

176-01

JOHN HOWARD, JR., :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE CITY : DECISION
 OF EAST ORANGE, ESSEX COUNTY, :
 :
 RESPONDENT. :
 _____ :

SYNOPSIS

Petitioning Superintendent of Schools alleged the Board violated his tenure rights and *N.J.S.A.* 18A:17-20 when it invalidated his contract and failed to notify him in writing prior to July 1, 1999, that he would not be reappointed at the end of the term of his contract. The issue herein was whether, after rescinding the initial four-year contract for the 1992 to 1996 term in August 1995, the Board entered into a contract replacing the initial contract and a second contract for the term from 1996 to 2000. Petitioner asserted that there was a replacement contract, renewal and an addendum to the contract, and that certain actions of the Board ratified the renewal contract and that the Board's failure to properly notify him of nonrenewal triggered a third contract for 2000-2005 by operation of statute. Moreover, petitioner alleged that he was not given a 5% raise in accordance with his alleged 2000-2005 contract.

The ALJ found that whether there was a contract and/or whether the contract was ratified by Board action were purely issues of contract law. Citing *East Brunswick* and *Picogna* court decisions, the ALJ noted that although the Commissioner has jurisdiction to hear and decide cases arising under school laws, where a dispute does not arise under school laws, it is outside the Commissioner's jurisdiction, even though it may relate to school personnel. The ALJ found that the Commissioner lacked jurisdiction over the contract claims asserted by petitioner. Petition was dismissed for lack of jurisdiction; petitioner's motion for summary decision was rendered moot.

The Commissioner determined to reverse the Initial Decision of the ALJ and grant summary decision to petitioner. Following the passage of *P.L.* 1991, *c.* 267, establishing contractual tenure for superintendents, the Commissioner has consistently exercised his jurisdiction when faced with situations where appointment, contract rescission or modification of a superintendent's contract relates to questions of a superintendent's contractual tenure. The ALJ's reliance on *Picogna* was misplaced since *Picogna* was a *nontenured* assistant superintendent. Since it was undisputed that the Board herein appointed petitioner to an initial four-year contract beginning July 1, 1992 and ending June 30, 1996, pursuant to *N.J.S.A.* 18A:17-15 *et seq.*, therefore, petitioner held tenure as a superintendent when the Board acted to rescind the initial contract on August 15, 1995. The Commissioner found that by Resolution on August 15, 1995, the Board rescinded petitioner's initial contract and reappointed him to a new five-year term commencing June 1, 1995 and terminating on June 30, 2000, and by its subsequent actions and vote to modify the agreement on January 20, 1998, the Board ratified the terms of that agreement. Thus, petitioner was contractually tenured through June 30, 2000. As a result of the Board's failure to act to reappoint petitioner to a contract for the same term or a different term, or to provide notice of nonrenewal at least one year prior to the expiration of the 1995-2000 contract pursuant to *N.J.S.A.* 18A:17-20.1, petitioner was deemed reappointed for another five-year contracted term beginning July 1, 2000 and ending June 30, 2005 by operation of statute. The provisions of this 2000-2005 contract, including the 5% salary increases specified in the contract, thereby will remain in effect during its contractual term, unless either the petitioner and the Board elect to terminate the contract by mutual agreement or the Board prevails in the pending tenure proceedings. The Commissioner granted summary decision to petitioner with the exception of petitioner's claims of Open Public Meetings Act and Rice notice violations, which were rendered moot as a result of this determination.

JUNE 5, 2001

OAL DKT. NOS. EDU 7553-00 AND EDU 9906-00 (CONSOLIDATED)
AGENCY DKT. NOS. 273-7/00 AND 334-9/00

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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 were submitted in accordance with *N.J.A.C.* 1:1-18.4 and were duly considered by the Commissioner in reaching his determination herein.

