

HOWARD SOLOMON, :  
PETITIONER, : COMMISSIONER OF EDUCATION  
V. : DECISION  
PASSAIC COUNTY EDUCATIONAL :  
SERVICES COMMISSION, :  
RESPONDENT. :  
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### SYNOPSIS

Former superintendent of Educational Services Commission (ESC) contended, among other allegations, that the ESC improperly terminated his employment in contravention of statute and the parties' implementing contractual agreement. Petitioner claimed entitlement to automatic renewal because the ESC did not provide two years' notice of its intent not to renew his employment as required by contract. The ESC argued that the contractual two-year notice provision was invalid and that it had complied with the one-year statutory requirement.

In a Partial Initial Decision addressing only the question of the two-year notice provision, the ALJ found that such provision was valid and enforceable. The ALJ found that the statutory scheme required automatic renewal of employment when requisite notice of termination was not provided, and that the statute's notice provision was permissive so long as the period provided was at least one year in duration. The ALJ directed that petitioner be reinstated as superintendent of the ESC for the same term as the preceding contract.

The Commissioner adopted the Partial Initial Decision as a matter of law, but declined to order the recommended consequential relief at this point in proceedings. The Commissioner noted that the record before him was incomplete, addressing only the question of law raised, and that other issues potentially impacting upon the relief to be afforded petitioner appeared to be as yet unresolved. The Commissioner ordered the matter to continue as scheduled before the ALJ, bearing in mind the Commissioner's ruling of law herein.

<p>This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.</p>
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June 24, 2004

OAL DKT. NO. EDU 9721-02  
AGENCY DKT. NO. 294-9/02

HOWARD SOLOMON, :  
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 PETITIONER, : COMMISSIONER OF EDUCATION  
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The record of this matter with respect to the limited issue presently before the Commissioner, and the Partial Initial Decision of the Office of Administrative Law (OAL), have been reviewed. Timely exceptions were filed by both parties, as were replies by each to the other’s exceptions.<sup>1</sup>

In its exceptions, the respondent Educational Services Commission (ESC) argues that the Administrative Law Judge (ALJ) misinterpreted the Appellate Division’s holding in *Gonzalez, supra*, by failing “to account for the ‘balance’ that the Appellate Division acknowledged\*\*\*between binding future boards and the restrictions of N.J.S.A. 18A:17-20.1” and ignoring the reading of *Gonzalez*, suggested by the Commissioner in the administrative decision underlying the court’s ruling,<sup>2</sup> that would permit only the board constituted immediately prior to the twelve months before expiration of the superintendent’s contract to appoint a successor superintendent. According to the ESC,

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<sup>1</sup> The Passaic County Educational Services Commission also filed a “reply to Petitioner’s response” on June 3, 2004; that submission, however is not considered herein because applicable rule, *N.J.A.C.* 1:1-18.4, makes no provision for responses to reply exceptions.

<sup>2</sup> *Manuel Gonzalez v. Bd. of Ed. of the City of Elizabeth, Union County*, decided by the Commissioner January 27, 1998.

by allowing the two-year notice provision to stand, the ALJ has “improperly permitted a board of education constituted well [before] twelve months prior to the expiration of the [superintendent’s] contract to make an appointment” and created a situation where “a five year contract could renew itself in the first year if it contained a notice provision requiring notice at that time, thereby effectively giving the superintendent a ten year contract.” (ESC’s Exceptions at 3-6, quotations at 5) The ESC also argues that the ALJ erred in ordering petitioner’s reappointment for the same term as the preceding contract, since the operative provision of *N.J.S.A.* 18A:17-20.1 applies only when the *statute* is violated—which it was not in the present instance because petitioner was undisputedly afforded the required one year’s notice of his nonrenewal—and petitioner’s contract did not provide for automatic renewal upon failure to honor the *contractual* notice provision. (*Id.* At 6-7)

In reply, petitioner contends that the ESC relies, as it did before the ALJ, on “general passages and dicta\*\*\*out of context” to conclude that the Legislature did not intend to permit boards to reach beyond their own official life in reappointing a superintendent. Petitioner further contends that any difficulty occasioned by reappointing petitioner for another five-year term is entirely of its own making, since it willingly entered into a contract providing for two years’ notice of intent not to renew petitioner’s contract. (Petitioner’s Reply Exceptions at 1-2, quotation at 1)

