

AMERICAN ARBITRATION ASSOCIATION

Turkia A. Mullin,

Claimant

vs.

Case No. 54 166 00142 121

Arbitrator: Paul S. Teranes

Wayne County Airport Authority
and Bernard F. Parker, Jr., individually
and in his official capacity, jointly and severally,
Respondents.

_____/

Raymond J. Sterling (P34456)
Jennifer L. Lord (P46912)
Howard S. Weisel (P72932)
Attorneys for Claimant
Sterling Attorneys At Law PC
33 Bloomfield Hills Parkway, Suite 250
Bloomfield Hills, Michigan 48304
248-644-1500

Leonard D. Givens (P14028)
Megan P. Norris (P39318)
Christopher M. Trebilcock (P62101)
Attorneys for Respondents
Miller Canfield Paddock & Stone PLC
150 West Jefferson Avenue, Suite 2500
Detroit, Michigan 48226
313-963-6420

John R. Trentacosta (P31856)
Vanessa L. Miller (P67794)
Co-Counsel for Wayne County Airport Authority
Foley & Lardner LLP
500 Woodward Avenue, Suite 2700
Detroit, Michigan 48226
313-234-7100

OPINION OF THE ARBITRATOR

A seven count complaint was filed by Turkia A. Mullin against the Wayne County Airport Authority and Bernard Parker, Jr. in the Circuit Court for the County of Wayne. The case was assigned to the Honorable Robert J. Colombo who ordered that the case go to arbitration under the arbitration clause of Mullin's employment contract with the Airport. Bernard Parker, Jr., also agreed to arbitration and to be bound by the decision of the arbitrator. The parties chose Paul S. Teranes as the arbitrator under the auspices of the American Arbitration Association. An arbitration hearing was held from February 18 to February 26, 2013; post-hearing briefs were presented, and below are the findings of facts, the conclusions of law, and the award of this arbitrator.

At the core of this case is the employment contract Ms. Mullin had with the Wayne County Airport Authority as CEO of the Airport. The contract was an at-will contract for a term of three years, unless extended by the board, at the pay of \$250,000 dollars a year. The contract also contains a severance clause in Section 7d which states in part “However, if Ms. Mullin’s employment with the Authority is terminated by the Board other than for Cause (as defined below). . Ms. Mullin shall receive severance equal to the greater of (a) thirty (30) weeks of Mullin’s base salary or (b) the base salary for the remainder of the Term. Section 7f(i) of the contract states that “For the purpose of this Agreement, ‘Cause’ means (i) dishonesty, theft, willful misconduct, breach of fiduciary duty or unethical business conduct which is injurious to the Authority in other than a *de minimis* manner” Ms. Mullin was dismissed by the Board of the Airport Authority on October 31, 2011, two months after she began as CEO of the Airport. Ms. Mullin claims that she is entitled to two years and ten months of her salary as severance pay under the terms of the contract. The Airport claims that Ms. Mullin was discharged for cause, and is not entitled to payment for the remaining time on the contract under section 7f(i).

BURDEN OF PROOF

The first issue to be addressed is who has the burden of proof on the issue of just-cause. The Claimant, Ms. Mullin, contends that just-cause is an affirmative defense, and the burden of proof is on the Respondent, Airport Authority. The Respondent contends that in order for Ms. Mullin to be entitled to severance pay she must prove that her dismissal was without just-cause as a condition precedent to receive severance pay, and therefore she has the burden of proof to show there was no just-cause to dismiss her.

Under the Michigan Standard Jury Instruction MI civ J.I. 100.10 the burden of proof shifts to the defendant to prove that there was just-cause to discharge an employee. A compelling case on this issue is *Ridgeway v Ford Dealer Computer Services*, 114 F3d 94, (6th Cir 1997) where an at-will employee was denied a benefit after discharge for just-cause. The *Ridgeway* court addressed who has the burden of proof on the issue of just-cause, in a case where an employee can be fired for just-cause only, verses a case in which an at-will employee is denied benefits after discharge because of just-cause. The *Ridgeway* court found no distinction between those circumstances, and found that the defendant has the burden of proof in both cases. It would seem that in both circumstances just-cause is an affirmative defense; i.e. the discharge was for just-cause while the denial of benefits was also for just-cause.

Based on the above, I find that the Respondent has the burden of proof to show that the Airport Authority had just-cause to not pay Ms. Mullin the remaining salary on her three year contract after they dismissed her.

FACTS

Turkia A. Mullin was born in Lebanon, and came to the United States with her parents at the age of two. She was educated in the public school system, graduated from college, and received a law degree. After serving in the United States army, she obtained a job with the County of Wayne in September of 2002. She became an assistant in the executive's office under Robert Ficano, the county CEO. In 2008 Mr. Ficano appointed Ms. Mullin director of economic development for Wayne County. Ms. Mullin claims that under the agreement she had with Mr. Ficano she was to be paid \$200,000 dollars a year as director of economic development, and severance pay of one year's salary if she were to leave that position.

Ms. Mullin testified that she was very successful in her position of Director of Economic Development, and through her efforts 5.5 billion dollars of new economic development came to Wayne County.

