MANUEL GONZALEZ, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE : DECISION

CITY OF ELIZABETH, UNION

COUNTY,

RESPONDENT. :

SYNOPSIS

In February 1995, Petitioner entered into an employment contract for the position of superintendent for a three-year period commencing July 1, 1996. He alleged that when the newly elected Board (of April 1996) refused to allow him to begin service and failed to pay him salary and benefits under said contract, its actions were illegal and violative of the Commissioner's directives set forth in the 1995 decision *Dunn v. Board of Education of the City of Elizabeth*.

Citing *Cummings* and relevant statutes, the ALJ found that petitioner's appointment to the position of superintendent by a prior board was null and void and not binding on the subsequent Board as the prior board acted to appoint a superintendent when there was no vacancy. Moreover, as to alleged secret meetings which resulted in OPMA violations, ALJ found that petitioner raised a factual issue which could not be resolved on the papers presented and as to civil rights claims, ALJ found that petitioner failed to state a cause of action upon which relief might be granted. ALJ granted summary decision to the Board and petition was dismissed.

Commissioner modified the initial decision. Commissioner affirmed the ALJ's dismissal of petitioner's claims with respect to the Board's violations of his rights under federal law and the U.S. Constitution, as well as his rights under the NJLAD. Commissioner also dismissed the OPMA claims, as well as petitioner's claim that his compensation was improperly reduced. The Commissioner further determined that petitioner must not prevail in his assertion that his contract was valid and binding and remained effective since the Board herein acted beyond the scope of its lawful authority when it voted in February 1995 to appoint petitioner to the superintendency effective July 1, 1996. Petition was dismissed.

January 27, 1998

OAL DKT. NO. EDU 7884-96 AGENCY DKT. NO. 256-7/96

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DECISION

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The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and the Board's reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4.*

Petitioner initially renews his contention that the prior board had the right to enter into a contract to appoint him as the superintendent for a term which was to commence upon the expiration of Thomas Dunn's contract. In this regard, petitioner finds *Cummings*, *supra*, to be inapplicable, arguing that

***[t]he superintendent reappointment statute as it existed at the time that *Cummings* was decided was vastly different from the statute as it currently exists. The similarity between the two stops with the provision that authorized a board to have the ability to

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^{*} Although petitioner submitted a response to the Board's reply, it is noted that there is no provision for such a submission and, therefore, it was not considered in rendering this decision. *N.J.A.C.* 1:1-18.4. Additionally, although petitioner asserts that the Board's reply to his exceptions was untimely filed, the Commissioner notes that, in the absence of documentation indicating a date certain of delivery of said exception arguments to the Board and given the Board's assertion that it received petitioner's exceptions on December 16, 1997, the Board's reply submission, received December 23, 1997, is deemed timely.

appoint a superintendent for a five year term. The prior law did not contemplate action to be taken by a board "at least" one year prior to the end of the term. ***

***The deliberate use of the words "at least" [in the current statute] demonstrates the intent of the legislature to override the constraint against binding future boards. The Commissioner has already embraced this interpretation by permitting mutual modification and/or recission of the respective superintendent's contracts during the unexpired term of a contract. (Citations omitted) (emphasis in text) (Petitioner's Exceptions at p. 3)

Petitioner reasons that the 1991 statutory amendments would compel a different outcome to the facts presented in *Cummings*, were it to be decided today. (*Id.* at p. 5)

Moreover, petitioner asserts that the interpretation of the superintendent's statute rendered by the Administrative Law Judge (ALJ) will have the effect of destabilizing superintendent contracts and paralyzing school boards in their efforts to seek and obtain employment of a superintendent on a timely basis. (*Id.* at p. 6) Petitioner reasons that Dunn, whose contract was to have terminated on June 30, 1996, was to be notified by June 30, 1995 that he would not be renewed for the following year. However, the initial decision would require that

***[t]he board that gave him notice *** would not be able to search for his successor. The board which would be in office on May 1, 1996, would have to undertake the search with only two months before the term of the Dunn contract was to expire. Even if the board commenced the search, it would [not have] had the authority to hire according to the ALJ's decision. In this regard, it must be noted that the New Jersey School Boards Association reports that a search for a new superintendent can take up to one year or more. (*Id.* at p. 7)

