obviously what the state representative meant by the instruction, "Pick something close." It did not mean pick a different teacher, but rather select a class that is on the state list as properly coded and substitute this course name for the one used by the school.

Keller testified that he had nothing to do with the way this was reported, but I do not find this credible. It appears that [REDACTED] probably completed the report, and [REDACTED] would have been acting on Keller's instructions, as [REDACTED] had been doing in a number of areas, and keeping him closely advised. I believe it more probable that [REDACTED] advised him of [REDACTED] actions here, too, and he has either forgotten or was not paying attention.

He signed the report under penalty of perjury, and is held to know the contents of what he signed. In any event, given the significance of the teacher of record listing, and the potential for fraud and worse if it is misused, good management practice would demand that a separate list of any irregularity at all be maintained and kept up to date. Instead, this is an example of taking a relatively simple problem and making it much worse.

I think the errors chargeable to Keller here are (1) not anticipating that the IB program may have unique classes that are not coded or included in the state board's classification structure, and designing a method or plan for handling the teacher

classification in such events; (2) allowing a different teacher to be designated as the teacher of record instead of the actual teacher of the class; and (3) designating [REDACTED] as the teacher of record without [REDACTED] knowledge or permission, and (4) not collaborating with the state over this.

It does not appear there is any money enhancement here, so if it had occurred in isolation the offense would be more of a management or administrative problem than a material violation of rules or policy. Since this occurs in a listing of similar offenses, this offense does serve to aggravate the seriousness of the rest.

D.3. [REDACTED]

[REDACTED] but Keller decided to [REDACTED]. [REDACTED], but no teaching license. [REDACTED], but it is out of date. So, Keller instructed [REDACTED] [REDACTED] as the teacher of record for [REDACTED] course. [REDACTED] did not know [REDACTED] being designated TOR for [REDACTED] class. Keller took no steps after reporting [REDACTED] as the teacher of record on the classes being taught [REDACTED] to correct the matter – either to get [REDACTED] [REDACTED] bring them up to date or to [REDACTED] [REDACTED]

The consulting expert witness from North Idaho indicated that it might be permissible to list some one else as the teacher of record on a temporary basis – if the one listed then took at least some part of the class. Perhaps by mentoring the teacher, sitting in from time to time, monitoring attendance, or such. And the expert further made it clear

that this would or should be with the concurrence of the State department of education. Neither of these were done here. When the device is used, it has to be with the understanding that it was a temporary fix, and that some long term solution that will lead to a qualified and fully credentialed person in the position had to be forthcoming. None of this was done here. Keller acknowledged that this just fell through the cracks.

After Keller was placed on leave, an acceptable “alternative path” plan was put in place and approved by the board to get [REDACTED]. With the alternative plan in place, which may take three years [REDACTED] can now be correctly listed as a teacher of record under an alternative plan. There is no reason why this could not have been done by Keller when the problem first came up.

Keller’s errors are (1) listing another as the teacher of record for [REDACTED] courses, (2) not immediately taking steps to cure the problem with [REDACTED] so that it would be corrected by the next report, (3) failing to notify and obtain the consent of the individual whose name was used as the TOR, and (4) failing to advise the state and get their buy-in to the plan. The defalcation has serious monetary consequences, since it makes it appear that there was a much higher qualified teacher in place for funding and reimbursements.

D.4. Boise Community Theater

An elective course is taught at the Boise Community Theater without the participation of any teacher from Sage. The students are released from Sage and are on their honor to report for class at the theater near downtown Boise.

[REDACTED] as the Teacher of Record, but in [REDACTED] has nothing to do with the class. Keller maintains this listing was done without [REDACTED]

knowledge, but I do not accept this explanation. I do not accept the explanation that anyone would list a completely bogus entry on this report without Keller's knowledge.

In any event, he signed the report under penalty of perjury, and is responsible for the defalcation. This is a completely fictitious entry that would immediately create the impression that funding was appropriate for a fully credentialed and licensed teacher when in fact the position indicated was totally non-existent. This is plainly a fraudulent entry, made with the expectation that it would be relied upon, with significant monetary consequences. It is the direct responsibility of the executive director, and Keller bears responsibility.