In May of 2011 Janelle Allen, the interim CEO of the Wayne County Airport Authority announced that she was going to resign from that position. Robert Ficano asked Ms. Mullin to apply for the position of CEO of the Airport Authority. Ms. Mullin testified that she at first was hesitant to apply for the job because of family commitments being a single mother with two young children. She eventually decided to apply for the job, and put a great deal of effort studying up on airport administration to prepare for the CEO job interview.

The seven member Airport Authority Board of Directors were to appoint the new CEO, and as a part of the selection process, the Board established a committee to screen applicants. The screening committee consisted of board members Sam Nouhan, Susan Hall, and Charley Williams. The committee hired Jack Krasula's public relations firm, Trust In Us, to narrow down the applicants, and had about six applicants to interview. Among the final six to be interviewed by the selection committee was Turkia Mullin.

On July 30, 2011 the selection committee conducted interviews of the six finalists, and as a part of the interview process, each applicant was asked to write a bluebook essay on their vision of the future of the Airport. The applicants were directed to a room with a monitor, and given one half hour to write their essay. The Bluebook essay was the idea of Susan Hall.

All three committee members agreed that Turkia Mullin was the outstanding candidate, and her essay "knocked it out of the park". The format of her essay was in the nature of a press release announcing the advances the airport made looking back from 2016. The three committee members recommended to the other board members that Turkia Mullin be appointed as the CEO of the Airport Authority.

On August 2, 2011 the Airport Authority Board of Directors met to select the new CEO, and Turkia Mullin was unanimously selected. The terms of her employment contract were the same as the former permanent CEO, Lester Robinson. She was to have a salary of \$250,000 a year for three years. The contract was labeled as an at-will contract with a severance provision under 7d whereby if Ms. Mullin was discharged by the board without cause, she would receive the remaining salary left on her three year contract.

Ms. Mullin spent the month of August winding down her duties at Wayne County, and learning more about the operation at the airport. Susan Hall and several other members of the Airport Authority board wanted Ms. Mullin to keep “a wall” between the operation of the airport and the County of Wayne. Ms. Hall did not want to get into a situation which existed when Edward McNamara was CEO of Wayne County where in 2003 the State Legislature stepped in and set up the Airport Authority to end the influence of the McNamara regimen over the airport. Ms. Hall insisted that Ms. Mullin resign from several boards which were connected with Wayne County before she took the position of CEO of the airport.

Ms. Mullin began her job as CEO of the airport on September 6, 2011. There was some controversy over her plans to lay off airport employees to reduce costs, and some board members felt that she maintained too close a relation with Wayne County employees. There were those, however, who thought Ms. Mullin was doing a good job. Delta Airlines was impressed with her efforts, and a long pending contract with a shuttle service was resolved with the airport.

On September 22, 2011 a story appeared in the media that Turkia Mullin received a \$200,000 severance pay when she left her job as Director of Economic Development to take the job as CEO of the airport. This story was widely covered in the press and on television. In a TV interview Ms. Mullin said that she had a written contract that indicated that she was entitled to the \$200,000 severance pay when she left her job as Director of Economic Development for Wayne County.

A letter signed by Robert Ficano appeared in the media which indicated that Ms. Mullin would receive \$200,000 severance pay when she left her position as Director of Economic Development for Wayne County. This letter raised questions in the media because it was undated, and on a letterhead of Wayne County with an address of 600 Randolph, Detroit, MI. The address for the CEO of Wayne County in 2011 was the Guardian Building. There were questions as to whether this letter was undated with an old address to make it appear that it was written at the time Ms. Mullin first began her job as Director of Economic Development. Ms. Mullin eventually returned the \$200,000 to Wayne County.

Several board members of the Airport Authority believed that the publicity over Ms. Mullin’s severance pay when she left her position with the county was a distraction in the operation of the airport, and they began to doubt the honesty of Ms. Mullin.

On October 28, 2011 Renee Axt, chairman of the board, sent a notice to the board members for a special meeting of the Airport Board to be held on October 31, 2011 for the purpose of discussing the employment of the CEO. On October 29 three members of the board met with John Cashen, Attorney for the Airport Authority.

At the meeting on October 31, Ms. Mullin appeared with her attorney, Raymond Sterling. When the meeting was called to order, Bernard Parker made a motion to have the board go into closed session, which motion was passed. The members of the board went into closed session, but Ms. Mullin was not allowed to participate in the closed session. The reason for the closed session was to discuss issues of law with Mr. Cashen. After the closed session the members of the board went back into open session. The board had a written resolution to dismiss Ms. Mullin as CEO of the Airport Authority for cause based on the grounds stated in 7f(i) of Ms. Mullin's employment contract as quoted above. On a motion, the resolution of discharge was passed on a five to two vote: Sam Nouhan and Michael Jackson dissenting. Sam Nouhan dissented, claiming that the issues of cause relied on by the affirming board members were not injurious to the authority in other than a *de minimis* manner. Michael Jackson dissented because he believed there should be further investigation into the charges against Ms. Mullin given that there was over \$700,000 at stake in severance pay.