Arguing that the Commissioner has primary jurisdiction over all controversies arising under the school laws, petitioner excepts to the Administrative Law Judge’s (ALJ) conclusion that the subject of this matter involves purely an issue of contract law and is, therefore, not within the Commissioner’s jurisdiction. (Petitioner’s Exceptions at 4) Citing numerous cases, petitioner contends that the Commissioner has never declined to assert jurisdiction in matters implicating superintendents and the manner in which they were appointed or the manner in which their employment was to cease. (*Id.* at 5) Thus, petitioner asserts, the fact that an issue involves the contract of a superintendent does not mean that the case is governed by contract law. (*Id.* at 7)

Pointing to *N.J.A.C.* 18A:17-20(b), petitioner underscores that a superintendent holds contractual tenure during the term of the employment contract and that the same tenure protections afforded to other certified employees also apply to superintendents. *See, West Village Civic Club, Inc., et al. v. Board of Education of the Township of Manchester et al.*, decided by the State Board June 5, 1996. (*Id.* at 6-7) Petitioner argues that the ALJ's conclusion that this matter involves a question purely of contract law stands the statutory scheme of contractual tenure on its head, averring that the statute contemplates the formation of a superintendent's contract by operation of law, and that even if a board does not take formal action to vote for the renewal of a superintendent's contract, simply by failing to act within the prescribed timelines, the superintendent is automatically granted a new contract for the same duration as the expired contract. (*Id.* at 8)

Moreover, petitioner argues, there are two scenarios regarding his employment rights under Title 18A where, by operation of statute, rather than by virtue of a contract, petitioner's contract would be automatically renewed through non-action by the Board. Under the first alternative, if the Board did nothing prior to the end of his initial contract, which ran from July 1, 1992 through June 30, 1996, petitioner would have obtained contractual tenure from July 1, 1996 through June 30, 2000 by virtue of the fact that the Board did not provide notice of renewal one year prior to the end of the initial contract, and, given that the Board did not provide him notice of nonrenewal on or before June 30, 1999, petitioner maintains, a subsequent contract for the period of July 1, 2000 through June 30, 2004 also would be triggered by operation of statute. (*Ibid.*)

Secondly, petitioner asserts that the Board rescinded his initial contract in accordance with *West Village Civic Club, supra*, and appointed him to a new five-year contract

from July 1, 1995 through June 30, 2000. (*Id.* at 9) If the Commissioner concludes that the Board properly rescinded the previous contract and entered into a new five-year contract, petitioner contends, he then had tenure in the superintendent's position from July 1, 1995 through June 30, 2000. Therefore, petitioner proffers, given that the Board failed to properly provide notice of nonrenewal, petitioner's contract was automatically renewed and he, therefore, has contractual tenure for the five-year period from July 1, 2000 through June 30, 2005. (*Ibid.*)

In addition to his argument that his tenure rights under *N.J.S.A.* 18A:17-20(b) are directly at issue in this matter, petitioner avers that the present dispute implicates *N.J.S.A.* 18A:17-15, *N.J.S.A.* 18A:20.1 and *N.J.S.A.* 18A:17-20.2 and, thus, the Commissioner has jurisdiction over this matter. (*Id.* at 9-10)

Further, arguing that it is well-settled that the Commissioner has ancillary jurisdiction to hear petitioner's claims arising under the Open Public Meetings Act (OPMA), (*See, N.J.S.A.* 10:4-6 *et seq.* and *Sukin v. Northfield Bd. of Educ.*, 171 *N.J. Super.* 184, 187 (App. Div. 1979)) and his notice rights pursuant to *Rice v. Union Cty. Reg. H. Sch. Dist. Bd. of Educ.*, 155 *N.J. Super.* 64 (App. Div. 1977), *certif. den.* 76 *N.J.* 238 (1978) because there is a significant nexus to education law, petitioner asserts that these claims should be addressed by the Commissioner in the event that the Initial Decision is reversed and the matter remanded to the OAL. (*Id.* at 10-11)

