

CONCETTA B. CAPONEGRO, VIRGINIA :
 DEVANE, HOWARD JOHNSON, NORMAN :
 JEFFRIES AND BESSIE WHITE, :

 PETITIONERS, :

 V. : COMMISSIONER OF EDUCATION

 STATE OPERATED SCHOOL DISTRICT OF : DECISION
 THE CITY OF NEWARK, ESSEX COUNTY, :

 RESPONDENT. :
 :

SYNOPSIS

Petitioners, senior staff whose positions were abolished during State takeover, alleged they were improperly denied 60 days' pay and that due to contracts of employment, each petitioner should have been awarded his or her full position for the entirety of the 1995-96 school year. District contended implied contracts did not exist between petitioners and the District.

ALJ concluded that petitioners were not entitled to their full salary for the 1995-96 school year, finding that their claim of an implied employment contract failed because any claims based on law or contract are superseded by *N.J.S.A.* 18A:7A-44(a) and 7A:42a(3). ALJ determined, with the exception of Petitioner Johnson whose position was terminated in accordance with *N.J.S.A.* 18A:7A-42(a)(3), petitioners' claim to payment for 60 calendar days was granted. Petitioners' claim for payment of accrued sick, vacation and personal leave days was denied, as the statute does not provide for such relief. District was to determine whether petitioners had received the appropriate payment as established by the ALJ.

Commissioner affirmed, with clarification.

JANUARY 4, 1999

OAL DKT. NO. EDU 11980-95
AGENCY DKT. NO. 370-9/95

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

Initially, petitioners reiterate that, contrary to the Administrative Law Judge's (ALJ) findings, they were entitled to rely upon the offer of employment for the 1995-95 school year extended to them by the former Executive Superintendent of Schools, Eugene Campbell. Petitioners underscore that, according to Campbell's testimony, his appointment decisions did not require ratification by the former Board. Citing *Peck v. Imedia, Inc.*, 293 *N.J. Super.* 151, 168 (App. Div. 1996) to advance the proposition that an individual is entitled to proceed on a theory of promissory estoppel by virtue of her reliance on a promise for employment, petitioners argue that "***it is hard to imagine a more definite promise of employment than that contained

in Mr. Campbell's June 29, 1995 'Notice of Continued Employment.'" (Petitioner's Exceptions at p. 3)

Petitioners next challenge the ALJ's conclusion that the "60 day" provision referred to in *N.J.S.A. 18:7A-44a* means 60 calendar days, rather than 60 work days. In this regard, petitioners assert that the ALJ fails to consider the language of *N.J.S.A. 18A:6-14*, which provides that a board may, upon certification of tenure charges to the Commissioner of Education, suspend that person with or without pay, but if a determination is not made within 120 *calendar* days, then the full salary of that person shall resume. Contending that this provision is dispositive, petitioners aver,

***it is clear, that when the Legislature in the Education Laws decided that a time period was to be computed based upon "calendar days," it has specifically so stated. Clearly, if the Legislature intended that Executive Administrators should receive only 60 calendar days' pay it would have used the exact same verbiage that it used in the tenure statute. (*Id.* at p. 6)

Petitioners reason that *N.J.S.A. 18A:7A-44a*, which is remedial in nature, as recognized by the ALJ, should be liberally construed for the benefit of the persons to be protected. (*Id.*)

Petitioners further find it "mind boggling, considering the quantity of the dollars involved and the number of years of service of the Petitioners***" that the ALJ would have concluded that they were not entitled to payment for accumulated sick, vacation or personal days. (*Id.* at p. 8) Petitioners cite a recent decision of the Appellate Division, which establishes that "teachers' accumulated sick leave compensation was not a 'mere expectancy' but rather was either an accrued or vested right." (*Id.*, citing *In the Matter of Morris School District Board of Education*, 310 *N.J. Super.* 332 (App. Div. 1998)) Petitioners add,

In essence what the Administrative Law Judge has done herein is allow, with absolutely no analysis, the decades and scores of Petitioners' meritorious service to the Newark School District to be

forfeited in direct contravention to the Appellate Division decision in *Morris* based upon her lame interpretation of one phrase of the statute in question. *** (*Id.* at p. 9)

Petitioners contend that the ALJ has broadly interpreted what she viewed as a waiver provision in *N.J.S.A.* 18A:7A-44a, so as to improperly bar their claims, contrary to what they view as the rules of statutory construction. (*Id.* at p. 10, citing *Young v. Schering Corp.*, 141 *N.J.* 16 (1995))

Finally, petitioners contend that the ALJ denies Petitioner Johnson recovery of accumulated sick, vacation and personal leave time by applying *N.J.S.A.* 18A:7A-44a, rather than 18A:7A-42a(3). In this regard, petitioners remind that Johnson was already paid for part of his accumulated leave days. (*Id.* at p. 13) Moreover, petitioners note that *N.J.S.A.* 18A:7A-42a(3) contains no provision specifying that 60 days' pay "shall be in lieu of any other claim," as does *N.J.S.A.* 18A:7A-44a.