Because the discharge was for cause, the Airport Authority did not pay the two years and ten months salary as a severance payment to Ms. Mullin. As a result of non-payment, Ms. Mullin filed the instant seven count complaint against the Wayne County Airport Authority and Bernard Parker.

CONCLUSIONS OF LAW

Count I of the complaint claims a breach of the employment contract between Ms. Mullin and the Wayne County Airport Authority when the Airport Authority failed to pay Ms. Mullin her severance pay as set forth in the employment contract. The amount of money claimed by Ms. Mullin as her severance pay is \$712,328, the salary she would have earned if she were allowed to complete her three year contract.

The Airport Authority contends that they are not obligated to pay under the severance agreement because Ms. Mullin was discharged for cause under the provisions of 7d. The majority of the board thought that she should be discharged for cause because of her dishonesty in a number of ways in her dealings with the Airport Authority.

Several of the board members believed that Ms. Mullin was dishonest during the application process for the CEO position. It was Mr. Ficano who urged Ms. Mullin to apply for the CEO position at the Airport. Mr. Ficano appointed four of the seven members of the board, so his favored candidate for the CEO position most likely would have been known to the board members. I do not see anything dishonest if Ms. Mullin presented her application for the CEO position to Mr. Krasula before the position was posted. She still had to go through the application process.

Several board members believed Ms. Mullin was dishonest because she had knowledge that an essay on the applicant's view of the future of the airport would be asked for at the time of the interview. Ms. Mullin testified that there were rumors that an essay would be a part of the interview process. As she said, "The County is full of rumors", so it would not be unusual that information about the essay leaked out. The board was looking for a CEO who had experience in development, so the topic of one's future view of the airport would not be unusual.

Ms. Mullin testified that she asked Lynn Ingram to prepare a document for her in the nature of a news release setting forth the development of the airport as if it were the year 2016. She provided her ideas of what the airport should look like in 2016, and Mr. Ingram put it together in a press release format. Mr. Ingram was experienced in preparing news releases because he was the Communications Director for Wayne County, and worked with Ms. Mullin in the past. Ms. Mullin seems to have an excellent memory, and memorized Mr. Ingram's writing for her bluebook essay. Mr. Ingram also drafted letters of endorsement for Ms. Mullin to be signed by people who agreed to endorse her for the CEO position. It is not unusual for a person who is asked for an endorsement letter to have the requesting party prepare the letter for their signature.

In looking at the claims of dishonesty by Ms. Mullin in the application process, I find that Ms. Mullin's actions were not dishonest, but understandable acts of a person in Ms. Mullin's preferred position when she is applying for the job of CEO of the airport.

Bernard Parker said that after Ms. Mullin was discharged as CEO, he learned about Ms. Mullin supposedly knowing about the bluebook essay before the interview which he believed was dishonest. The Respondent argues that this is after-acquired evidence which can be used as a basis for Mr. Parker finding that Ms. Mullin was dishonest. Since I have found that supposed knowledge of the bluebook essay before the interview does not constitute dishonesty, the after-acquired evidence theory is not applicable.

Another allegation of dishonesty on the part of Ms. Mullin by some of the board members was Ms. Mullin's claim that she was responsible for 5.5 billion dollars of economic development coming into Wayne County. Robert Ficano in his arbitration hearing testimony and in statements on television interviews also stated that Ms. Mullin was responsible for economic development in Wayne County amounting to 5.4 billion dollars. While on the television show "Flash Point" Mr. Ficano had a document in hand prepared by Wayne County which he said refuted the Free Press contention that Ms. Mullin did not generate about 5.5 billion dollars worth of economic development. Mr. Ficano disputed the Free Press method of investigation to reach their conclusion.

The statements of Mr. Ficano supported the claims of Ms. Mullin that about 5.5 billion dollars worth of economic development came to Wayne County while she was the Director of Economic Development. This confirmation of Mr. Ficano is sufficient evidence to establish that Ms. Mullin was not dishonest in her claims of bringing 5.5 billion dollars worth of economic development to Wayne County.

Another charge of dishonesty against Ms. Mullin by several of the board members was that Ms. Mullin said she had the same contract provisions concerning severance as her predecessor, Mulu Dirru, had as Director of Economic Development. Again this statement was confirmed by Robert Ficano in his arbitration hearing testimony and in his public announcements on television. Further, the undated letter on 600 Randolph letterhead signed by Mr. Ficano, indicated that Ms. Mullin had the similar provisions as her predecessor except the severance payment was one year's salary, not eighteen month's salary.¹ It was further specified that this severance was to be paid as long as she was not asked to leave for cause. From these facts, I cannot find that Ms. Mullin's claim that her contract with the County was the same as her predecessor was a dishonest statement.