Pointing out that he has tenure during the term of his contract, petitioner submits that *Picogna v. Bd. of Educ.*, 249 *N.J. Super.* 332 (App. Div. 1991), *rev'd and remanded* 143 *N.J.* 391 (1996), relied on by the ALJ in reaching her determination, is distinguishable from the instant matter because "*Picogna* involved a *nontenured* assistant superintendent who brought a whistleblower claim under the Conscientious Employee Protection Act and constitutional

rights claims, in addition to a breach of contract claim.” (emphasis in text) (*Id.* at 11) With respect to the other case relied on by the ALJ, *Board of Educ. of the Twp. Of East Brunswick v. Twp. Council of East Brunswick*, 48 *N.J.* 94 (1966), which finds that the Commissioner does not have jurisdiction merely because matters involve school personnel, petitioner submits that the *East Brunswick* decision is generally supportive of the Commissioner’s broad authority to decide school matters and that “[t]here is no holding or conclusion that would prohibit the Commissioner from exercising jurisdiction over the tenure rights[’] claims of a superintendent.” (*Id.* at 11-12) Therefore, petitioner urges the Commissioner to reverse the Initial Decision and remand the matter to the OAL.

In its reply, the Board urges the Commissioner to adopt the ALJ’s finding that “[w]hether there is a contract and/or whether the contract was ratified by the action of the Board are purely issues of contract law” and, thus, that this matter is outside the Commissioner’s jurisdiction. (Board’s Reply at 2)

In a counterstatement of the facts, the Board asserts that the resolution passed by the Board on August 15, 1995 recites the Board’s intention to rescind petitioner’s 1992 contract and to establish new employment contracts with petitioner, but that the Board did not take official action to approve a successor contract or set forth or approve specific terms of a new contract. (*Id.* at 3) Moreover, the Board posits that the 1995 contract language violates the explicit language in *N.J.S.A.* 18A:17-15, limiting superintendent’s contracts to terms of three to five years, because it contains an automatic annual extension provision, thus converting the contract to a six-year agreement on the first effective date of the contract. (*Id.* at 4)

With respect to whether the Commissioner has jurisdiction to decide this matter, the Board cites *Picogna, supra*, and argues that the contract principles in *N.J.S.A.* 18A:17-15 and

N.J.S.A. 18A:17-20.1 are contained in Title 18A because they pertain to school personnel, but that “does not automatically convert this matter into ‘school’ law.” (*Id.* at 5-6) The Board posits that the statutes governing contractual term limits and the renewal/termination process implicate traditional principles of contract law, not expertise in the educational field. (*Id.* at 6)

Moreover, the Board asserts that tenure is not the primary issue in this matter and that the ALJ correctly concluded that a determination must first be made with respect to which of petitioner’s possible contracts is the controlling contract (if any) because the application of *N.J.S.A.* 18A:17-20.1 is meaningless until the contract question is answered. (*Id.* at 7-9) The Board also advances the argument that the procedure for renewal or termination of a superintendent’s contract does not arise under *N.J.S.A.* 18A:17-20.2, but that it might potentially apply once a decision is made with respect to which contract governs petitioner’s employment. (*Id.* at 10-11)

The Board further argues that there is no OPMA claim for which the Commissioner can exercise jurisdiction because: 1) there is not a sufficient nexus; and 2) the Board’s notice satisfied the *Rice* notice requirements. (*Id.* at 11-13) Acknowledging that the Commissioner may have jurisdiction to consider a claim under *N.J.S.A.* 18A:25-7, which requires written notice of entitlement to have representation whenever a teaching staff member is required to appear before the Board concerning any matter that could adversely affect his employment, the Board proffers that the statute does not apply in this instance because it applies to teaching staff members who are required to appear at meetings or interviews before the Board. (*Id.* at 12)

Finally, the Board claims that petitioner’s arguments differentiating the nontenured assistant superintendent in *Picogna, supra*, from a tenured employee are irrelevant to

the contractual dispute in this matter. (*Id.* at 13) Citing *Board of Educ. of the Twp. of East Brunswick, supra*, at 102, the Board argues that the involvement of school personnel in matters not arising under school laws does not place a matter within the Commissioner's jurisdiction. (*Id.* at 14) The Board, therefore, urges the Commissioner to adopt the recommended decision of the ALJ. (*Id.* at 15)

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 reverse the Initial Decision of the ALJ and grant summary decision to petitioner for the reasons set forth below.

Initially, with respect to jurisdiction to hear this matter, *N.J.S.A.* 18A:6-9 sets forth the extent of the Commissioner's jurisdiction to hear and determine disputes, as follows:

The commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws, excepting those governing higher education, or under the rules of the state board or of the commissioner.

