

EDU #8705-00
C # 303-01
SB # 41-01

GERALD W. KOHN, :
 :
 PETITIONER-RESPONDENT, :
 : STATE BOARD OF EDUCATION
 V. :
 : DECISION
 BOARD OF EDUCATION OF THE CITY :
 OF VINELAND, CUMBERLAND COUNTY, :
 :
 RESPONDENT-APPELLANT. :
 _____ :

Decided by the Commissioner of Education, September 14, 2001

Decision on motion by the State Board of Education, March 6, 2002

For the Respondent-Appellant, Louis J. Greco, Esq.

For the Petitioner-Respondent, Maria M. Lepore, Esq.

For the amicus curiae New Jersey School Boards Association,
Amy M. Fankhauser, Esq.

Gerald W. Kohn (hereinafter "petitioner") filed a "Petition for Declaratory Ruling" with the Commissioner of Education challenging the action by the Board of Education of the City of Vineland (hereinafter "Board" or "Vineland Board") to terminate his employment as superintendent of schools in September 2000 and place him in the position of Director for Special Projects with a reduction in salary. The petitioner sought a declaration that the Board's action was improper and requested that he be reinstated as superintendent together with back pay and emoluments.

The record indicates that the petitioner commenced his employment as superintendent on July 1, 1997 under a contract which provided for a five-year term ending on June 30, 2002. It also contained a provision, Paragraph 9(d), which stated that:

During the 2000-01 or the 2001-02 school years, the Board may unilaterally elect to terminate Dr. Kohn's employment as Superintendent by a minimum of six (6) affirmative votes of the Board. Should the Board do so, Dr. Kohn will be paid thirty-three and one-third percent (33.3%) of the salary indicated in this contract for those years plus full health benefits, and he shall be thus appointed until July 1, 2002 to the position of Director for Special Projects. He shall be granted a paid leave of absence for the remainder of this contract.

The parties filed cross-motions for summary decision, and on July 26, 2001, an Administrative Law Judge ("ALJ") recommended granting summary decision to the petitioner. The ALJ found that the parties had entered into a five-year contract, notwithstanding the Board's desire to offer only a three-year agreement, and that the only interpretation to give N.J.S.A. 18A:17-15 et seq. was that the Board was required to pay the petitioner for the remainder of the term of the contract.¹ The ALJ found that there was no statutory provision which would permit the Board to unilaterally convert a

¹ N.J.S.A. 18A:17-15 provides, in pertinent part:

The board of education of a Type I district and of any Type II district, now having or hereafter authorized to have a superintendent of schools, may, by contract appoint, for a term of not less than three nor more than five years and expiring July 1, a superintendent of schools by the recorded roll call majority vote of the full membership of the board.

N.J.S.A. 18A:17-20.2 provides 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.

five-year contract to a three-year contract or to reduce the petitioner's compensation and benefits. The ALJ therefore recommended that the petitioner be restored to his position as superintendent of schools until June 30, 2002 with all back pay and emoluments due him under the contract.

On September 14, 2001, the Commissioner adopted the ALJ's findings and conclusions. The Commissioner found that there was "ample case law which establishes the principle upon which the ALJ relied; i.e., that a board that relieves a superintendent from his duties during the term of his contract must continue to pay the compensation and other emoluments the superintendent would have received as superintendent had he performed superintendent duties for the remainder of the contract period." Commissioner's Decision, slip op. at 44 (emphasis in original). The Commissioner agreed that the Board had awarded the petitioner a five-year contract as superintendent of schools, stating:

Notwithstanding the contract provision that permits the Board to terminate Petitioner's five-year contract as superintendent of schools after three years and reduce petitioner in position and salary...there is no statutory authority, absent the sustaining of tenure charges as indicated in N.J.S.A. 18A:17-20.2 above, for the Board to reduce petitioner's position and salary during the term of his five-year contract.

Id. at 44-45.

The Commissioner added that:

...it is well-settled that a teaching staff member cannot waive or forfeit tenure entitlement by virtue of a contract, nor is an improperly removed superintendent required to mitigate his damages. [Citing Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982); Dunn v. Board of Education of the City of Elizabeth, decided by the State Board of Education, December 6, 1995; and Harrington v. Board of Education of

the Township of Clinton, decided by the Commissioner of Education, 95 N.J.A.R.2d (EDU) 535.]

Id. at 45 (emphasis added).

The Commissioner therefore directed that the petitioner be restored to the position of superintendent with all back pay and emoluments due him as superintendent of schools.

The Vineland Board filed the instant appeal to the State Board, arguing, inter alia, that the Commissioner had erroneously applied the law of mitigation of damages.

Initially, we grant the motion filed by the New Jersey School Boards Association for leave to appear as amicus curiae, and we have considered the Association's brief in reviewing this matter.

