

BEFORE THE ALASKA PROFESSIONAL TEACHING PRACTICES COMMISSION

In the Matter of)	
)	
JANELLE M. ORSOLITS)	OAH No. 17-0556-PTP
_____)	Agency No. PTPC 17-22
)	
In the Matter of)	
)	
JOSHUA R. EMERY)	OAH No. 17-0557-PTP
_____)	Agency No. PTPC 17-23
)	

ORDER OF SUSPENSION

I. Introduction

Janelle M. Orsolits and Joshua R. Emery served as teachers in the Kashunamiut School District’s school in Chevak, Alaska under one-year contracts for the 2016-2017 school year. They resigned their positions at mid-year and moved to another state. After an investigation triggered by a complaint from the district, the Executive Director of the Professional Teaching Practices Commission filed accusations alleging that Mr. Emery and Ms. Orsolits violated their responsibility to honor their professional employment contracts under 20 AAC 10.020(d)(15). The commission staff requested one-year suspensions as a sanction.

With agreement of the respondents, the two cases were consolidated because of their interrelated facts. The Professional Teaching Practices Commission heard the consolidated matter on February 26, 2018. The respondents elected not to attend in person, but they participated by telephone and testified during the hearing. Assistant Attorney General Erin Egan represented the commission staff. Administrative Law Judge Christopher Kennedy presided. Based on the evidence¹ and the arguments of the parties, the commission has decided that Mr. Emery and Ms. Orsolits violated the Alaska Code of Ethics and Teaching Standards, and that their misconduct merits suspension of their teacher certificates for calendar year 2018.

¹ The evidence considered consisted of the 92-page Agency Record (A.R.) and Respondents’ Exhibits A-C, all admitted without objection at the hearing, and the testimony of witnesses Janelle Orsolits, Joshua Emery, Falon Tardiff (a teacher in Chevak), and Norma Holmgaard (Superintendent, Kashunamiut School District). No evidence was excluded at the hearing. A hearsay limitation was placed on certain testimony relating to A.R. 65-85.

II. Facts and Proceedings

A. Background

Janelle Orsolits holds an Initial Teacher Certificate with an endorsement in special education, issued by the Alaska Department of Education and Early Development.² Joshua Emery holds an Initial Teacher Certificate with endorsements in health and physical education.³ Both of them signed separate contracts in early March of 2016 to work for the Kashunamiut School District for the 2016-2017 school year.⁴ The contracts permitted the teacher to terminate his or her employment upon 30 days' written notice, provided there was written assent of the other party.⁵ Otherwise, the teacher was obligated to complete the agreed term.

At the time of contracting, Mr. Emery and Ms. Orsolits were a couple. Each had about four years of experience teaching in lower-48 schools.⁶

Both respondents began the school year in Chevak as agreed. Both submitted letters of resignation on December 5, 2016, with the resignations to be effective 26 days later.⁷ Both offered to, and did, continue to work until the beginning of Christmas break, leaving Chevak about December 23, 2016.

The district did not accept the resignations or agree to the departure.⁸ Mr. Emery and Ms. Orsolits did not return to the school after Christmas break. The district was not able to fill Ms. Orsolits's position for the remainder of the year. A replacement for Mr. Emery was found in February of 2017.⁹

B. Reasons for Ms. Orsolits's Departure

Ms. Orsolits has offered two reasons for her resignation. In her letter of resignation, she gave "hostile work environment" as the single reason for leaving.¹⁰ At the hearing, she discussed a difficult work environment, but also testified, "I left because I had a medical issue."¹¹

² A.R. 34.

³ A.R. 46-47.

⁴ A.R. 35, 48.

⁵ *Id.* at ¶ 9.

⁶ Orsolits testimony (questioning of Commissioner Piazza); Emery testimony (questioning of Commissioner Kardash). In Mr. Emery's case, the experience was part-time.

⁷ A.R. 28, 41.

⁸ This fact is undisputed. However, neither side submitted copies of the district's letters of nonacceptance. For completeness of the record, PTPC staff should have obtained these letters during its investigation.

⁹ Holmgaard testimony.

¹⁰ A.R. 28.

¹¹ Orsolits testimony.