D. 5. Summary

The worst of these incidents of false reporting is the Boise Community Theater situation covered at section D.4., which is a deliberate falsification that is a material breach of state law. The remainder of the incidents could be classified as administrative or management errors without intent which, if taken individually, might not reach the degree of materiality sufficient to warrant drastic personnel action. However, I find the insouciant attitude on the part of Keller towards this accumulation of errors, and his willingness to take deliberate missteps to simply paper over a problem and push it down the road, rather than work to establish methods and processes to anticipate these situations and handle them routinely, and his tendencies not to collaborate with his staff or seek the state's buy-in to his solutions to the problem circumstances beforehand, and his failure to keep the board advised, are all management deficits that demonstrate a disregard for both the state and the board of directors' authority, and that would, to my mind, disqualify him from the position of executive director.

E. Tuition Reimbursement

Sage International School has a written policy that it will not reimburse anyone's tuition for seeking advanced degrees or post graduate course work from colleges and universities. This has nothing to do with general training or general benefits that might be offered to all teachers, but is aimed at preventing the selection of favored teachers and administrators for special benefits that in fact are not offered to all. This policy was adopted by the board in April of 2014, and Keller was aware of it.

In direct contravention of this policy, Keller caused Sage to pay the tuition of [REDACTED] for advanced course work, being a total of \$29,267 (Exhibit 42). Of this total, approximately \$17,500 was paid after the formal board action in 2014. Keller's explanation was that the individuals would be of use to Sage as administrators, and the course work was to qualify them for these positions and would therefore be of benefit to Sage. The explanation simply begs the question; the policy expressly addresses the concern, was adopted by the board with that concern in mind. The further excuse that a large number of the expenditures came before Keller's contract was extended in February of 2016, inferring some sort of estoppel or implied waiver, also begs the question. The most that can be assumed from this fact is that the board was not paying attention. In any event, at least one significant expenditure came after that date.

There is no other way of looking at this other than that Keller openly ignored a clear directive from the board of directors. The expenditure of close to \$17,500 in direct contravention of board policy, without seeking board approval and a waiver or exemption from that policy, is a direct, material and insubordinate act on Keller's part, and sufficient

to sustain termination of contract for cause. If there is any question of the board's interest in the matter at the time of renewal of Keller's contract, other than that the board was simply not aware of the magnitude of the charges in the previous years, the single expenditure of more than \$2,000 for tuition reimbursement in direct contravention of board policy in April of 2016 is a material and insubordinate act sufficient to warrant termination of contract.

F. Unauthorized Use of Credit Card

The board has an express policy declared and published in its employee handbook stating that the school has a zero tolerance to use of alcohol. Alcohol is forbidden on school property, and use is forbidden in connection with any school events.

There was evidence that Keller kept a bottle of Canadian blended whiskey in his desk, and shared a drink from it from time to time on special occasions. This is a direct violation of school policy, but does not amount to one sufficiently material to warrant adverse personnel action. On balance, an admonition to stop should suffice; if the board is constrained, a written admonition could be issued.

There was evidence that at off-campus events, on several occasions drinks would be shared by Keller and others, including members of the board. These were usually events celebrating milestones, or spirit builders to encourage collegiality among the teachers and staff, or with meals in connection with board meetings. There was no evidence of abuse on the part of Keller.

Formal school events arranged off campus at which alcohol is served, if with board knowledge and participation, is a tacit waiver of the policy, and warrants no intervention here. Informal gathering at a local saloon or bar, after school to celebrate the

end of the day, are not school events, and the policy does not apply. In either event, the circumstances do not rise to the level of constituting a material violation sufficient to warrant termination on the first action. On a first offense, the circumstance warrants a warning and perhaps a formal letter of admonition, but not termination. I find no circumstance meriting further inquiry in the area of use of alcohol in contravention of board policy.

However there was also evidence that, on a number of occasions Keller would pay for rounds of drinks for himself and staff members at a local saloon and restaurant, usually using a credit card provided to him by Sage but on one occasion putting in for reimbursement for charges he had paid out of his own pocket.