There were board members who testified that Ms. Mullin was dishonest when she said she had a written contract as Director of Economic Development which contained a severance agreement as long as she left her position without cause. Maryanne Talon, former Corporation Council for Wayne County, testified that she drafted an employment contract for Ms. Mullin at the time she became Director of Economic Development, but for some reason she does not believe that the contract was ever executed. In a radio interview with Paul W. Smith, Robert Ficano said there was an agreement with Ms. Mullin as Director of Economic Development which included a severance provision if she left without cause. There was also a separation agreement (Exhibit cccc) signed by Ms. Mullin which indicated she would receive \$200,000 severance for her promise to hold the County harmless for any claim she may have against it. Finally there is the undated letter on the 600 Randolph letter head signed by Mr. Ficano setting forth a severance agreement as follows, "The County will only agree to 12 months of severance and not 18 months like your predecessor. This severance would be paid upon departing employment, as long as you were not asked to leave for cause. You also agreed that as a prerequisite to receiving severance you will sign a release and a waiver of claims".

Mr. Ficano in a television interview on November 6, 2011 stated that when he gave the interview with Paul W. Smith in September 2011, he believed that there was a written employment contract with Ms. Mullin as Director of Economic Development. He said it was not until later that he found there was no written contract, and because of that he asked Ms. Mullin to return the \$200,000 severance payment, which she did.² Further when the news broke concerning the severance payment to Ms. Mullin, Mr. Blackwell, Robert Ficano's press secretary, issued a statement that the payment of the severance was a part of the contract with Ms. Mullin, and she was entitled to it.

From the testimony of Ms. Mullin, Mr. Ficano, and Ms. Talon there is evidence that an employment agreement with Ms. Mullin as Director of Economic Development existed, and that this agreement was put into a draft form, although never signed. Mr. Ficano believed that if Ms. Mullin left her position as Director of Economic Development, she would receive a

¹ Mulu Dirru did not have his contract renewed as director of economic development for Wayne County. When he left the County he received a year's salary, \$200,000, and another \$100,000 for six months work to encourage China to invest in Wayne County.

² Lynn Ingram testified that he attended a meeting of Mr. Ficano's advisors in which it was decided that Ms. Mullin should return the \$200,000 to save face for Mr. Ficano.

severance pay of one year's salary. When questioned about a severance package when someone leaves employment voluntarily, he said that such a contract is not unusual. He said that economic developers are the highest paid public employees, and severance can be considered as part of their compensation.³

Bernard Parker, a member of the Wayne County Board of Commissioners, testified that his investigation found no written employment contract with Ms. Mullin for her position as Director of Economic Development. He also testified that Mr. Ficano was known to enter into employment agreements without approval of the County Commission. These unapproved employment contracts have been a bone of contention between the county CEO and the county commissioners.

In light of the above, it is reasonable that Turkia Mullin believed that she had an agreement or employment contract for her position as Director of Economic Development, and that it contained a severance payment when she left the county. There was a draft of the employment agreement according to Ms. Talon. There were also written documents such as the undated letter and the separation agreement which spoke to the severance payment. So I find that when Ms. Mullin said she had an agreement for a severance payment, she was not dishonest. As far as the agreement being written is concerned, the undated letter and the separation agreement were written documents that memorialized the agreement. Whether these documents constitute a written contract or not, it was reasonable for Ms. Mullin to consider that she had a written contract. For Ms. Mullin to say that she had a written contract is not significantly injurious to the Airport Authority and therefore does not constitute cause for discharge.

Some board members believed that the undated letter with the 600 Randolph address which set forth the terms of Ms. Mullin's severance agreement was to cover up the fact that Ms. Mullin did not have an employment contract with a severance agreement when she first became Director of Economic Development, and therefore an attempt to defraud. As noted above, the evidence clearly indicates that Ms. Mullin had an agreement that she would get one year's severance pay when she left the county. Mr. Ficano believed that a written employment contract was signed when Ms. Mullin began as Director of Economic Development. Mr. Ficano testified that the undated letter was to memorialize their agreement. Mr. Ficano admitted that he signed the letter, and did not deny the accuracy of the letter. One can only speculate why the letter was undated and with an old County address. One theory is to rectify the mistake that a written contract was not executed when Ms. Mullin began as the Director of Economic Development. Mr. Ficano stated publically that mistakes were made. It would appear that the mistake was that the severance agreement was not put in writing. It was not until he found out that the agreement was not in writing that he asked Ms. Mullin to return the \$200,000 severance payment. Ms. Mullin testified that when she first got her new job with the county, drafts of a written employment contract went back and forth, but for some reason a contract

³ One may take judicial notice that a severance payment clause in an employment contract is frequently included to protect an employer from a lawsuit for wrongful discharge by an employee. In order to get the severance pay the employee must sign a release which releases the employer from all liability and damages which may have accrued because of the discharge.

was never signed. The job of getting a written contract fell on Ms. Talon and Mr. Elder. Mr. Ficano demoted Ms. Talon and suspended Mr. Elder seemingly for making mistakes concerning the severance payment to Ms. Mullin by not having a written contract.

Timothy Taylor, director of human relations and labor, testified that he needed authority from Mr. Ficano to process the severance pay to Ms. Mullin. The undated letter signed by Mr. Ficano gave him that authority. He did not notice that the letter was undated. Even though the undated letter was not written and signed at the time Ms. Mullin became director of economic development, it memorialized the agreement that was reached between Ms. Mullin and Mr. Ficano in 2008, and therefore was not a fraudulent document.