In reply, the District contends that the ALJ correctly rejected petitioners' implied contract claim. The District underscores that *N.J.S.A.* 18A:7A-44a addresses petitioners' rights upon separation from employment, providing that such employees shall be terminated upon creation of the State-operated school district, "[n]otwithstanding any other provision of law or contract." (emphasis in text) (District's Replies at p. 2) Moreover, the District asserts that,

[a]ssuming that Petitioners can explain how their implied contract claim can be maintained in light of the explicit statutory prohibition, they are unable to prove the existence of an agreement since such implied agreement required ratification by the former Newark Board of Education. Even as the former Executive Superintendent, Eugene Campbell was required to obtain the ratification by the former Newark Board of Education of any decisions made with respect to Petitioners' employment. *N.J.S.A.* 18A:17A-5(c). (*Id.* at p. 3)

Thus, the District reasons that Campbell's offer of employment was invalid and without legal effect. As to the significance of *Peck, supra*, the District argues that *Peck* concerned private

sector employment, rather than the public sector employment, as herein, which was created and is governed by statute. (*Id.*)

The District next asserts that the ALJ correctly construed the 60 days' pay provision in *N.J.S.A. 18A:7A-44a*, arguing that petitioners' reading conflicts with the statute's "notice of termination" provision which has been interpreted by the Appellate Division as 60 *calendar* days. (*Id.* at pp. 4-5)

Finally, the District reasons that the ALJ appropriately rejected petitioners' claim for accrued sick, vacation and personal leave time, and the District should, therefore, be reimbursed for all payments made in connection with such claims, as the payment constitutes an improper diversion of public monies. (*Id.* at p. 5) In this regard, the District finds that the *Morris* case, as cited *supra* by petitioners to advance their claim, is inapposite to the matter herein. Rather, the District points out that the Legislature expressly

***defined a class of employees covered under *N.J.S.A. 18A:7A-44(c)* who could assert a claim for accrued vacation and sick leave. However, Petitioners, as at-will executive administrators, were not covered by a collective bargaining agreement and were not employees defined under *N.J.S.A. 18A:7A-44(c)*." (*Id.* at p. 6)

The District concludes that "***the remedial effect of *N.J.S.A. 18A:7A-44(a)* is to provide the State-District Superintendent with strong powers to modify and amend the practices of previously ineffective or failed local school administrators," (*id.* at pp. 6, 7) and maintains that petitioners' claims for accrued sick, vacation and personal leave time are without merit.

Upon careful and independent review of the record in this matter, the Commissioner determines to affirm the initial decision of the ALJ, with clarification as set forth below. Initially, the Commissioner notes that the parties do not refute that Petitioners Devane,

White, Jeffries and Caponegro were terminated in accordance with the provisions of *N.J.S.A.* 18A:7A-44a. That statute provides,

Notwithstanding any other provision of law or contract, the positions of the district's chief school administrator and those executive administrators responsible for curriculum, business and finance, and personnel shall be abolished upon creation of the State-operated school district. The affected individuals shall be given 60 days' notice of termination or 60 days' pay. The notice or payment shall be in lieu of any other claim or recourse against the employing board or the school district based on law or contract. Any individual whose position is abolished by operation of this subsection shall be entitled to assert a claim to any position or to placement upon a preferred eligibility list for any position to which the individual may be entitled by virtue of tenure or seniority within the district. No individual whose position is abolished by operation of this subsection shall retain any right to tenure or seniority in the positions abolished herein. (Emphasis added) (N.J.S.A. 18A:7A-44a)

Neither do the parties dispute that Petitioner Johnson, formerly the Chief Auditor for the Newark Board, was terminated in accordance with *N.J.S.A.* 18A:7A-42a(3), which provides that

*The State district superintendent of school shall, subject to the approval of the commissioner or his designee, make all personnel determinations relative to employment, transfer and removal of all officers and employees, professional and nonprofessional, except that the services of the district auditor or auditors and attorney or attorneys shall be immediately terminated by creation of a State-Operated school district***. (emphasis added) (N.J.S.A. 18A:7A-42a(3))*

The Commissioner concurs with the ALJ that, even assuming, *arguendo*, petitioners can establish that a contract for their employment for the 1995-96 school year, in fact, existed, the language in both statutes, cited above, renders it abundantly clear that, upon creation of the State-operated School District of the City of Newark on July 12, 1995, *any* employment “contract” was extinguished. (Initial Decision at p. 14) It was the intent of the Legislature that, upon establishment of a State-operated school district, the chief executive officers of the district

would be dismissed. (See Statement to A-4644, Senate Education Committee.) Thus, the Commissioner affirms that none of the petitioners has a viable claim to continued employment for the 1995-96 school year, pursuant to *N.J.S.A.* 18A:7A-42a(3) and 18A:7A-44a.