With the passage of *P.L.* 1991, *c.* 267 (*N.J.S.A.* 18A:17-15 *et seq.*), the Legislature eliminated *career tenure* for superintendents and instituted a system providing *a period of tenure during the duration of the contract*. The Assembly Education Committee Statement declares:

This bill revises existing law regarding the tenure of a superintendent of schools to substitute for the present career tenure a period of tenure for the duration of the contract between the local board of education and the superintendent.

The bill stipulates that a superintendent shall hold tenure during the term of the contract with the board and during the contract period shall not be dismissed or reduced in compensation except for inefficiency, incapacity, unbecoming conduct, or other just cause.

(Assembly Education Committee, Statement to Assembly Bill No. 1131, L. 1991, c. 267)

The new statutory scheme not only provides tenure to superintendents during the period of their contract, but also provides *specific* conditions for renewing a superintendent's contract either by the negotiation of a new contract or by failure to properly notify a superintendent that his contract will not be renewed. *N.J.A.C.* 18A:17-20.1 provides that the initial contract shall be renewed for a term of the same duration as the original contract unless, by contract, the board appoints the superintendent to a different term or, at least one year prior to expiration of the contract, the board notifies the superintendent that he will not be reappointed. The primary issue in this case, therefore, is whether petitioner has contractual tenure under *N.J.S.A.* 18A:17 20.1 and, if so, the duration thereof.

In the instant matter, it is undisputed that the Board appointed petitioner to an initial four-year contract beginning July 1, 1992 and ending June 30, 1996. Pursuant to *N.J.S.A.* 18A:17-15 *et seq.*, therefore, *petitioner held tenure as a superintendent when the Board acted to rescind the initial contract on August 15, 1995.* Thus, the issues of: 1) whether the Board replaced the initial contract with a contract beginning July 1, 1992 and ending June 30, 1996, and reappointed petitioner to a second contract beginning July 1, 1996 and ending June 30, 2001; or 2) whether a second contract term from July 1, 1996 through June 30, 2000 was awarded by operation of statute, expressly arise from the effect of the Board's actions or inactions on petitioner's tenure rights as a superintendent as governed by school law, over which the Commissioner has primary jurisdiction pursuant to *N.J.S.A.* 18A:6-9.

The ALJ's reliance on *Picogna, supra*, is misplaced because petitioner in this matter was *contractually tenured* under *N.J.S.A.* 18A:17-15 *et seq.* at the time that the controverted contractual issues arose, whereas, *Picogna* was a *nontenured* assistant

superintendent who asserted contractual and constitutional claims. Unlike the protections afforded tenured employees, a board of education has almost unfettered discretion to discontinue the services of a nontenured employee absent a constitutional or statutory infirmity. *See, Dore v. Bedminister Twp. Bd. of Ed.*, 185 N.J. Super. 447 (App. Div. 1982); *Kufel v. Union County Vocational-Technical School District*, 96 N.J.A.R.2d (EDU) 446, *aff'd* 97 N.J.A.R. 2d (EDU) 317 (App. Div. 1997); *Gillison v. Board of Education of the City of Newark, Essex County*, 95 N.J.A.R. 2d (EDU) 157 (1993); and *Paladino v. Lacey Township Board of Education, Ocean County*, decided by the State Board of Education February 1, 1989. Although the Board in *Picogna, supra*, argued that school laws were controlling because, if the assistant superintendent was found to have been wrongfully terminated, he was therefore prevented from obtaining tenure, the Appellate Division found that:

The contract claim of a *nontenured* school employee does not arise under the school laws simply because its outcome may later enable him to attain tenure under the school laws. *See Board of Ed., E. Brunswick Tp. v. Township Council, E. Brunswick*, 48 N.J. 94, 102, 223 A.2d 481 (1966) (“Where the controversy does not arise under the school laws, it is outside the Commissioner’s jurisdiction even though it may pertain to school personnel.”) Whether petitioner’s employment was wrongfully terminated under the contract and under the CEP Act is for the court, not the Commissioner, to decide. (*Picogna, supra*, at 335)