As mentioned above, some members of the board were concerned about Ms. Mullin maintaining a wall between the county and the airport. Some members, particularly Ms. Hall and Ms. Zuckerman, believed that Ms. Mullin was dishonest because she did not keep her promise to maintain the wall between the county and the airport. Ms. Hall believed Ms. Mullin lied when she said Lynn Ingram was not on the airport premises. If in fact Mr. Ingram was on the airport property, that would be “injurious to the Authority in other than a *de minimis* manner”.

There were also complaints by board members that Ms. Mullin entered into joint agreements with Wayne County to do work at the airport. Such joint efforts are not unusual. The Wayne County sheriff provides security on the airport property, and Wayne County helps to maintain roads at the airport. The fact that Ms. Mullin still had an office in the Guardian Building does not mean that she is not working on airport business, or that the county is gaining undue influence in the operation of the airport. These breaches in the wall do not constitute cause sufficient to be grounds for dismissal as set forth in the employment contract.

There was testimony indicating some animosity between “McNamara People” such as Ms. Hall and Ms. Zuckerman and “Ficano people” which may have led them to be overly concerned about separation between the airport and the county.

After hearing the testimony, I have concluded that some members of the board, particularly Susan Hall and Mary Zuckerman, were dissatisfied with the job that Turkia Mullin was doing as CEO, such as, considering layoffs of airport employees. Members of the board were also upset with the publicity Ms. Mullin was generating over the controversy about her severance payment when she left as Director of Economic Development. There were board members who believed Ms. Mullin was becoming a distraction, which interfered with the operation of the airport. Under the provisions of Ms. Mullin’s employment contract these factors would not have constituted cause for her discharge. The airport board may have discharged Ms. Mullin without cause but if she is discharged without case she is entitled to the salary due her on the remainder of her contract.

Based on the opinion above I find that the Respondent, Wayne County Airport Authority has not born their burden of proof to prove by a preponderance of evidence that the Board members had cause to discharge Turkia Mullin from her position as CEO of the Airport Authority as set forth in 7d and 7f(i) of the employment contract. I further find that

Turkia A. Mullin is entitled to \$712,328.00 as severance pay under the terms of her employment contract.

COUNT II BREACH OF CONTRACT TO PAY EXTENDED HEALTH CARE BENEFITS

In Count II of her complaint, Turkia Mullin claims that she is entitled to extended life time health benefits from the Airport Authority under her employment contract. The Airport Authority denied extended health care benefits to Ms. Mullin when she left her employment with the Airport, because she was not hired by the Airport before October 1, 2008 as required under Part IV B 10 of the airport health plan.

Gail Laroche testified that she was employed by the Airport Authority in the Human Relations department. According to her records Ms. Mullin had eight years and two months combined retirement time with Wayne County and the Airport Authority. Ms. Mullin, like other employees who went from the County to the Airport was allowed to combine county and airport time for county pension purposes; however, pension and extended health care benefits are not the same. In order to be entitled to Airport Authority extended health care benefits, an airport employee has to be hired before October 1, 2008. Ms. Mullin did not begin her employment until September 6, 2011, and therefore is not entitled to extended life time health care benefits.

COUNT III VIOLATION OF THE MICHIGAN WAGES AND FRINGE BENEFITS ACT

Turkia Mullin claims that the Airport Authority violated the Michigan Wages and Fringe Benefits Act, MCL 408.471 et seq. when they failed to pay the severance to which she was entitled from the time of her discharge through the remainder of her three year contract. I agree with the Claimant that a severance payment is a fringe benefit under 408.471(e) of the act which defines a fringe benefit as, "compensation due an employee pursuant to a written contract or written policy for holiday, time off for sickness or injury, time off for personal reasons or vacation, bonuses,..." Severance pay is considered a fringe benefit. *Shah v. City of Farmington Hills*, 278 Mich. App. 95, (2008).

Under the provisions of the Wages and Fringe Benefits Act, the jurisdiction in which a complaint should be filed is the Michigan Department of Labor. MCL 408.481 Sec 11(1) of the act states, "An employee who believes that his or her employer has violated this act may file a written complaint with the department within 12 months after the alleged violation."

The present action was filed in the Wayne County Circuit Court and referred for arbitration. If the Claimant wished to pursue her claim for the severance under the Wages and Fringe Benefits Act, she would have to file her complaint with the Department of Labor as directed under MCL 408.481.

The Claimant asks for double damages, penalty, and attorney fees as allowed under MCL 408.488 of the Wages and Fringe Benefits Act, but in order to recover these enhanced damages, the action must be brought under the Department of Labor as indicated above. Further, the double exemplary damages are due only if the violation is flagrant or repeated which is not applicable here.

Therefore I will dismiss Count III because jurisdiction of the Michigan Wages and Fringe Benefits is with the Michigan Department of Labor.