As will be seen in Part III, Ms. Orsolits had the burden of proof on each of these issues insofar as they are used to excuse her failure to abide by the terms of her contract. She did not sustain her burden on either.

1. Health

The purported health issue appears to have been anxiety attacks.¹² Ms. Orsolits did not seek medical attention for this matter while she was teaching in Chevak. She had sick leave available to her, but did not use it to travel to a town or city for a medical evaluation or for treatment of this common affliction.¹³ After she resigned, she still did not seek immediate medical attention, first seeing a provider on February 28, 2017.¹⁴ That provider, a naturopath, did not confirm any diagnosis.¹⁵ Further, any medical concerns do not seem to have been serious enough for her or her partner to mention them in their resignation letters.¹⁶ In these circumstances, the commission does not find Ms. Orsolits's testimony that she resigned for medical reasons to be credible, and finds that she was not suffering from a medical condition that would have precluded her from completing the term of her contract.

Despite the insubstantial nature of this claim, Ms. Orsolits testified to the commission, without qualification, that "I left because I had a medical issue." The clear unreliability of this testimony somewhat undermines Ms. Orsolits's credibility on other matters.

2. Work Environment

The claim of a hostile work environment stems from a relationship between Ms. Orsolits and some of her supervisors. All acknowledge this relationship to have been difficult.

Ms. Orsolits disagreed fundamentally with Superintendent Holmgaard about how Ms. Orsolits should schedule her aides. This was a professional disagreement, but the views on each side were fervently held. The commission's firsthand impression of Ms. Orsolits through her testimony, as well as observations of others, suggests that she was a highly assertive, potentially abrasive, advocate for her position, confident that she knew what was best.¹⁷ Superintendent

¹² A.R. 12 (letter from Ms. Orsolits to Executive Director Seitz).

¹³ Orsolits testimony (questioning of Commissioner DeVaughn).

¹⁴ Orsolits testimony (questioning of Commissioner Piazza); A.R. 8, 12.

¹⁵ A.R. 8.

¹⁶ A.R. 28, 41.

¹⁷ Orsolits testimony (questioning of Commissioner Legg); A.R. 82-83, 86 (observations of SPED Coordinator Eva Wortman); A.R. 75 (observations of fellow teacher Sandy Manning).

Holmgaard has likewise been described as potentially abrasive,¹⁸ and projects a similar certainty that her perspective is the correct one.¹⁹

At one meeting in early October of 2016, Ms. Orsolits had assembled visiting outside experts to bolster her position. She invited Ms. Holmgaard to the meeting, without giving her advance notice of the nature of the meeting. Ms. Holmgaard, by her own description, felt that she had been “set up,” became “angry,” left the room, and viewed the behavior by Ms. Orsolits as “insubordinate.”²⁰ After investigating this incident, PTPC Executive Director Seitz concluded that Ms. Holmgaard had “erupted with anger and began yelling at Orsolits.”²¹ Later in October, Ms. Orsolits had the impression that Ms. Holmgaard was recruiting a possible replacement for her, indicating to her that her job was insecure.²²

Ms. Orsolits had a similarly difficult relationship with her principal, who shared Superintendent Holmgaard’s view that Ms. Orsolits was mishandling the aides. According to Executive Director Seitz’s findings, on one occasion the principal “interrupted a private meeting Orsolits was having with a parent and student, yelled at Orsolits, and [threatened] to ‘write her up’ . . . in the presence of another teacher, a parent, and a student.”²³ This event apparently happened on November 4, 2016.²⁴

Subsequently, Ms. Orsolits was denied approval to attend outside training. She regards the denial as an instance of favoritism and a reflection of the “hostile work environment.”²⁵

Despite the difficult professional relationships with two of her superiors, Ms. Orsolits remained employed under her contract and worked through December of 2016. She apparently did not file a union grievance relating to a hostile work environment or any other issue.²⁶ She appears to have used union representatives informally to facilitate discussions with school officials, but this did not progress to a formal grievance.²⁷

¹⁸ A.R. 67 (observations of former Principal Molli Sipe).

¹⁹ Holmgaard testimony.

²⁰ Holmgaard testimony (cross-examination by Emery).