While I conclude that the mere use of alcohol on personal time is not an activity that can rise to the level of a material violation of board policy, it is a different matter when an administrator attempts to pay for the alcohol for himself and others with Sage funds. Here, it is not the use of alcohol that is objectionable, it is the unauthorized use of public funds. Idaho Code § 18-5701 makes misuse of a credit card by one entrusted with the card a felony. Here there is no dispute that Keller used the Sage card on several occasions to purchase rounds at a local bar for teachers and staff at after school informal gatherings; it is not entirely clear whether just alcohol was involved or also food, but it is clear that at least some alcohol was involved. The total amount is relatively trivial – a few hundred dollars at most. I recognize that the statute makes it a felony regardless of the amount, but if so, it is a low level felony.

Keller's motivations here were to build spirit or "team build" and develop collegiality among teachers and staff. There is no evidence of use of the card purely for

Keller's personal purposes. All the evidence was consistent that such use was in connection with informal gatherings of teachers and staff.

For this reason, I do not conclude that the circumstance of use of the credit card for purchases of alcohol for these informal team building and spirit raising events was a material breach of board policy. The purpose was a laudable one in the inception; the error was in the implementation. An admonition and restitution of the funds wrongly advanced is a sufficient remedy here for a first offense; if the conduct should be repeated, more significant sanctions can be considered.

I do consider these episodes to be further indication of Keller's general attitude towards the policies and authority reposed in the board, and his proclivity to ignore such when so inclined. Although the specifics of these incidents do not warrant drastic personnel action on their own, the incidents lend weight to the other charges where material cause has been found.

G. Failure to Implement Job Descriptions and Evaluations

The final area of the board's concern is the failure of Keller, as executive director, to complete adequate written job descriptions of all non-certified employees, and to set in place and see to the accomplishment of the mandatory written job evaluations, as required by Idaho Code § 33-517(1), and by the policies and procedures adopted by the board and as contained in the employee handbook.

There was no dispute that job descriptions are required by law for all non-certified employees, as well as a procedure for periodic evaluation, and that the job descriptions and procedures are to be available for review by anyone seeking employment. There is no

dispute that this task was not accomplished completely, with no real excuse being offered by Keller other than that it did not get done.

However, neither was there any evidence of any actual harm or prejudice existing because of the lapse, or any other evidence of any adverse consequence of this lack. There was testimony of a litany sanctions that might be imposed, but no evidence of any steps actually taken. This sort of requirement, when imposed by law, usually draws a notice and demand for compliance first, with opportunity to cure, before any sanctions are imposed. There was no evidence that events had even reached this first stage.

I conclude that although Keller is in technical violation of the statute for not completing the necessary descriptions and procedures for evaluations of non-certified employees as required by statute, I do not conclude that the breach is material or sufficient to sustain any adverse personnel decision at this time.

This is a matter of management prerogative, and absent the existence of actual harm or jeopardy to the operation caused by the lapse, or the existence of a notice and demand for compliance issued by the state, there is no reason for action here. If the board insists, it may issue a demand that these steps be accomplished, with notice of a time and opportunity to comply. At this point, however, the issue is premature and no further action is warranted.

G. Summary of Conclusions

I conclude that Keller's actions are materially in violation of board policy or law in three areas: (1) the failure to correctly calculate and to significantly overstate the required report on hours of instruction, as discussed in part C., (2) the failure to correctly report in some instances, and to falsely report in another, the teacher of record

designation on required reports to the state board as discussed in part D., and (3) causing Sage to reimburse the personal tuition charges of three staff members in contravention of stated board policy as discussed in part E. I conclude that any of these occurrences are sufficient standing alone to sustain the termination of contract; that all three reinforce the materiality cause considerably.

I conclude that the use of alcohol and alcohol on site are infractions of board policy, warranting an admonition or perhaps a letter of caution. But they are not a material breach sufficient to sustain termination of contract. Repeated offenses after admonition could rise to the level cause for termination, but at this time lesser sanctions may be in order, but not termination.

I conclude that the use of a Sage credit card to buy drinks for teachers and staff at spirit or team building events is an infraction of the law and of board policy. However, Keller's motivations were well founded to promote collegiality and good feelings among the staff and teachers at the school. There is no showing he improperly used the card for his personal use, or that he abused the use of alcohol at the schools expense. I conclude that a caution and admonition are sufficient in this case. If the conduct should be repeated after the admonition, the events might clearly elevate to sustain termination. But I understand this is the first time action has been proposed on these grounds, and I conclude that lesser sanctions may be in order, but not termination.