COUNT IV DEFAMATION

In Count IV Turkia Mullin claims that Bernard Parker defamed her through three statements he made to the media. The first was on October 31, 2011 in an interview with WXYZ TV in which he said that Mullin was fired for just-cause under 7f(i) of the employment contract but refused to specify what the just-cause was but that mainly it was a loss of confidence.

Also on October 31 in an interview with WDIV TV Parker said, "It was the deceit around the severance pay, not being honest and coming forward and talking about that and saying she had a contract when she knew she did not have a contract."

In the *Michigan Chronicle* on May 9, 2012 Parker was quoted to say, "The bottom line is that we selected someone who misrepresented the facts. After we began to uncover her background and poor leadership that is when we took action and did what we did."

In order to prove defamation a claimant must show: (1) a false and defamatory statement concerning the plaintiff; (2) an unprivileged communication to a third party; (3) fault amounting to at least negligence on the part of the publisher (showing of actual malice is required in cases concerning public figures); and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by publication. *Collins v Detroit Free Press*, 245 Mich. App. 27 (2001).

I find that the Claimant has not proved defamation for the following reasons. When Mr. Parker told WXYZ TV that the board dismissed Ms. Mullin for cause under 7f(i) of her contract, he was correctly stating what the board had done. Ms. Mullin as the CEO of the Wayne County Airport Authority is a public official. In order for a public official to prevail in a defamation claim there must be malice or reckless disregard for the truth shown on the part of the declarant, and the malice must be proved by clear and convincing evidence, *New York Times Co. v Sullivan*, 376 U.S. 254 (1964) Mr. Parker testified that he did not believe that Ms. Mullin had a contract for severance pay when she left her job with the county because he did some investigation, and did not find that the County Commission approved a written contract for Ms. Mullin as director of economic development. The fact that Mr. Parker conducted some investigation into whether Ms. Mullin had a contract for severance pay indicates that Mr. Parker did not make the statements to the media knowing them to be false, or with reckless disregard of the truth. There is not clear and convincing evidence that Mr. Parker acted maliciously, and is liable for defamation. Mr. Parker's statements to the media were not defamatory *per se* because they

did not impute a lack of chastity or the commission of a criminal offense. In statements to WDIV and the *Michigan Chronicle*, Mr. Parker said that Ms. Mullin was dishonest in her statements which is not an accusation of a crime.

Finally Ms. Mullin has been under a barrage of newspaper articles and television newscasts which have implied that she has been engaging in devious activities which have harmed the taxpayers. These articles and newscasts have done more to harm the reputation of Ms. Mullin than the protected statements of Mr. Parker.

For the reasons above I find that Turkia Mullin has not proved her claim of defamation against Bernard Parker.

COUNT V BREACH OF DUTY TO DEFEND AND INDEMNIFY IN DAVIS II

This count was decided in favor of Turkia Mullin when the Claimant's motion for Summary Disposition was granted. An order was entered requiring the Airport Authority to indemnify Ms. Mullin for her costs and attorney fees in Davis II.

COUNT VI VIOLATION OF THE MICHIGAN OPEN MEETINGS ACT

Turkia Mullin claims that the Wayne County Airport Authority discharged her from the position of CEO of the airport in violation of the Michigan Open Meetings Act, MCL 15.261 et seq. Under the OMA the actions of the public body must be conducted in an open meeting. There is an exception under the attorney-client privilege. A public body may meet in closed session to discuss a written legal opinion of its attorney. In the complaint Ms. Mullin claims that in the meeting of the Airport Authority's board on October 31, 2011, called to consider the employment of Ms. Mullin, the board met in closed session. During the course of discovery a motion was made before me, as arbitrator, to conduct an *in camera* proceeding to determine whether the Airport board engaged in a privileged closed session, i.e. a discussion of Mr. Cashen's written legal opinion. The motion was granted, and I found that portions of the transcript dealt with Mr. Cashen's written legal opinion, and thus were privileged. I released to the Claimant those portions of the transcript which were not protected by the attorney-client privilege. In neither the protected portion nor the released portion of the closed session did the board make a decision on whether to discharge Ms. Mullin. Further Michael Jackson, a member of the board, testified at the hearing that no decision concerning Ms. Mullin's employment was made during the closed session.

The transcript of the board meeting of October 31, 2011 shows that a motion to discharge Ms. Mullin as CEO of the Airport was made after the board came out of closed session. The basis of the motion was that she violated section 7 f(i) of her employment contract. The motion to discharge was passed 5-2. Although the motion to discharge did not designate a specific violation listed under 7 f(i) of her contract, the document is a public record, and those acts which constitute grounds for discharge are public knowledge.

Since the decision to discharge Ms. Mullin as CEO of the Airport was made at a public meeting, I will dismiss the Claimant's claim of violation of the Michigan Open Meetings Act.

