

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

Former Superintendent of Passaic County Educational Services Commission (ESC) contended, among other allegations, that he was improperly terminated from employment in contravention of statute and the parties' contractual agreement. Petitioner claimed, *inter alia*, 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 May 2004, the ALJ issued an order granting partial summary decision in favor of petitioner on the question of the two year notice provision in the contract, concluding that it was valid and enforceable pursuant to N.J.S.A. 18A:17-20. Although petitioner has been reinstated to his position as of January 3, 2005, the ALJ found that he was improperly and prematurely terminated from his employment from July 1, 2003 through this date. The ALJ ordered that: the petitioner be immediately reappointed, retroactively, to a new five year term commencing July 1, 2003; and the ESC pay petitioner any back pay due under the terms of the new retroactive contract, including all benefits and emoluments to which he is entitled.

Upon careful review and consideration of the record, the Commissioner concurs with the ALJ that petitioner is entitled to retroactive employment as Superintendent – along with back pay, benefits and emoluments – as a consequence of the renewal of his employment contract, by operation of law, for the period July 1, 2003 through June 30, 2008, and adopts the Initial Decision with the following modification: payment to the petitioner shall be subject to offset by any income received from substituted employment and/or unemployment compensation during the term at issue. Commissioner found no support for the granting of pre- or post-judgment interest.

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.

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

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of respondent, Passaic County Educational Services Commission (ESC), were timely filed pursuant to *N.J.A.C.* 1:1-18.4 and fully considered by the Commissioner in making his determination herein. Due to a substitution of attorney,¹ petitioner requested and was granted an extension of time, until Monday, August 8, 2005, within which to file reply exceptions. Although petitioner's reply exceptions were dated August 8, they were not *filed* with the agency until August 9, 2005, thereby rendering them untimely. (*N.J.A.C.* 1:1-18.4) Consequently, this submission was not considered herein.

Exceptions of the ESC essentially recast and reiterate its arguments advanced since the inception of this matter, *i.e.*, that since the ESC provided the minimally required notice pursuant to *N.J.S.A.* 18A:17-20, thereby satisfying the statutory requirement, and because automatic employment was not specified in the contract as a remedy for violation of the contractual 2-year notice provision, the ESC is not obligated to abide by the statutory

¹ By letter and advisement of Substitution of Attorney, dated August 1, 2005, Fiona M. Kolvek, Esq. reported that she had taken over representation of petitioner in this matter from withdrawing attorney, Joseph R. Morano, Esq.

requirement for reappointment. Again, it charges that to find to the contrary ignores “well established law prohibiting courts from rewriting better contracts for parties.” (ESC’s Exceptions at 4) Finding this argument to have been fully considered and resolved by the Administrative Law Judge (ALJ) in her prior Partial Initial Decision in this matter, which was clarified and adopted by the Commissioner and the State Board, and *again* clearly explained and resolved in the instant Initial Decision, the Commissioner finds any additional discussion on this issue unwarranted.

The ESC further objects to the ALJ’s failure to address the question of mitigation.

In this regard it proffers:

[r]espondent’s papers and oral argument noted that even though petitioner claimed that he is a highly qualified and experienced superintendent, petitioner did not present the Court with any evidence of mitigation. Despite the lack of mitigation evidence, the July 15, 2005 decision not only fails to address this point, but the decision also fails to adjust petitioner’s damages.
(ESC’s Exceptions at 4)

Upon careful review and consideration of the record in this matter, the Commissioner concurs with the determination of the ALJ that petitioner is entitled to retroactive employment as Superintendent of Schools – along with back pay, benefits and emoluments – as a consequence of the renewal of his employment contract, by operation of law, for the period July 1, 2003 through June 30, 2008. The Initial Decision is, therefore, adopted, as modified below.

Initially, although the ALJ’s decision indicates that oral argument was conducted in this matter (Initial Decision at 2), presumably – at a minimum – to elicit testimony with respect to the issue of petitioner’s mitigation of damages, the Initial Decision contains no discussion, nor does the record provide any details, on this topic. In this regard, the

Commissioner observes that petitioner claims entitlement to back pay as a consequence of his improper termination pursuant to *N.J.S.A.* 18A:6-30, which specifies:

Any person holding office, position or employment in the public school system of the state, who shall be illegally dismissed or suspended therefrom shall be entitled to compensation for the period covered by the illegal dismissal or suspension***.