Additionally, it is noted that in analyzing *Picogna’s* tenure entitlement under N.J.S.A. 18A:28-5, the Supreme Court, citing *Canfield v. Board of Educ.*, 51 N.J. 400 (1968), found that:

***breach of a contract covering a full probationary period of employment that may have resulted in tenure had no breach occurred does not confer tenure in the absence of continued employment after service for the requisite number of consecutive years in the same district. (*Picogna, supra*, 143 N.J. at 401-402)

Moreover, since the passage of *P.L. 1991, c. 267*, establishing contractual tenure for superintendents, the Commissioner has consistently exercised his jurisdiction when faced with situations where appointment, contract rescission or modification of a superintendent's contract relates to questions of a superintendent's contractual tenure. *See, West Village Civic Club, Inc, supra; Graham v. Board of Education of the Town of Kearney, 95 N.J.A.R.2d (EDU) 510; Dunn v. Elizabeth Board of Education, 96 N.J.A.R.2d (EDU) 279; and Harrington v. Board of Education of the Township of Clinton, 95 N.J.A.R.2d (EDU) 535.*

Accordingly, for the reasons set forth above, the Commissioner rejects the ALJ's conclusion that the instant matter should be dismissed for lack of jurisdiction and, therefore, concludes that authority to decide the issues in this matter appropriately rests with the Commissioner.

Additionally, the Commissioner has determined to grant petitioner's motion for summary decision. Pursuant to *N.J.A.C. 1:1-12.5(b)* and *Contini v. Bd. of Educ. of Newark, 286 N.J. Super. 106, 121 (App. Div. 1995) (citing, Brill v. Guardian Life Insurance Company of America, 142 N.J. 520 (1995))*, summary decision may be granted in an administrative proceeding if there is no genuine issue of material fact in dispute and the moving party is entitled to prevail as a matter of law. In this regard, notwithstanding the fact that the ALJ did not reach to the merits of the matter because she determined to dismiss the consolidated cases for lack of jurisdiction, both parties filed motions for summary judgment and answers thereto and, thus, the issues were fully briefed in the proceedings before the ALJ. In viewing the evidentiary documents and the arguments presented in this matter in the light most favorable to the Board, there is no "genuine issue" of material fact" and the Commissioner has determined that

petitioner is entitled to prevail as a matter of law for the reasons that follow. *See Brill, supra*, at 540.

As stated above, it is undisputed that the Board appointed petitioner to an initial four-year contract beginning July 1, 1992 and ending June 30, 1996. It is also undisputed that the Board did not notify petitioner that it did not intend to renew his contract before June 30, 1995, as required by *N.J.S.A.* 18A:17-20.1. (Petition of Appeal at 2, and Board's Opposition to Petitioner's Motion for Summary Decision at 2) Therefore, had nothing else occurred, petitioner would have been reappointed for another four-year contract beginning July 1, 1996 through June 30, 2000 by operation of statute. However, on August 15, 1995, the Board acknowledges that it adopted a Resolution to rescind petitioner's 1992-1996 contract. (Board's Opposition to Petitioner's Motion for Summary Decision, Exhibit B, Answer to Petitioner's Interrogatory #18) The Board's Resolution of August 15, 1995 reads, as follows:

BE IT RESOLVED: "that the Board of Education, upon the recommendation of the Superintendent of Schools, approve the following resolution."

WHEREAS, in June 1992 the East Orange Board of Education entered into an employment contract with Dr. John Howard, Jr., the term of which is from July 1, 1992 through July 1, 1996; and

WHEREAS, the East Orange Board of Education has determined the necessity of renegotiating said employment contract and thus, rescinding the current employment contract with Dr. Howard.