Petitioner avers that such an interpretation will have a "devastating effect," not only on districts electing not to renew a superintendent's contract, but on districts whose superintendents plan to retire, and, in so doing, provide a significant margin of notice to their boards to allow the board

time to conduct a search. (*Id.* at p. 8) Under such circumstances, should the board find a suitable candidate, it may be hampered from entering into a contract with that person. Indeed, petitioner asserts that "***the board will be ill-advised, under the holding of the initial decision here, to begin the search process or incur any expenses toward finding a new superintendent until the May prior to the actual vacancy." (*Id.*) Petitioner reasons that the purpose of the 1991 superintendent's statute was to balance the interests of boards of education and superintendents of schools; "[t]he amendments were to give boards greater flexibility and to insure superintendents a reasonable degree of job security. (citation omitted)" (*Id.* at p. 9) Thus, petitioner concludes that he entered into a binding contract with the board on February of 1995 to become the superintendent of schools. Should the board wish to relieve him of his duties as such, petitioner argues that it must do so in accordance with the decision in *Dunn*, *supra*, and pay him compensation and benefits due under the terms of the contract. (*Id.* at p. 12)

Petitioner also asserts that the ALJ disregarded his claim that the Board illegally reduced his compensation in violation of *N.J.S.A.* 18A:6-10 when, in August of 1995, it passed a resolution which set his salary at \$108,760, and thereafter, on May 1, 1996, it set his salary at \$94,760. Although his salary was, on March 3, 1997, changed to \$102,000, petitioner argues that \$6,760 has been wrongfully withheld, and the Board should be ordered "to restore that amount to his salary for all future years in which [he] maintains his tenure with the district.***" (*Id.* at p. 14) Petitioner also claims a right to pre-judgment interest.

As to his Open Public Meetings Act (OPMA) claims, petitioner excepts to the ALJ's finding that, even if his allegations that secret meetings took place were true, it is irrelevant because the Board's actions could be ratified in the instant proceedings. Petitioner contends, "It is not the court or administrative judicial forum that can ratify such an action, but only the body

which took the action originally. Therefore, the decision to grant summary judgment on this issue should be reversed." (*Id.* at p. 15) Moreover, petitioner maintains that *Rice, supra*, compels that an affected employee, in order to be able to request that his employment matters be conducted at a public hearing, must first receive notice of the Board's intention to consider personnel matters related to him. (*Id.* at p. 16) Here, petitioner insists that he did not receive the requisite *Rice* notice, notwithstanding that the Board "had seemingly known that [his] employment would be discussed ***." (*Id.*)

Lastly, petitioner contends that the ALJ improperly dismissed his allegations contained in Counts I and III of the petition concerning violations of Title VII of the United States Civil Rights Act of 1964, 42 U.S.C. Section 1983, the Fourteenth Amendment of the United States Constitution and the New Jersey Law Against Discrimination (NJLAD). If, as the ALJ states, petitioner's claims were not sufficiently developed, he argues that he "should have been granted leave to amend the Petition to detail these claims further." (*Id.* at p. 17)

In reply, the Board relies on the holdings in *Cummings, supra*, and *Barckett, supra*, to support the proposition, as argued at the OAL, that the petitioner's contract was null and void as the prior board had no right to appoint him for a term which was to commence after the expiration of that board's existence. (Board's Reply at p. 3) The Board maintains that the prohibition against making prospective appointments by governing bodies is well-established in common law. (*Id.* at p. 5) Moreover, the Board points out that the 1991 amendments to the superintendent's statute did not change the law with respect to prospective appointments. (*Id.* at p. 8)

There is *** no specific statutory authority which would allow a board to enter into a contract which is not to begin until after two board elections have taken place. *N.J.S.A.* 18A:17-20.1 does not

offer such authority. *N.J.S.A.* 18A:17-20.1 merely states that a superintendent must be informed "at least one year prior" to the expiration of his or her contract that it will not be renewed.***

(*Id.*)

The Board further counters that petitioner's contention that the ALJ's conclusion will have a "destabilizing" effect on superintendent contracts is "without merit and entirely without factual and legal support." (*Id.* at p. 10) To accept petitioner's reasoning, the Board continues, is to permit the "at least one year" language in the statute to change "the longstanding rule that boards of education cannot, without specific statutory authority, bind their successors." (*Id.* at p. 11) Rather, the Board argues that the "at least one year" provision was intended "to provide superintendents with a buffer against 'the whims' of a particular board." (*Id.* at p. 12) In requiring such notice, the Board reasons

***the Legislature effectively insured that the board giving [at least one year's] notice would not be the same board sitting on the date of the superintendent's termination. Thus, an excellent superintendent who runs afoul and becomes subject to the caprice of a particularly constituted board, will have the security of a board election and new board deciding whether to go forward with the former board's action. (*Id.*)

The Board maintains that the Elizabeth Board of Education which was sitting in 1995 was not authorized, and in fact was prohibited from, entering into a contract for a position which was not to become vacant until after the expiration of the life of that board. (*Id.* at p. 13)

