

GERALD W. KOHN, :
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 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE CITY : DECISION
 OF VINELAND, CUMBERLAND :
 COUNTY, :
 :
 RESPONDENT. :
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SYNOPSIS

Petitioner challenged the Board's termination of his employment as superintendent of schools and placement of him in the position of director for special projects with a reduction in salary, pursuant to his contract with the Board, asserting that the contractual provision and the Board's actions were contrary to statute and decisional law. The Board denied the charges and contended that petitioner was contractually bound to accept the termination and placement in a different position.

The ALJ determined that respondent must reinstate petitioner to the position of superintendent and provide him his full salary and emoluments, concluding that *N.J.S.A.* 18A:17-15 precluded the Board from reducing the contract term from five years to three years, and from reducing his compensation and benefits. The ALJ also rejected respondent's assertion that principles of waiver and equitable estoppel precluded petitioner from seeking reinstatement to the position of superintendent.

The Commissioner affirmed the decision of the ALJ. While agreeing with the Board that the legislative history relied upon by the ALJ pertained to a section of the law that was never adopted by the Legislature, the Commissioner concluded that the plain language of the applicable statute and relevant decisional law compelled a determination that petitioner is entitled to the position of superintendent for the full five-year term of the contract, unless he is dismissed pursuant to statute. The Commissioner also determined that the contract at issue is for a term of five years, not a contract for a minimum of three years as argued by respondent, and that petitioner is entitled to his full salary and benefits and is not required to mitigate his damages.

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board’s exceptions and petitioner’s reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4 and were duly considered by the Commissioner in reaching his determination.

In its exceptions, the Board avers, *inter alia*, that the portion of the Assembly Committee’s Statement relied on by the Administrative Law Judge (ALJ) as the underpinning of his conclusion that the termination clause in the statute speaks of paying a terminated superintendent the amount he/she would have received if he/she had served the remainder of his/her contract, refers to language that was deleted from the bill during the legislative process. (Board’s Exceptions at 2) Since the language relied on was not included in the bill enacted by the Legislature, the Board asserts, the ALJ’s analysis is incorrect. (*Ibid.*) The significance of the deleted language, the Board posits, is that it clearly demonstrates the legislative intent that a board is not obligated to pay a full salary to a terminated superintendent. (*Ibid.*)

Additionally, the Board argues, the ALJ failed to recognize that the Board did not act to terminate petitioner, but instead acted in accordance with the provisions of petitioner’s

contractual agreement when it changed petitioner's appointment to another position and paid him the agreed amount for that position. (*Id.* at 3) Emphasizing that petitioner's contract is a guarantee of three years in the office of superintendent, not a five-year contract for superintendent of schools, the Board contends that the contract guaranteeing petitioner three years in the office of superintendent satisfies the minimum statutory requirement and, thus, "the tenure like aspects of [the] statute have not been offended." (*Ibid.*)

With respect to the ALJ's conclusion that petitioner must be restored to the position of superintendent, the Board points to *N.J.S.A.* 18A:6-30.1 and *N.J.S.A.* 18A:17-18, contending that it is within the Board's discretion as to whether petitioner is permitted to continue to perform the duties of superintendent during the term of his contract, and that the plain language of superintendents' contract law does not disturb the Board's power in this regard. (*Id.* at 4) The Board also takes issue with the implication in the Initial Decision that there should be no mitigation. (*Id.* at 5) In support thereof, the Board points to the Court's interpretation of *N.J.S.A.* 40A:9-172 governing municipal employees, which it asserts contains identical language to that in *N.J.S.A.* 18A:6-30. (*Ibid.*) In interpreting *N.J.S.A.* 40A:9-172 in *White v. Township of North Bergen*, 77 *N.J.* 538 (1978), petitioner argues that the Court found that restoration of payment due to wrongfully terminated individuals is subject to mitigation (*Ibid.*) The Board also argues that in *Mullen v. Board of Education of the Township of Jefferson*, 81 *N.J. Super* 151 (App. Div. 1963), *N.J.S.A.* 18A:6-30 and 30.1 are found to be applicable to the office of superintendent of schools and *Mullen* also holds that the right to lost income is subject to mitigation. (*Ibid.*)

Finally, the Board seeks relief from the Commissioner, as follows:

1. A finding that there has been no contract termination and that the contract between the parties should be enforced as written since it does not violate the minimum requirements of *N.J.S.A.* 18A:17-15.

2. In the alternative, should the Commissioner find that the statute has been violated, a ruling that the doctrine of estoppel should be applied to petitioner due to the unique facts of this case, as briefed below, and requiring that the contract be enforced as written.
3. In the alternative, should the Commissioner find that the statute has been violated, a ruling confirming that [it] is solely within the discretionary power of the Board to determine if Petitioner should be returned to duty, *N.J.S.A.* 18A:6-30.1.
4. In the alternative, should the Commissioner find that the statute has been violated, a ruling noting that the obligation of mitigation applies to the calculation of damages, if any, as required by the State Supreme Court and other controlling judicial rulings. (*Id.* at 5-6)

In his reply, petitioner submits that *Dunn v. Elizabeth Bd. of Educ.*, 96 *N.J.A.R.2d* (EDU) 279, 283, *aff'd* State Board 96 *N.J.A.R.2d* (EDU) 285 holds that “[a] board of education has the right to relieve the superintendent of his duties, so long as he retains the position of superintendent, with all compensation, benefits and emoluments pursuant to the contract of employment.” (Petitioner’s Reply Exceptions at 4) Petitioner, therefore, agrees that the Board has the authority to determine whether a superintendent should actually perform the duties of his office or be placed on leave. (*Ibid.*) The problem herein, petitioner contends, is that the Board removed petitioner from the position of superintendent with its attendant compensation, benefits and emoluments and placed him in the position of a director at a lesser salary. (*Ibid.*)