After a thorough review of the record, we affirm in part and reverse in part the decision of the Commissioner. We affirm the Commissioner's determination that the petitioner was under contract as a superintendent for five years and was entitled to the compensation and other emoluments he would have received as superintendent for the remainder of the contract period. See Dunn, supra (although a district board may unilaterally relieve a superintendent of schools employed under a five-year contract of his duties for the remainder of his contract term while continuing to pay him the salary and benefits due him under his contract as a superintendent, it may not assign him the duties of assistant superintendent during that period).

However, we reverse the Commissioner's determination that the petitioner's damages should not be reduced by the wages he earned in other employment.²

² The petitioner acknowledges that he accepted a position as superintendent of schools in Harrisburg, Pennsylvania in 2001.

“Traditional concepts of contract and tort law require one wronged by the action of another to mitigate damages.” Harvard v. Bushberg Bros., 137 N.J. Super. 537, 542 (App. Div. 1975). “When a wrongful discharge of an employee occurs the measure of damages is usually the employee’s salary for the remainder of the employment period.” Goodman v. London Metals Exchange, Inc., 86 N.J. 19, 34 (1981). “However, since the employee has available time which may be used profitably, the employer has been permitted to reduce its damages by showing that the employee has earned wages from other employment.” Id. “Mitigation does not excuse the wrong or violation. Rather, it simply limits the amount of the judgment.” Id. at n.2. The Court observed that “[t]he basic purpose of awarding back pay is to make the discriminatee whole by reimbursement of the economic loss suffered....If the discriminatee had been working an award of the full amount of back pay would exceed the economic loss.” Id. at 34-35. The “underlying rationale of mitigation is that an employee, and particularly a public employee whose back pay award is funded by the public treasury, should be made whole. He should not, however, at public expense, be made more than whole.” Newark v. Copeland, 171 N.J. Super. 571, 575 (App. Div. 1980), certif. denied, 85 N.J. 505 (1981).

Notwithstanding the fact that the petitioner had contractual tenure pursuant to N.J.S.A. 18A:17-15 et seq., we find no basis for exempting him from general mitigation principles. Indeed, the courts of New Jersey have strongly supported the application of mitigation to reduce damage awards. For example, in Mullen v. Bd. of Ed. of Jefferson Tp., 81 N.J. Super. 151, 160 (App. Div. 1963), the Court emphasized that the facts therein “vividly illustrate the unreasonable result of construing N.J.S.A. 18:5-49.1 [now

N.J.S.A. 18A:6-30], so as to preclude mitigation.” The Court observed that allowing a superintendent whose employment was wrongfully terminated to be compensated for his back pay in addition to the higher salary he was earning in another district “would be to give him a windfall.” Id. The Court found such an interpretation of the statute at issue, which, like N.J.S.A. 18A:17-15 et seq., contained no specific reference to mitigation, to be “unreasonable and...inconsistent with the principle that the Legislature must always be presumed to favor the public interest as against any private one.” Id.

In Mastrobattista v. Essex County Park Commission, 46 N.J. 138, 149 (1965), in which two county park police officers sought back pay for the periods of their wrongful suspensions and dismissal, the Supreme Court quoted with approval the above-cited language from Mullen in remanding the matter for a determination of back pay and mitigation. Similarly, in White v. Township of North Bergen, 77 N.J. 538 (1978), the Court, citing Mullen, interpreted N.J.S.A. 40A:9-172, which provides that a wrongfully dismissed municipal employee is entitled to recover his salary from the date of such dismissal, as being subject to mitigation principles despite the fact that the statute contains no reference to mitigation. In so doing, the Court reaffirmed its comment in Township of Springfield v. Pedersen, 73 N.J. 1, 7 (1977), that “[w]e find it hard to believe that the Legislature entertained the...purpose of providing a windfall recovery to such officials to be forthcoming from public funds.” White, supra, at 561.

We find no basis for deviating from this practice in the case of a superintendent. Nor do the decisions relied upon by the Commissioner stand for the proposition that a

wrongfully terminated superintendent's damages are not to be offset by other earnings.³ Consequently, we conclude that the damages to which the petitioner is entitled are to be reduced by his earnings in other employment during the relevant period. In doing so, we reject the petitioner's contention that his damages should not be reduced by such earnings since he had to relocate to obtain other employment. As previously indicated, allowing the petitioner to collect his back pay in addition to his earnings in another district during the relevant period would provide him with a windfall from public funds. Moreover, under mitigation principles, circumstances may dictate that a wrongfully terminated employee lower his sights and accept employment at a more distant location. Goodman, supra, at 38-40. However, the expenses that the petitioner reasonably incurred in mitigating his damages may be applied to offset his outside earnings. Cf. Sommer v. Kridel, 74 N.J. 446 (1977).

Since the record before us does not permit us to calculate the petitioner's damages, we remand this matter to the Commissioner for such a computation in accordance with the terms of our decision. We do not retain jurisdiction.

November 6, 2002

Date of mailing _____

³ In Spiewak, supra, the New Jersey Supreme Court awarded a supplemental teacher back pay mitigated by her earnings. Neither Dunn, supra, nor Harrington, supra, involved any questions related to the mitigation of damages.