NOW, THEREFORE, BE IT RESOLVED, on the 15th day of August 1995, the East Orange Board of Education *hereby rescinds the current employment contract of Dr. Howard*; and

BE IT FURTHER RESOLVED, that the East Orange Board of Education will establish new employment contracts with Dr. Howard, the terms and conditions of which shall commence July 1, 1992 and terminate on June 30, 1995 and commence July 1, 1995 and terminate on June 30, 2000. (emphasis added) (Petitioner's Motion for Summary Decision, Exhibit A)

Although acknowledging that *the above resolution rescinded petitioner's initial contract*, the Board proffers the argument that the August 15, 1995 Resolution only expressed the Board's *intent* to establish new employment contracts and that the actual contracts were never approved. (Board's Opposition to Petitioner's Motion for Summary Decision at 2-3) As indicated above, *N.J.S.A. 18A:17-15 et seq.* establishes contractual tenure for superintendents. Accordingly petitioner was tenured under the initial contract from July 1, 1992 through June 30, 1996. Although a board has the authority to rescind an initial agreement with a superintendent prior to the conclusion of an existing contract and to reappoint the superintendent to a new contractual term, *Graham, supra*, contractual tenure protects a superintendent from a board rescinding an existing agreement without entering into a new contractual arrangement, except as provided for in *N.J.S.A. 18A:17-20.2*, which states 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.

Absent the sustaining of tenure charges as indicated in *N.J.S.A. 18A:17-20.2* above,¹ therefore, accepting, *arguendo*, the Board's claim that it did not act to reappoint petitioner to a new contract, the Board would have violated petitioner's tenure rights by acting *ultra vires* in rescinding his initial contract if it did so without entering into a new contractual agreement.

Pursuant to *N.J.S.A. 18A:17-20.1*, the Board had only two choices from which to select at the conclusion of petitioner's initial contract. The Board had to either 1) notify petitioner prior to June 30, 1995 that he would not be reappointed, or 2) reappoint petitioner by

¹ The Commissioner notes that tenure charges were subsequently filed against Dr. Howard on *January 12, 2001*.

contract for a different term. Rescission of the initial contract without reappointment during the period that petitioner was contractually tenured was not an option available to the Board under *N.J.S.A.* 18A:17-20.1. The Board acknowledges that it did not notify petitioner prior to June 30, 1995 that he would not be reappointed, and now claims that subsequent to the rescission of his existing contract, contrary to law, petitioner was not reappointed by contract.

Although in agreement with the Board that the language in the August 15, 1995 Resolution is somewhat ambiguous with respect to the establishment of the new contracts to which it refers, the Commissioner finds that review of the *specific* language in the Resolution, in light of statements of the Board members present on August 15, 1995, as well as the Board's subsequent actions, confirms that the August 15, 1995 Resolution rescinded the initial contract *and* reappointed petitioner to a new five-year term. Specifically, the Resolution states that, "the East Orange Board of Education will establish new employment contracts with Dr. Howard, the terms and conditions of which shall commence July 1, 1992 and terminate on June 30, 1995 and *commence July 1, 1995 and terminate on June 30, 2000.*"² (emphasis added) (August 15, 1995 Resolution of the Board)

Six board members were present at the August 15, 1995 meeting wherein the Board's Resolution was adopted. One Board member was absent. None of the Board members serving on August 15, 1995 serve on the current Board. According to petitioner's affidavit, three of the Board members are now deceased and petitioner submits that he attempted to obtain an affidavit from Ernestine Harris, the Board president in 1995, but was unable to do so because she

² If the Board had not acted, by operation of statute, petitioner's second four-year contract term would have also ended on June 30, 2000. Thus, unlike the situation in *West Village Civic Club, Inc., supra*, rescinding the initial contract and appointing petitioner to a new term did not extend the length of the contractual term beyond that which would have been triggered by the Board's failure to notify petitioner that he would not be reappointed as provided for in *N.J.S.A.* 18A:17-20.1.

was ill.³ (Petitioner's Motion for Summary Decision at 2) The two remaining Board members, Daniel Desrivieres and Sheila Oliver, submitted affidavits on petitioner's behalf, which state:

At the Board's meeting on August 15, 1995, the Board voted to approve a five-year employment contract with Dr. John Howard, Jr., Superintendent of Schools. The employment contract was dated August 15, 1995. The term of the employment contract was July 1, 1995 to June 30, 2000. (Affidavits attached to Petitioner's Motion for Summary Decision)