With respect to petitioners' claims that if they were not entitled to continued employment for the 1995-96 school year, then they are entitled to 60 working days' pay, rather than 60 calendar days', the Commissioner affirms that Petitioner Johnson has no entitlement to 60 days' severance pay of either kind, pursuant to *N.J.S.A.* 18A:7A-42a(3). (See *Massa v. State-Operated School District of the City of Jersey City*, 92 *N.J.A.R.* 2d (EDU) 52 (1991), *aff'd* at 366 establishing that attorneys and auditors employed by the District were not entitled to pay in lieu of the 60 days' notice of termination upon State-operation.)

Further, notwithstanding petitioners' plea that the language set forth in *N.J.S.A.* 18A:6-10 should be dispositive herein, the Commissioner concurs with the ALJ, for the reasons set forth at pages 16 and 17 of her initial decision, that Petitioners Devane, White, Jeffries and Caponegro are entitled to 60 *calendar* days' pay, prorated in accordance with the salaries each was receiving on July 11, 1995, just prior to State-operation.¹

Finally, with respect to petitioners' claims for payment for accumulated sick, vacation and personal leave time, the Commissioner finds that neither *N.J.S.A.* 18A:7A-42a(3), in the case of Petitioner Johnson, nor *N.J.S.A.* 18A:7A-44a, supports petitioners' claims. Here, the Commissioner finds it noteworthy that *N.J.S.A.* 18A:7A-44a specifies that the employee's 60 days' pay "****shall be in lieu of *any other claim* or recourse against the employing board or the school district based on law or contract." (emphasis added) Even more persuasive, however, is

¹ It is herein noted that Petitioner White was paid her salary for 60 calendar days (initial decision at p. 5) and Petitioner Caponegro was paid for 60 calendar days at the salary for an assistant personnel director, the position to which she returned after State-operation, rather than as the acting executive director. (*Id.* at p. 6) The record further indicates that Jeffries has received 45 days' pay for 60 calendar days. (*Id.* at p. 7)

that while *N.J.S.A.* 18A:7A-44c contains a “waiver” provision similar to that in subsection (a), subsection (c) nevertheless *explicitly* provides that employees whose positions are abolished pursuant thereto may assert “***upon separation from service any legal contractual right to health care coverage, annuities, accrued vacation days, accrued sick leave, insurance and approved tuition costs.” Clearly, if the Legislature had intended to allow claims for accumulated sick, vacation and personal leaves from employees terminated pursuant to *either* 18A:7A-44a or 18A:7A-42a(3), it would have so provided.

Additionally, the Commissioner rejects the precedential value petitioners place on *Morris, supra*. There, the Appellate Division reviewed and affirmed a decision rendered by the Public Employees Relations Commission which established, *inter alia*, that the Morris Board’s proposal to cap paid leave entitlements, rather than permit the accumulation of sick leave as deferred compensation upon retirement, as was its practice for 45 years, must be stayed, since the Association “***had not knowingly waived the vested rights of its members to accrued sick leave compensation***.” *Morris, supra* at 336. Unlike the situation herein, the *Morris* Court was particularly concerned not just with an employee’s right to deferred compensation, but with *the Association’s power to bargain away such rights* “***absent knowing consent by those who would be adversely affected.” (*Id.* at 345) The cases cited by the Court in support of its holding involved employees working under collective bargaining agreements. Moreover, contrary to petitioners’ characterization, the Court *explicitly* stated that it took no position with respect to whether a teacher’s accumulated sick leave compensation constituted an “accrued right,” a “vested interest” or a “mere expectancy.” (*Id.* at 341) To the contrary the Court confirmed, “We think there is no profit in dealing in labels such as ‘vested right,’ ‘accrued interest’ or ‘mere expectancy.’ None fits precisely, and it would be a mistake to choose one and be driven by the

choice.” (*Id.* at 343) The Commissioner, therefore, rejects the weight ascribed to *Morris* by petitioners with respect to their claims for sick leave, and, instead, finds that the ALJ’s conclusion in this regard may not be dismissed as a “lame interpretation of one phrase of the statute in question,” as petitioners have urged. (Petitioners’ Exceptions at p. 9)

Accordingly, the Commissioner adopts the initial decision of the ALJ, as clarified herein, and directs that the District pay Petitioner Devane for 60 calendar days and Petitioner Jeffries for 15 calendar days, prorated according to the annual salary each enjoyed just prior to State-operation. To the extent Petitioner Caponegro’s 60 calendar days’ payment was at the rate for an assistant personnel director rather than that of an acting executive director for human resources (initial decision at p. 6), and assuming the former rate is less than the latter, she is to be reimbursed for any differential. Petitioners are entitled to no further compensation. Petitioners Jeffries and Johnson are directed to reimburse the District for the amount each received as compensation for accumulated sick, vacation or personal leave time.²

IT IS SO ORDERED.³

COMMISSIONER OF EDUCATION

JANUARY 4, 1999

² In the case of Petitioner Jeffries, the District may offset any obligation to pay him the balance of the 60 calendar days’ severance by the amount he received as compensation for accumulated sick, vacation or personal leave time.

³ This decision, as the Commissioner’s final determination in the instant matter, 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.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.