Petitioner further argues that his contractual term is five years and that he, therefore, has tenure protection, pursuant to *N.J.S.A.* 18A:17-20.2, which provides that a superintendent shall not be dismissed or reduced in compensation during his contractual period except for inefficiency, incapacity, unbecoming conduct or other just cause. (*Id.* at 5) *Citing Spiewak v. Board of Educ. of Rutherford*, 90 *N.J.* 63, 76 (1982), petitioner avers that there is no mechanism in the mandatory statutes permitting a board to dismiss a superintendent or reduce his salary, thus waiving his tenure rights by virtue of a contractual provision entered into in advance, because an employee cannot forfeit or waive tenure by virtue of his contract. (*Id.* at 6)

Arguing that the Commissioner has already ruled on this issue, petitioner cites *Harrington v. Board of Educ. of the Township of Clinton*, 95 N.J.A.R.2d (EDU) 535, 541, wherein the Commissioner found that:

[W]here the possibility of unilateral termination is expressly contemplated, the Commissioner holds that such provisions cannot take precedence over a statutory requirement for tenured employment. Such precedence would permit terms and conditions of employment to effectively negate a legislative entitlement, a perversion which is not only unacceptable as a matter of law, *Spiewak, supra*, but also inadvisable as a matter of educational policy***. (*Id.* at 8)

Citing numerous other cases, petitioner further maintains that the Commissioner has consistently held that employees may not waive tenure rights in advance, even where the employee does so “explicitly and knowingly.” (*Id.* at 9)

The Board realized that there was a possibility that the termination provision in the contract was illegal, petitioner advances, as demonstrated initially by the fact that the appointing resolution acknowledges the fact that “the enforcement of the buyout provisions under applicable statutory and decisional law has not yet been settled.” (*Id.* at 10) Secondly, petitioner points to the “Savings Clause” which provides that if it is found that a specific clause of the contract is contrary to law, the remainder of the contract shall remain in effect and will not be affected by such ruling. (*Ibid.*)

Finally, petitioner argues that the Board raises the issue of mitigation for the first time in its exceptions and that there are no facts on the record to support a finding for the Board on this issue. (*Id.* at 12) Thus, if the Commissioner determines that a ruling is required on mitigation, the matter should be remanded to the OAL for further proceedings. (*Ibid.*) Citing *Harrington, supra*, and *Dunn, supra*, petitioner submits that a superintendent removed from his position contrary to law is not required to mitigate his damages. (*Ibid.*)

Upon careful and independent review of the record, the Initial Decision, the exceptions and the reply thereto filed in this matter, the Commissioner determines to affirm the Initial Decision.

Although the Board correctly notes that the language in the Assembly Education Committee Statement relied on by the ALJ refers to a provision not included in the bill establishing contractual tenure for superintendents enacted by the Legislature, the Commissioner notes that there is ample case law which establishes the *principle* upon which the ALJ relied; *i.e.*, that a board that relieves a superintendent from his duties during the term of his contract must continue to pay the compensation and other emoluments the superintendent would have received as superintendent had he performed superintendent duties for the remainder of the contract period. *See Dunn, supra, and Harrington, supra.*

Moreover, the Commissioner agrees that the Board awarded petitioner a five-year contract as superintendent of schools, not a contract for a minimum of three years as argued by the Board. Item 1 in petitioner's contract states, as follows:

The Board, in consideration of the promises herein contained of the Superintendent, hereby employs, and the Superintendent hereby accepts *employment as Superintendent of Schools for a term commencing July 1, 1997 and expiring midnight June 30, 2002.* (emphasis added) (Petitioner's Contract at 2)

Moreover, *N.J.S.A.* 18A:17-20.2 provides that:

During the term of any employment contract with the board, a superintendent shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming a superintendent or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of Title 18A of the New Jersey Statutes.

Notwithstanding the contract provision that permits the Board to terminate petitioner's five-year contract as superintendent of schools after three years and reduce petitioner in position and salary, therefore, there is no statutory authority, absent the sustaining of tenure charges as indicated in *N.J.S.A.* 18A:17-20.2 above, for the Board to reduce petitioner's position

and salary during the term of his five-year contract. Moreover, it is well-settled that a teaching staff member cannot waive or forfeit tenure entitlement by virtue of a contract, nor is an improperly removed superintendent required to mitigate his damages. *See Spiewak, supra, Dunn, supra, and Harrington, supra.*

The Commissioner, therefore, concludes that petitioner is contractually tenured as the superintendent of schools of the Vineland School District through June 30, 2002 by virtue of the five-year contract entered into by the Board, and that petitioner must be restored to the position of superintendent with all back pay, benefits and emoluments due him as superintendent of schools.¹

Accordingly, the Initial Decision is affirmed for the reasons expressed therein.

IT IS SO ORDERED.²

COMMISSIONER OF EDUCATION

Date of Decision: 9/14/01

Date of Mailing: 9/14/01

¹ The Board may elect to relieve petitioner of his duties so long as he retains the position of superintendent during the relevant contractual period. *Dunn, supra.*

² This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A. 18A:6-27 et seq.* and *N.J.A.C. 6A:4-1.1 et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.