The court in *Mullen v. Board of Education of Jefferson Township*, 81 *N.J. Super.* 151 (App. Div. 1963), in reviewing *N.J.S.A.* 18:5-49.1, the precursor to this statutory provision, found that “the Legislature must be taken as having meant that all claims made by illegally dismissed persons under [this statute] be subject to the common law rule of mitigation of damages, in light of the plain meaning carried by the word ‘compensation’,” such being the case because damages under this statute have been determined to be “compensatory” in nature and, thus, an individual should not be awarded more damages than actually sustained. (at 159) Therefore, under common law principles, the within petitioner was under a duty to mitigate his damages during the period of his improper termination by making reasonable efforts to secure alternative employment, notwithstanding that he was improperly terminated from his position. See *Zielenski v. Board of Education of the Town of Guttenberg, Hudson County*, 1981 *S.L.D.* 759; *White v. Township of North Bergen*, 77 *N.J.* 538 (1978); *Miele v. McGuire*, 31 *N.J.* 339 (1960). Petitioner’s obligation in this respect is not conditioned on any action on the part of the Board or any other individual or entity involved in adjudication of the case in chief. Consequently, the Commissioner finds and determines that the Board is entitled to offset from petitioner’s award any money he received from alternative employment and/or unemployment compensation during the period of his illegal termination,² thereby according petitioner the full

² Although the Board is entitled to offset petitioner’s monetary award by any unemployment compensation he may have received, it has an obligation, pursuant to *N.J.S.A.* 43:21-5(b), to reimburse the Department of Labor any monies so offset.

measure of his *actual* damages. To find otherwise would violate public policy as petitioner would be provided compensation in excess of his economic loss at public expense. However, while it is without doubt that the amount of petitioner's award must be reduced by his actual earnings during the time of his improper removal, (*Goodman v. London Metals Exchange, Inc.*, 86 N.J. 19 (1981)), it is, likewise, well settled that a charge of *failure to mitigate*, which apparently is the crux of the Board's charge here, is an affirmative defense and the burden to demonstrate such failure rests with the employer. See *Goodman; Zielenski, supra*. It is not sufficient for an employer to merely raise lack of mitigation as an issue. As stated in *Cartin v. Continental Homes of New Hampshire*, "Such burden [of failure to mitigate] is not met by merely arguing the possibility and, absent concrete evidence, the issue is merely speculative." 360 A. 2d. 96, 134 Vt. 362 (1976) (*Zielenski* at 764) Rather, as stated by the Supreme Court in *Goodman, supra*,

Mitigation *** is an affirmative defense and the burden of proving the appropriateness of its application rests on the wrongdoer, in this case the employer *** [who] may establish a prima facie case by first showing that comparable employment opportunities were available and, *** that there were other suitable [available] jobs ***. (at 40-41)

Here, the Commissioner notes that the Board raised the question of failure to mitigate in its papers below but failed to sustain its burden under the *Goodman* case by bringing forth facts serving to demonstrate that comparable job opportunities were available to petitioner in similar types of employment, with reasonable and diligent efforts. Thus, the Board cannot now complain that it was denied a favorable ruling on this issue.

Finally, the Commissioner declines to grant petitioner's request for interest in this matter. With respect to pre-judgment interest, the Commissioner concludes that the record before him does not support a finding that respondent's actions were taken in bad faith or in

deliberate violation of the law (*N.J.A.C.* 6A:3-1.17(c)1). As to post-judgment interest, such a request is premature, as the 60-day timeline relative to the granting of this interest does not even begin to toll until the Commissioner renders his decision in the instant matter. (*N.J.A.C.* 6A:3-1.17(c)2).

Accordingly, the Initial Decision of the OAL, as modified above, is adopted as the final decision in this matter.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 22, 2005

Date of Mailing: August 22, 2005

* 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.*