COUNT VII VIOLATION OF THE DUE PROCESS CLAUSE OF THE CONSTITUTION

In Count VII of the complaint, the Claimant claims that she had a constitutional property interest in her compensation for the remaining term of her employment contract under 42 USC (§1983). Proving a violation under 42 USC (§1983) is a two step process. First, was there a deprivation of a constitutionally protected liberty or property; and second, if so, did the deprivation occur without due process of law. *Zimmerman v. Burch*, 494 US 111 (1990)

The first step is to determine whether Ms. Mullin had a constitutional property interest in her compensation. The respondent argues that since Ms. Mullin was an at-will public employee she had no expectation for employment, and thus no property interest. Respondent relies on *Manning v City of Hazel Park*, 202 Mich App 685 in which the court said, "A public employee does not have a property interest in continued employment when the position is held at the will of the employee's superiors and the employee has not been promised termination only for just-cause. Therefore, a public employer need not comply with procedural due process in terminating an employment interest unless the public employee has a property right in that interest."

The case at bar is factually different from the facts in *Manning*. Although Ms. Mullin's contract indicated that it was an at-will contract, the severance clause of the employment contract indicated that if Ms. Mullin was discharged before the termination of the contract, she would receive a severance payment of the salary due on the remainder of the contract if the discharge was without just-cause. In *Pandy v. Board of Water and Light* Unpublished November 28, 2006, No. 259784, the Michigan Court of Appeals held that a public employee had a just-cause contract under the same facts we have in the case at bar. Mr. Pandy was given a five year contract with the Board of Water and Light with a provision that if he were dismissed without just-cause before the termination of the contract he would receive the remainder of the salary due on the contract. The court said, "...the contract at issue here is a for-cause agreement, irrespective of the at-will language included in the contract. First, the Charter language that the Board may appoint and remove the Director 'at its pleasure' confirms that a Board has authority only to enter into at-will employment arrangements. Next, the term of the employment agreement specifying that if Pandy is terminated without cause, he is entitled to the full compensation and benefits he would have received for the length of the contract if he had not been terminated confirms that the contract is essentially a for-cause employment agreement."

Because Ms. Mullin had a just-cause provision in her employment contract, she was not an at-will employee, and had a property interest in the severance payment from the time of her discharge to the end of the contract.

Since Ms. Mullin had a property interest, we go to the second step: did she receive due process at the time the Airport discharged her as CEO of the airport at the meeting on October 31, 2011.

As Mr. Parker stated at the meeting, "Under Section 8A of the Michigan Open Meetings Act it states that whenever you're considering disciplinary suspension or dismissal that the person has a right to make a statement and answer questions either in the public forum or to go into closed session."

The transcript of the proceedings showed that Ms. Mullin wished to have a public hearing. The transcript also shows that Mr. Sterling, Ms. Mullin's attorney, and Mr. Parker went back and forth at each other. Mr. Parker said that he had a question to ask Ms. Mullin concerning her operation of the Airport, but because of the back and forth with Mr. Sterling, he never posed the question. At the arbitration hearing Mr. Parker said he did not ask a question because of frustration. Ms. Axt, chairman of the Board, finally asked the members of the board if they had any questions, and there was no response. At that time Ms. Hall made her motion to discharge Ms. Mullin as CEO of the Airport.

The OMA gives the person who is subject to suspension or dismissal the right to make a statement or to answer questions. Although the Board members had no questions for Ms. Mullin, she was never given the right to make a statement. She indicated that she wished to have an open meeting where she could make a statement and answer questions. She was never given the opportunity to make a statement. Besides asking for questions, Ms. Axt should have asked Ms. Mullin if she wished to make a statement.

The claimant further contends that Ms. Mullin's due process rights were violated because the agenda of the special meeting did not specify that the purpose of the meeting was to consider her discharge. The agenda only said, "To consider the employment of the Chief Executive Officer". "To consider the employment" may imply discharge, but does not give Ms. Mullin specific notice that the board is going to consider her discharge. Due process requires that Ms. Mullin be given specific notice that the meeting on October 31, 2011 was to consider whether she should be discharged as CEO of the Airport.

Based on the above, I find that Ms. Mullin did have a property interest in the severance pay. Further, the decision of the board to discharge Ms. Mullin for cause as CEO resulting in the denial of her severance pay was made without allowing Ms. Mullin due process in that she was not given an opportunity to make a statement, and that she was not given proper notice of the purpose of the meeting of the Board on October 31, 2011.

The actions of the Airport Board and Mr. Parker's statements did not constitute a violation of Ms. Mullin's constitutional right to liberty, reputation, and the right to pursue future employment. I have previously found that Mr. Parker's statements were not defamatory. As mentioned above, there was a barrage of articles both before and after Ms. Mullin's discharge which could injure her reputation and prevent her from getting employment in the future. The Claimant has not proved that it was action of the Airport Board or the statements of Mr. Parker

that deprived her of liberty, reputation, and the right to pursue future employment. But rather it was the media assault on Ms. Mullin that effected her liberty, reputation, and the right to pursue future employment.

DISCUSSION OF DAMAGES

The amount of damages to Turkia Mullin on her breach of contract claim for not paying her severance pay under the employment contract is \$712,328.00. This is the amount of salary that Ms. Mullin would have been due if she had completed the two years and ten months remaining on her employment contract after she was discharged. The Claimant is asking for \$750,000.00 in damages for three years of employment she could have had under the renewal terms of her employment contract. I will deny this request because there is no evidence that even if Ms. Mullin was not discharged on October 31, 2011, her contract would have been renewed at the end of the first three year term.