²¹ Accusation, ¶ 7. *See also* A.R. 13.

²² Orsolits testimony. On cross-examination by Mr. Emery, Ms. Holmgaard testified under oath that she was actually seeking to hire an additional special education teacher, not a replacement for Ms. Orsolits.

²³ Accusation, ¶ 7. *See also* A.R. 16, 91.

²⁴ A.R. 59.

²⁵ Orsolits testimony.

²⁶ This can be inferred from Ms. Orsolits’s testimony. *See also* A.R. 89.

²⁷ *See* A.R. 14.

The commission’s overall impression from the evidence is Ms. Orsolits, from an employee’s perspective, was in an unpleasant professional situation. The exact allocation of blame for this situation is unclear, although it is likely that Ms. Orsolits herself at least contributed to the poor atmosphere. Ms. Orsolits has raised the possibility that others may also have managed the professional differences imperfectly. However, she has not shown that her supervisors placed her in an impossible position, whereby she could not reasonably be expected to continue to work on the disagreement through proper channels and finish out her commitment to her students.

C. Reason for Mr. Emery’s Departure

Mr. Emery was well-liked by the district’s administrators, enjoyed his job, and did not experience a work environment that he found to be hostile or unpleasant.²⁸ He resigned because he and Ms. Orsolits were in a committed relationship, and he felt he needed to be with her.²⁹ Mr. Emery has pointed out that he and his partner were hired as a teaching couple, receiving their offers on the same phone call at the same time.³⁰ However, the employment contracts of the two teachers were independent, not linked to one another.³¹

D. Ethics Complaints

The Kashunamit School District filed complaints about each of the teachers with the Professional Teaching Practices Commission on January 16, 2017.³² After an investigation that included interviews with many witnesses, the Executive Director issued Accusations against each of them on May 2, 2017. Mr. Emery and Ms. Orsolits filed Notices of Defense exactly 30 days later, and this proceeding followed. The commission staff moved for summary adjudication, but the motion was denied immediately as legally deficient. The matter then proceeded toward a hearing. It was originally scheduled to be heard before the commission on October 3, 2017, but the hearing was delayed to give the respondents additional time to seek legal representation.³³ No attorney entered an appearance for them, and the case went to hearing at the next commission meeting.

²⁸ A.R. 37-38; testimony of Emery and Holmgaard. Ms. Holmgaard described him as a “fabulous teacher.”

²⁹ Emery testimony.

³⁰ A.R. 37.

³¹ A.R. 35, 48.

³² A.R. 30, 50.

³³ In the early stages of this case, the respondents missed three conferences and did not seem to take the proceeding seriously. The administrative law judge told them he was deeply concerned and urged them to consult with a lawyer.

III. Analysis

A. *The Respondents' Violations*

Members of the teaching profession are required to abide by the professional teaching standards adopted by this commission.³⁴ In 20 AAC 10.020, we have adopted a Code of Ethics and Teaching Standards. A violation of this Code is grounds for revocation or suspension of a teacher certificate, or for the lesser sanctions of a warning or reprimand.³⁵

Provision (d)(15) of our Code of Ethics and Teaching Standards provides that educators “may not unlawfully breach a professional employment contract.” Particularly in Alaska, it can be difficult to replace teachers who prematurely leave positions they have promised to fill. The result can be highly disruptive to the educational process. For this reason, we require teachers to honor their commitments except in very unusual circumstances, such as a true health emergency or substantially misrepresented employment or working conditions. In essence, “unlawfully breach” is a shorthand to capture the legal concept of an unexcused failure to perform. If the teacher’s failure to perform was legally excused, there can be no ethics violation.

There are a number of circumstances that can excuse a contracting party from performing, but only two are at issue in this case. One is the doctrine of impossibility: if an unforeseen circumstance makes it impossible for a party to perform, failure to perform is typically not a breach of the contract.³⁶ The second is the issue of prior breach: if one party has already materially breached the contract, the other does not have to continue to perform. As a legal matter, both of these excuses are “affirmative defenses”—that is, once the Executive Director established that Ms. Orsolits and Mr. Emery had not performed one of the written terms of their contracts, the burden shifted to them to prove that their nonperformance was excused.³⁷

Impossibility is the doctrine that governs Ms. Orsolits’s claim regarding her health. In a personal services contract such as a teaching contract, if a person is too ill to continue to work, the person almost invariably is legally excused from performing.³⁸ However, the commission

³⁴ AS 14.20.480.