I conclude that the failure to create job descriptions and procedures for evaluations is a management issue, not an infraction or breach of policy.

RECOMMENDATIONS TO BOARD

Although I am finding that Keller was in material breach on three major areas of performance, it must be noted here that none of these findings include any element of malice, ill motive or selfishly motivated conduct on Keller's part. As misguided as some of his steps were, they were all taken in the belief that everything was in the best interest of the school and were in furtherance of what Keller perceived to be the loftiest of its goals and objectives. That he proved to be his own worst enemy here, and was in the way in too many of these endeavors, and not helping, does not detract from the fact of his good intentions throughout.

I do not believe that Keller should return to his position of executive director. It does strike me, however, that Keller is a remarkably talented man, if use can be made of his talents. It might be possible to return him to a lesser position, reporting to one more inclined to the management needs of the school – but I doubt it. It might, however, be possible to put him into a special position reporting directly to the board.

Keller's talents appear to be centered upon getting one of these things started from scratch, and it appears from what is in the material that he is very, very good at this sort of project. I also note in several places where Sage International may be contemplating opening new schools in conjunction with the JKA Foundation. The Board might consider creating a position for Keller where he is given the project of doing what he does best -- starting new schools, reporting only to the board, and having no connection or say in the management of the existing school.

If this is not possible, then some consideration should be given to making the eventual result of these proceedings as least punishing as feasible. Keller should not

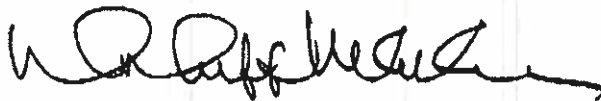
return to the position of executive director; but perhaps granting him an extended sabbatical – without pay – until he eases himself out or his contract runs out. Or permitting him to resign with the understanding that this report and its findings will be kept confidential, and a recommendation emphasizing his strong points will be published.

I understand that all of these alternatives portend considerable cooperation from Keller, which may no longer be feasible. This has become an adversarial proceeding, and I fully understand that tends to harden positions considerably. While for the reasons discussed, the subject of alternatives does merit exploration, if no feasible alternative is within reach or an acceptably collaborative arrangement cannot be found, so be it.

CONCLUSION

It is my ultimate recommendation based upon the conclusions stated herein, and in the best interests of the future of Sage International School, that the employment contract of Don Keller be terminated immediately for cause, subject only to such notice as may be required by law.

Submitted this 6th day of November, 2016.



D. Duff McKee, Hearing Officer

¹ I have been asked to interpret the reach of the contract in this case in light of the holding of the Idaho Supreme Court in *Nampa Education Assoc. v Nampa School District No. 131*, 343 P.3d 1094 (2015),

holding that under I.C. § 33-513(3), which contained the same language as I.C. § 33-5206(4) at the time of execution of the addendum to the contract, holding that an addendum that did not have the approval of the state superintendent would render the entire contract void. In this case, the base contract contains a notation that it was prepared pursuant to Section 33-5206(4) Idaho Code, and was approved by the State Superintendent of Public Instruction. The addendum purports to extend the contract by one year at a slightly higher salary. The addendum does not contain the reference notation to the statute, and was not approved by the State Superintendent. The question presented is whether the addendum is valid and operational. I agree with Ms. Simmons, counsel for Keller, that an administrative hearing officer would have no jurisdiction to adjudicate the legality of the instrument under which his jurisdiction was based in the first instance; this would be a question solely for the court to determine, at such time and if and when the matter of the hearing officer's findings upon the issues in suit were presented the court for confirmation. However, the hearing officer here is not governed by the Administrative Procedures Act, and no harm can come from an advisory opinion. It is a very close call, but it seems to me that the operative provision of the addendum here is an exact copy of the language of the first paragraph of the base contract with the date extended and the consideration increased slightly. If the language and form of the base contract have been approved, then the language and form of the addendum are approved as well, for they are exactly the same. This situation is distinguished on its facts from the cited case, and I would rule that the addendum is valid.