Although the minutes of subsequent Board meetings do not reflect further action to adopt the terms and conditions of a new contract, the Board's actions demonstrate that it recognized the existence of the five-year contract until the final year of the contract when it acted by Resolution on June 26, 2000 to terminate petitioner's contract as of June 30, 2000. (Petition of Appeal, Exhibit F) In support of his assertion of the validity of the 1995 contract, petitioner argues that, subsequent to the August 15, 1995 meeting, he was provided the salary⁴ and benefits provided for in the 1995 contract with the exception of an automobile entitlement. (Petitioner's Motion for Summary Decision at 3) Moreover, the Board acknowledges that it agreed to several "modifications to the purported 1995 Contract" in December 1997 (Board's Opposition to Petitioner's Motion for Summary Decision at 4), and approved those modifications as an Addendum to the Employment Contract on January 20, 1998. (Petitioner's Motion for Summary Judgment, Exhibit 6, Board's Response to Interrogatory #38 and Petitioner's Exhibit 7) Given that the Board in this matter is authorized by statute to enter into a contract with an individual to serve as superintendent of its schools, by voting to modify the disputed 1995 contract and affording petitioner the salary and benefits set forth in the contracts other than the automobile,

³ Ms. Harris' and petitioner's signatures appear on the disputed 1995-2000 contract.

⁴ The Commissioner notes that the 1995 contract specifies that petitioner's salary for the 1995-96 school year would be \$137,000. (Petition, Exhibit A) Petitioner asserts, and the Board concurs, that petitioner's salary for the 1999-2000 school year for \$170,050. (Petition of Appeal at 2, #6 and Answer at 2, #6)

the Board acknowledged the validity of that contract and thereby ratified the 1995-2000 contract by its modification and conformance to the terms thereof. *See, Matter of Certain Amendments*, 133 N.J. 206, 221-223 (1993); *Houmann v. Mayor of Pompton Lakes*, 155 N.J. Super. 129, 159-160 (Law Div. 1977); *Grimes v. City of East Orange*, 288 N.J. Super. 275, 280 (App. Div. 1996).

Moreover, in the Board's Petition for Declaratory Ruling, filed before the Commissioner on April 14, 2000, (Commissioner Decision Number 130-00L), seeking a ruling on its contract options in the face of petitioner's assertion that the Board's failure to provide him with timely notice of nonrenewal of his 1995-2000 contract resulted in an automatic renewal of the terms and conditions of the soon to expire contract, the Board acknowledged the validity of the contract when it stated:

1. The East Orange Board of Education entered into a five year employment contract with its Superintendent of Schools, Dr. John Howard, Jr. that expires on June 30, 2000. (Petitioner's Motion for Summary Decision, Exhibit D, Board's Petition for Declaratory Ruling at 1, #1)

The Commissioner also notes that the Board recognizes the 1995 contract in tenure charges it filed against petitioner on January 12, 2001 (Agency Docket Number 17-1/01) by referencing a tax deferred annuity plan which was only provided for in the 1995 contract, not the 1992-1996 contract. Charge No. VI states:

In accordance with the terms and conditions of the employment contract between petitioner and Dr. John Howard, Jr., petitioner is obligated, among other things, to make matching contributions to a tax deferred annuity plan on behalf of Howard. (Petitioner's Motion for Summary Decision, Exhibit #12)

For the reasons set forth above, therefore, the Commissioner finds that by Resolution on August 15, 1995, the Board rescinded petitioner's initial contract and reappointed petitioner to a new five-year term commencing July 1, 1995 and terminating on June 30, 2000,

and by its subsequent actions and vote to modify the agreement on January 20, 1998, the Board ratified the terms of that agreement.