³⁵ AS 14.20.030(a)(4); AS 14.20.470(a)(3).

³⁶ See, e.g., *Merl F. Thomas Sons, Inc. v. State*, 396 P.2d 76, 78-79 (Alaska 1964).

³⁷ See *Murray E. Gildersleeve Logging Co. v. Northern Timber Co.*, 670 P.2d 372, 375 (Alaska 1983); *Blackstone Medical, Inc. v. Phoenix Surgicals, L.L.C.*, 470 S.W.2d 636, 646 (Tex. App. 2015).

³⁸ See, e.g., *Parker v. Arthur Murray, Inc.*, 295 NE.2d 487, 489 (Ill. App. 1973) (“A duty that requires for its performance action that can be rendered only by the promisor or some other particular person is discharged by his death or by such illness as makes the necessary action by him impossible or seriously injurious to his health, unless

has found as a matter of fact that Ms. Orsolits was not so ill that she could not perform. Therefore, the doctrine of impossibility does not excuse her failure to abide by the terms of the contract.

Prior breach is the framework in which we must examine Ms. Orsolits's contention that her work conditions were so intolerable that she was justified in leaving. Here, the question is whether, by creating a hostile work environment³⁹ or otherwise treating Ms. Orsolits in a fundamentally unfair way, the district violated the implied covenant of good faith and fair dealing that is part of every contract in Alaska.⁴⁰ The commission appreciates that Ms. Orsolits had a fundamental professional disagreement with her superiors and that her relationship with them was unpleasant. However, the evidence Ms. Orsolits presented to the commission did not show treatment so fundamentally unfair that she had to leave her job at mid-year, without even attempting a formal grievance process for any problems that could not be managed informally. As a legal matter, it was Ms. Orsolits's burden to show, not merely unpleasant personal relations or potential errors by management, but pervasive or fundamentally unfair treatment sufficient to make her employment untenable. She did not do that.

As to Mr. Emery, no legal doctrine excuses his breach of his commitment to work to the end of the year. We recognize that if one member of a teaching couple is forced to leave by severe illness, the other might be justified in leaving to provide care. However, Ms. Orsolits did not show any adequate basis for early departure, much less a serious illness requiring her partner to be at her side. In leaving to be with his partner under these circumstances, Mr. Emery made a personal choice that put him in breach of his contract, and one that was to the detriment of his students.

the contract indicates a contrary intention or there is contributing fault on the part of the person subject to the duty") (quoting Restatement of Contracts).

³⁹ Although repeatedly used by Ms. Orsolits and Mr. Emery, the phrase "hostile work environment" is not the most apt legal term to describe their claim. "Hostile work environment" is a concept used to describe conditions that are made intolerable for purposes of discriminating against or retaliating against an employee. *See, e.g., Haley ex rel. Phillips v. Doe Excavation, Inc.*, OAH No. 09-0372-HRC (Alaska State Commission for Human Rights 2011) (published at <http://aws.state.ak.us/officeofadminhearings/documents/hrc/hrc090372.pdf>) ("hostile work environment" as an element of a sex discrimination case). Ms. Orsolits does not allege such a motive. She simply alleges that her employer treated her so unfairly that she could not reasonably be expected to continue as an employee.

⁴⁰ *See Guin v. Ha*, 591 P.2d 1281, 1291 (Alaska 1979).

B. *Appropriate Sanction*

In selecting an appropriate sanction, we look first to our prior handling of similar cases. While we may depart from these earlier benchmarks, we do so only for carefully articulated policy reasons. For violations of 20 AAC 10.020(d)(15) without adequate mitigating circumstances, it has been our practice, frequently publicized in our newsletters to members of the profession, to impose a one-year suspension. For example, in the case of *In re Dunbar*,⁴¹ decided after a full hearing in 2008, we imposed such a suspension on a teacher who violated a year-long contract in Ketchikan by leaving unilaterally in February to accompany her husband to a new job, causing substantial disruption and even the withdrawal of two students from the school. In several cases where no hearing was sought, we have approved the same sanction: examples include *In re Medlin*⁴² (departure in January for genuine health reasons, but ones that could have been addressed without leaving); *In re Kelly*⁴³ (departure at Christmas break for “personal reasons”); *In re Liss*⁴⁴ (departure in November for “job dissatisfaction”).