In its own exceptions, petitioner asks for correction of the Finding of Fact No. 6 (Initial Decision at 2), which petitioner claims is inconsistent with the ALJ’s conclusion that a two-year notice provision was required under the circumstances. Petitioner also requests that the ALJ’s recommended relief be modified to specify that

petitioner's reinstatement is to be immediate, retroactive to June 30, 2003 (the date of the ESC's improper termination of petitioner's employment), and with full back pay, benefits and emoluments, and that the ESC must refrain from advertising for, or employing another person in, the position of Superintendent of Schools. (Petitioner's Exceptions at 1-2) In reply, the ESC urges that Finding of Fact No. 6 is correct as is, since it speaks only to the *statutory* requirement; it further contends that it should be allowed to employ its current superintendent "until this matter reaches a final, unappealable conclusion ordering [petitioner's] reinstatement" because petitioner "is not familiar with the multitude of complex matters\*\*\*currently being overseen by the current superintendent," and if his claim is ultimately defeated, his temporary reinstatement will have served only to interrupt the ESC's effective provision of services. (ESC's Reply Exceptions at 1-2, quotation at 2)

Upon review, the Commissioner determines to adopt the Partial Initial Decision. As the ALJ has correctly concluded, *N.J.S.A.* 18A:17-20.1 clearly and unequivocally entitles a superintendent to reemployment if the employing board fails to provide notice of its intent not to renew employment by the requisite notice date, and the statute is permissive on its face with respect to the amount of time to be provided for such notice so long as it is at least one year prior to expiration of the employment contract. In other words, the operative statute provides a *nonnegotiable framework* requiring *both* notice to the superintendent *and* reappointment to the superintendency upon the board's failure to provide it; all that is left to contractual agreement is *how much* more than one year's notice the parties may additionally choose to require. Given the plain language of the statute, it is disingenuous to argue that, since the ESC *did* give petitioner the

minimally required *statutory* notice and automatic reemployment was not specified in the *contractual* agreement, the ESC is under no obligation to honor the statutory requirement for reappointment; it is similarly disingenuous, in light of the statutory framework and established case law, to argue that a board's honoring of a contractual agreement to provide two years' notice of nonrenewal would impermissibly act to bind future boards. In this latter regard, the Commissioner specifically notes his concurrence with the ALJ's application of *Gonzalez, supra*, and further notes that the alternative reading proffered by the ESC was expressly rejected by the State Board of Education in *Manuel Gonzalez v. Bd. of Ed. of the City of Elizabeth, Union County*, decided June 3, 1998, Slip Opinion at 3, *aff'd* by the Appellate Division in *Gonzalez, supra*.

As to the relief to be afforded as a result of the present interim proceeding, however, the Commissioner cannot concur with the ALJ that an order of relief is appropriate at this time. While it is true in principle that a party aggrieved by an employing board's failure to provide requisite notice of termination would be entitled to reinstatement for a like term as the preceding contract, as stated by the ALJ, in the current instance, it appears that there remains an unresolved question regarding the reach of the preceding contract.<sup>3</sup> Additionally, as to back pay, benefits and emoluments, again, while an aggrieved party would be entitled to these in principle, no specific determination can be made on the present record, which includes only undisputed facts and argument pertaining to the point of law at issue.<sup>4</sup>

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<sup>3</sup> The ALJ specifically mentions a dispute to be resolved in further proceedings as to whether the 2003-04 school year was added to the contract at issue. Initial Decision at 5, Note 1.

<sup>4</sup> By way of example, the record before the Commissioner includes neither information nor fact-finding regarding salary, benefits or emoluments, nor does it address questions of mitigation.

Accordingly, for the reasons expressed therein as modified above with respect to relief,<sup>5 6</sup> the Partial Initial Decision of the OAL is adopted as the final decision on the question of law now before the Commissioner in this matter, which shall continue at the OAL in accordance with the instructions of the ALJ, bearing in mind the Commissioner's ruling herein.

IT IS SO ORDERED.<sup>7</sup>

COMMISSIONER OF EDUCATION

Date of Decision: June 24, 2004

Date of Mailing: June 25, 2004

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<sup>5</sup> The Commissioner sees no need for modification of the Partial Initial Decision's findings of fact, since it is clear that, in Finding No. 6, the ALJ is referring solely to the statutory one-year requirement when stating that the ESC was in compliance.

<sup>6</sup> The Commissioner stresses that his determination not to award relief at this time is based upon the reasons set forth at 10 above, and not upon the ESC's argument, referenced herein at 9, that petitioner's reinstatement would be disruptive and should not be effectuated until this matter has reached "a final, unappealable conclusion."

<sup>7</sup> This decision 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.*