With respect to the Board's argument that the 1995 contract is invalid because its terms impermissibly provide for an automatic extension, thus becoming a six-year contract on the first effective date of the contract in violation of *N.J.S.A.* 18A:17-15, the Commissioner observes that the contract expressly states that if any specific clause of the agreement "is illegal in Federal or State Law, the remainder of the Employment Contract not affected by such ruling shall remain in force." (1995-2000 Contract at 9) As found by the State Board in *West Village Civic Club, supra* at 9, citing "[I]t is well established that the law is a silent factor in every contract, and parties to a contract are presumed to have contracted with reference to existing law." See also, *Red Bank Bd. of Ed. v. Warrington et al.*, 138 *N.J. Super* 564, 568-569 (App. Div. 1976) and *Silverstein v. Keane*, 19 *N.J.* 13 (1955). To the extent that the renewal provision in the 1995 contract violates the specific term limitations for appointments of superintendents to not less than three years nor more than five years, specified in *N.J.S.A.* 18A:17-15, the Commissioner, therefore agrees with the Board that the renewal provision is invalid. However, the invalidation of that provision does not serve to invalidate the entire contract at issue. Although the Board asserts that the misinformation and confusion caused by the automatic renewal provision in the 1995 contract resulted in its failure to act pursuant to *N.J.S.A.* 18A:17-20.1 in June 1999, to notify petitioner of its intent to not renew his contract (Board's Opposition to Petitioner's Summary Decision at 9), the Commissioner finds that the Board's argument only substantiates the conclusion that the Board recognized the 1995-2000 contract as its contractual agreement with the superintendent.

N.J.S.A. 18A:17-15 specifically provides that a board of education is authorized to appoint a superintendent of schools “for a term of not less than three nor more than five years.” *N.J.S.A.* 18A:20.1 is equally specific that, at the conclusion of the term of the initial contract or of any subsequent contract, the superintendent will be deemed appointed to another contracted term of the same duration unless the board appoints him for a different term of three to five years or notifies him in writing at least one year prior to the expiration of the first or subsequent contract that he will not be reappointed. Given the specificity in the statutes, the Commissioner finds the Board’s explanation for its failure to act pursuant to *N.J.S.A.* 18A:20-1 disingenuous. The obligation to resolve any “confusion or misinformation” to assure the Board’s compliance with statutory requirements when appointing, contracting, reappointing or advising petitioner that he would not be reappointed was inherently the responsibility of the Board and its attorney.

On June 26, 2000, the Board adopted a Resolution stating, in pertinent part:

WHEREAS, *N.J.S.A.* 18A:17-20.1 provides for renewal of a Superintendent’s employment contract unless notice of nonrenewal is given one year prior to its expiration date; and

WHEREAS, although the Board did not give notice of nonrenewal to Dr. Howard prior to June 30, 1999, it believes that applicable legal and equitable principles operate to excuse such lack of notice; and

WHEREAS, the Board wishes to retain all of its legal prerogatives with respect to the employment of the Superintendent;

NOW, THEREFORE, BE IT RESOLVED that Board does hereby direct that Notice be given to Dr. John Howard of the Board’s intention not to renew any existing employment agreement between Dr. Howard and the Board as of June 30, 2001, unless the Board and Dr. Howard should mutually agree upon a successor contract; and

BE IT FURTHER RESOLVED, that this Resolution is approved without prejudice any of the Board’s legal rights whatsoever with respect to the Superintendent’s employment, including but not

limited to the Board's right to maintain, upon further review, that any existing contract of employment will terminate or has terminated as of June 30, 2000. (Board's Motion to Dismiss, Exhibit E)

As fully explicated above, petitioner was contractually tenured through June 30, 2000. As the Board acknowledges in its June 26, 2000 Resolution, although it was aware of the requirement to give petitioner notice of nonrenewal of his contract one year prior to June 30, 2000 if it did not intend to renew petitioner's contract, it failed to do so. Accordingly, as a result of the Board's failure to act to reappoint petitioner to a contract for the same term or a different term, or to provide notice of nonrenewal at least one year prior to the expiration of the 1995-2000 contract pursuant to *N.J.S.A.* 18A:17-20.1, petitioner is deemed reappointed for another five-year contracted term beginning July 1, 2000 and ending June 30, 2005 by operation of statute. The provisions of the 2000-2005 contract renewed by operation of statute, including the 5% salary increases specified in the contract, will, therefore, remain in effect during its contractual term, unless either the petitioner and the Board elect to terminate the contract by mutual agreement or the Board prevails in the pending tenure proceedings.

The Commissioner, therefore, grants summary decision to petitioner with the exception of petitioner's claims of OPMA and *Rice* notice violations, which are rendered moot as a result of this determination.

IT IS SO ORDERED.⁵

COMMISSIONER OF EDUCATION

Date of Decision: June 5, 2001

Date of Mailing: June 5, 2001

⁵ 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.