The Claimant is seeking double wage damages and ten percent penalty under MCL 408.488 of the Michigan Wages and Fringe Benefits Act. Since I found that the Circuit Court is not the proper jurisdiction in which to bring an action under the Wages and Fringe Benefits Act, I will not award double damages and penalty.

Since I have found no cause of action on Claimants defamation claim, there are no economic or non-economic damages under those claims.

The Claimant has requested punitive damages under her violation of due process claim. I find that punitive damages are not called for under the circumstances in this case, and will not award punitive damages.

ATTORNEY FEES

Under the terms of the employment contract, each party shall bear their own attorney fees unless the arbitrator orders otherwise pursuant to such relief authorized by law. I interpret “authorized by law” to mean those instances in which attorney fees are allowed by statute. An example of this is under 42 USC §1983 where attorney fees are allowed to the plaintiff if the plaintiff prevails in the action. Attorney fees are allowed in constitutional due process cases so that a plaintiff who may not have a case with great monetary value, but that involves a constitutional rights issue can find an attorney to represent him or her with the prospect of recovering attorney fees if successful.

I found that the Airport Authority violated Ms. Mullin’s constitutional rights by not affording her due process at the Board meeting of October 31, 2011. The primary reason for Ms. Mullin to bring this action was not to protect her constitutional rights, but rather to recover the severance payment due to her. The constitutional rights issue is not the primary reason to bring the law suit, and therefore I will not award the full \$394,173.65 attorney fees and costs⁴,

⁴ I have not included the arbitration fees included in Mr. Sterling’s costs because they are considered separately.

but award an amount proportional to the importance of the due process claim. It is difficult to give an exact percentage to the importance of a claim in a multi-count complaint, but after consideration, I conclude that the due process claim has of 25% importance to the claims in this case.

I find that the attorney fees and costs presented by the Sterling Law Firm are reasonable. Taking 25% of 394,173.65, I will award \$98,543 to the Sterling Law Firm for attorney fees and costs under the Constitutional due process claim.

Since I have found in favor of the Airport Authority and Bernard Parker, Jr. on the defamation, Open Meetings Act, and Wage and Fringe Benefits Act claims, there are no attorney fees awarded under those claims.

The Claimant is requesting attorney fees under the provisions of MCR 2.313 (c) which states as follows, "If a party denies the genuineness of a document, or the truth of a matter as requested under MCR 2.312, and if the party requesting the admission later proves the genuineness of the document or the truth of the matter, the requesting party may move for an order requiring the other party to pay the expenses incurred in making that proof, including attorney fees." The Claimant served a "request for admissions" on the Respondent (Exhibit nnn). On p5, ¶136 of that exhibit, the Respondent was asked, "Mullin did not engage in any behavior that constituted cause for termination". The respondent's answer was "no".

The Claimant maintains that since this arbitrator found that Ms. Mullin did not engage in any behavior that constituted cause for termination, the Respondent did not answer ¶136 truthfully, and that the Claimant is entitled to attorney fees for proving the truth of the matter during the course of these proceedings. Although the Court Rule indicates that a party is entitled to attorney fees if the other party does not answer a request for admissions truthfully, there are exceptions. The pertinent exception here is that "the party failing to admit had reasonable ground to believe that he or she might prevail on the matter". Rule 2.313(C) (3) This entire case revolves around whether Ms. Mullin engaged in activity which constituted cause to discharge her. The Respondent throughout maintains that Ms. Mullin engaged in behavior which constituted cause for termination. Whether there was cause to discharge Ms. Mullin was a genuine issue of fact which took seven days of testimony and multi page post hearing briefs before I could reach a decision in favor of the Claimant. Under these circumstances, it was reasonable for the respondent to think it would prevail. It might have been better to answer the question, "neither admit or deny, but leave the Claimant to her proofs" but I do not find by answering the question "no" subjects Respondent to attorney fees.

ARBITRATION COSTS

Under the employment contract in question, there is a clause that requires any dispute between the parties to go to arbitration. The section states as follows, "Any dispute or controversy concerning the termination of employment between Mullin and the Authority, this Agreement or any other claim by Mullin for monetary damages and/or based on discrimination shall be resolved by arbitration under the laws of the State of Michigan. Each party shall bear

her or its own arbitration expenses and attorney fees unless the arbitrator orders otherwise pursuant to such relief authorized by law.” I interpret the language of the employment contract to mean that each side pays one half of the arbitrator’s fees and the Claimant pays the cost of arbitration.

INTEREST ON THE JUDGMENT

The interest on the damages shall be calculated at the statutory rate from the date of filing in the Circuit Court.

The Opinion and Order entered by this Arbitrator ordering the Airport Authority to indemnify Turkia A. Mullin for fees incurred in Davis II remains in effect.

Paul S. Teranes
Arbitrator

April 24, 2013