The Board further asserts that the ALJ's decision, contrary to petitioner's arguments, was correct in granting summary judgment on the issue of petitioner's OPMA claims. Here, the Board reasons that, since petitioner was merely the acting superintendent and possessed neither tenure nor contractual rights to said position, "the board was well within its rights to return Mr. Dunn to his full duties" when it acted on May 1, 1996. (*Id.* at p. 16) The Board adds

that since there was no discussion of petitioner's employment, there would have been no reason for him to be heard on the issue. (*Id.* at pp. 16, 17) Thus, the general meeting notices as provided by the Board were sufficient under the OPMA. Moreover, the Board concurs with the ALJ's view that the question of whether a "secret" meeting occurred is a fact in dispute. (*Id.* at p. 17) However, the Board warrants that the ALJ properly determined that "while the disputed fact might potentially be relevant in other contexts, *** it was not material to the determination of the issues presently before the court." (*Id.*)

Regarding petitioner's claim that the Board improperly reduced his salary, the Board affirms that, as an "acting" employee, petitioner did not have tenure in his position and cannot claim the protection of the tenure statutes for the position of acting superintendent. The Board reasons,

***His salary was reduced when his services in his acting position were no longer necessary and he was returned to his tenured position of assistant superintendent. To hold that a board, by appointing a person to *act* in some position, pursuant to *N.J.S.A.* 18A:16.1, and to pay [him] accordingly for the interim period, was then required to maintain that new salary structure once he *** had returned to [his] normal position would be an absurd interpretation of the statute and the school laws. (emphasis in text) (*Id.* at p. 19)

The Board underscores that the resolution passed on May 1, 1996 did not purport to change the salary set in petitioner's contract for the *assistant* superintendent position. (*Id.*)

Finally, the Board renews its contention that petitioner's federal civil rights causes of action, together with his NJLAD claim, should be dismissed. As for the federal civil rights claims, the Board argues that the Commissioner lacks jurisdiction. (*Id.* at p. 22) Likewise, although the Commissioner has jurisdiction under certain circumstances to adjudicate LAD

claims, the Board contends that the within Petition of Appeal "fails to reveal any allegation or even hint of ethnic, racial, gender or any other type of discrimination." (*Id.* at p. 24)

Upon careful and independent review of the record in this matter, the Commissioner determines, for the reasons set forth herein, that summary judgment may properly be granted to the Board.

Initially, the Commissioner acknowledges the holding in *Cummings*, supra, and the cases which prohibit a board from reaching "forward beyond its own official life and into the term of its successor to make a decision not due until then." Cummings, supra at 158. However, the Commissioner further observes that the operative statute, N.J.S.A. 18A:17-15 et seq., does not require that there be a vacancy in the position of superintendent, or even a notice of such, before a local board has the authority to enter into an agreement to employ a subsequent superintendent. To the contrary, as petitioner points out, the statute appears to contemplate, indeed, compel, that local boards will anticipate vacancies by notifying superintendents of their decisions not to reappoint them "at least one year prior to the expiration" of their contracts, N.J.S.A. 18A:17-20.1. This notification requirement, however, does not provide a board with the unfettered power to bind future boards. Instead, the Commissioner holds that the appropriate balance between the well-established stricture against binding future boards and the clear demands of N.J.S.A. 18A:17-20.1 may be struck by a reading which permits, apart from a current board, only that board constituted immediately prior to twelve months before the expiration of its superintendent's contract to appoint a successor. Such a reading recognizes both a board's obligation to notify its superintendent of its intentions well in advance, while still not binding future boards unnecessarily or beyond the express prescription of statute. Thus, when viewed in this light, the Board herein acted beyond the scope of its lawful authority in binding *both* the April 1995 Board and the April 1996 Board by voting in February 1995 to appoint a superintendent effective July 1996.

Moreover, contrary to petitioner's view as presented before the OAL that the Commissioner's prior holding in *Dunn*, *supra*, affirms the Board's action to appoint petitioner to the position of superintendent in February of 1995, the Commissioner observes that said argument is erroneous. Here, petitioner asserts

***Since the Commissioner knew at the time this decision was issued that the Board appointed [petitioner] as Superintendent at the end of Mr. Dunn's term as Superintendent, it is clear from the plain language of the decision that the Commissioner issued approval of this action. Therefore, in accordance with the Commissioner's holding, the Board properly appointed [petitioner] as Superintendent for a term beginning July 1, 1996. What is equally clear is the Board's outrageous defiance of the Commissioner by subsequently refusing to allow [petitioner] to assume [his] duties of Superintendent. Further, in light of the Commissioner's mandate, the Board's action shows an egregious disregard for the authority of the Commissioner as well as its taxpavers ***. (Brief in Support of Petitioner's Motion for Summary Judgment at p. 8)

The language to which petitioner refers is the Commissioner's declaration in Dunn, supra, that

***there is nothing to prevent the Board from continuing with its plan to appoint the current Acting Superintendent [Gonzalez], to whom the Assistant Superintendent must report and from whom he or she must take assignments, to the position of Superintendent upon the expiration of [Petitioner Dunn's] contract. 96 *N.J.A.R.* 2d (EDU) 279, 284, aff'd State Board 285.