We have reduced this sanction when there are significant mitigating factors. In 2011, for example, we imposed only a 7½-month suspension on a teacher who left early in violation of a contract, but who did so to serve many of the same students in a new capacity, who helped conscientiously in the transition to a replacement teacher, and who had a genuine and reasonable (but erroneous) belief that his contract had already expired.⁴⁵

We find no such mitigating factors here. Compliance with the Code of Ethics and Teaching Standards will not always be easy or pleasant. Nearly all teachers who leave before their contracts expire have strong personal reasons for doing so—unhappiness with rural life, better opportunities elsewhere, and so on. Ms. Orsolits’s professional conflicts fit into this spectrum, as do Mr. Emery’s desire to be with his life partner. They are not exceptional.

C. *Starting Date for Sanction*

Typically, when our staff finds a Code violation in connection with an early departure from an employment contract, we promptly make an offer allowing the teacher to accept a one-

⁴¹ PTPC Case No. 08-60, OAH No. 08-0375-PTP (Order of Suspension, Oct. 14, 2008).

⁴² PTPC Case No. 17-24 (Stipulation and Order approved April 24, 2017).

⁴³ PTPC Case No. 08-36 (Decision and Order, May 5, 2008).

⁴⁴ PTPC Case No. 08-29 (Decision and Order, Jan. 17, 2008). In the case of *In re Weems*, PTPC Case No. 02-80 (Decision and Order, May 5, 2003), we imposed the harsher sanction of revocation. Mr. Weems, however, committed a second violation involving dishonesty. Mr. Weems’s certificate was restored in 2008. PTPC Case No. 02-80, OAH Case No. 07-0639-PTP (Order of Reinstatement, Jan. 28, 2008).

⁴⁵ *In re Day*, PTPC Case No. 11-32, OAH No. 11-0068-PTP (Order of Suspension, April 22, 2011).

year suspension as agreed discipline, commencing retroactively on the date of breach. Ordinarily, this results in two semesters of suspension—the one from which the teacher just resigned, and the next one.⁴⁶

In this case, the date of breach was January of 2017. If we made the suspension retroactive to that month, it would already have expired before it was imposed. Accordingly, we elect to impose it retroactive to January 1, 2018, so that it will apply to two semesters, prospectively, in the same way that negotiated suspensions do.

IV. Conclusion and Order

The commission finds that Joshua R. Emery and Janelle M. Orsolits each breached a professional employment contract in violation of the Alaska Code of Ethics and Teaching Standards, 20 AAC 10.020(d)(15). After considering the circumstances surrounding the violations, the commission suspends the Initial Teacher Certificates of Janelle M. Orsolits and Joshua R. Emery for a period of one year, with the period of suspension to commence retroactively on January 1, 2018 and to continue through December 31, 2018.

Commissioner van Wagner concurs in the finding of an ethical violation and concurs in the duration of the suspension, but dissents regarding the beginning date for the suspension. Commissioner van Wagner would commence the period of suspension on the date the respondents failed to return to work, January 3, 2017.

Commissioners DeVaughn, Kardash, Legg, Mann, Piazza, Runion, and van Wagner participated in this hearing and decision. The participating commissioners voted unanimously in open session to adopt the above conclusion and order on February 26, 2018. This decision becomes effective as provided in Alaska Statute 44.62.520. Reconsideration and appeal rights will be communicated in the accompanying distribution notice.

DATED this 20 day of March, 2018.

PROFESSIONAL TEACHING
PRACTICES COMMISSION

By: Signed _____
Melody Mann, Chair

[This document has been modified to conform to the technical standards for publication.]

⁴⁶ Examples of this approach include *In re Medlin* (cited above) and *In re Leary*, PTPC Case No. 17-30 (Stipulation and Order adopted April 24, 2017).