This language does not support petitioner's view that the Commissioner *directed* the Board to approve an employment contract in February of 1995 which could not go into effect until July 1, 1996. Rather, the passage cited arose in a context where the time of such an appointment was not at issue, and the language quoted, referring to the Board as an ongoing

entity, certainly may not be construed as authorizing the then-sitting board, as opposed to a future board, to take the specified action.

As for petitioner's contention that the Board has violated the OPMA, the Commissioner finds it noteworthy that petitioner himself argued in his brief, dated April 4, 1997, in support of his motion for summary judgment that there were no facts in dispute in this matter such as to preclude a motion for summary decision in his favor. (Petitioner's Motion for Summary Judgment at p. 12) Later, however, petitioner argued on the issue of meetings allegedly conducted in secret that.

it is clear that there are a multitude of facts in dispute, as well as incomplete facts, as to whether or not respondent violated the Open Public Meetings Act at its May 1, 1996 meeting. Because the facts as presented must be construed liberally and in favor of the non-moving party on this issue, it would be impossible to grant summary judgment on this issue. ***(Brief in Support of Petitioner's Motion for Summary Decision and Reply Brief, dated April 25, 1997, at p. 13)

In any event, the Commissioner finds that the sum and substance of petitioner's allegations of "secret meetings" in this regard amount to conjecture which, in this context, is insufficient to constitute a genuine issue of material fact enough to defeat the Board's motion for summary judgment. Petitioner essentially argues that since the resolutions adopted at the May 1, 1996 meeting relieving him of his duties as acting superintendent, reducing his salary, and directing Dunn to resume his duties as Superintendent were not included in the agenda distributed prior to the meeting, yet said resolutions were prepared prior to the meeting and were distributed at the meeting, and inasmuch as there was no public discussion prior to the adoption of these apparently last-minute items, then, "because no discussion took place in public, it had to take place secretly." (*Id.* at pp. 11,12) However, as the Board counters,

the issue of secret meetings remains a bare assertion in the petitioner's Petition. As stated by the Court in *Judson v. Peoples Bank & Trust Co. of Westfield*, 17 *N.J.* 67 (1954) "if the opposing party offers no affidavits or matter in opposition, or only facts which are immaterial or of an insubstantial nature, a mere scintilla, 'fanciful, frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment...." (Board's Reply at p. 18, citing to *Judson* at 75)

Further, the Commissioner determines, for the reasons articulated by both the Board and the ALJ, *infra*, that petitioner's claim he was denied notice that his employment was to be discussed by the Board at its May 1, 1996 meeting is properly dismissed by way of summary decision.

As to petitioner's claim that the Board's action to terminate his service as acting superintendent on May 1, 1996 and to return him to a salary level of \$96,760 (from \$108,760) constituted a reduction in compensation in violation of his tenure rights, the Commissioner determines that such claim must fail. Here, the Commissioner finds persuasive the Board's assertion that petitioner acquired no tenure rights in the position of acting superintendent, where his appointment was parallel to that of a substitute teacher, and where there was no vacancy in the superintendent's position for him to fill. (Board's Response to Petitioner's Motion for Summary Judgment at p. 3, citing Mills v. Piscataway Twp. Bd. of Ed., 92 N.J.A.R. 2d (EDU) 372, 375, aff'd as modified 95 N.J.A.R. 2d (EDU) 133, aff'd 96 N.J.A.R. 2d (EDU) 588) As the State Board of Education instructed in Mills, although an "absence" is considered to exist where a missing teaching staff member is scheduled to return to his/her position, a "vacancy" does not exist unless the incumbent does not intend to return. Mills at 133, citing Lammers v. Bd. of Educ., 134 N.J. 264, 272 (1993). Since the superintendency was at no time vacated while petitioner served as the acting superintendent, see *Dunn*, *supra*, he could not accrue tenure rights to "the position" of acting superintendent. Tenure is acquired in a particular position. Howley and Bookholdt v. Board of Education of Ewing Township, 1982 S.L.D. 1328, 1337.

Consequently, when the Board acted to return him to his position as assistant superintendent and

to reduce his salary correspondingly, there was no tenure violation.

Finally, the Commissioner finds petitioner's exception arguments with respect to

the Board's violations of his rights under federal law and the U.S. Constitution, as well his rights

under the NJLAD, to have been properly dismissed for the reasons stated by the ALJ and the

Board.

Accordingly, the initial decision of the ALJ is modified, as set forth above. The

Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

January 27, 1998