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SCHOOL LAW

DECISIONS

January 1, 1988 to December 31, 1988

VOLUME 1

PAGES 1-830

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Commissioner of Education

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OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4798-87
AGENCY DKT. NO. 211-7/87

SAVE OUR SCHOOLS ASSOCIATION, ET AL.,

Petitioners

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD,

Respondent

Louis P. Bucceri, Esq., for petitioners
(Bucceri & Pincus, attorneys)

Lawrence Schwartz, Esq., for respondent
(Schwartz, Pisano, Simon & Edelstein, attorneys)

Record Closed: November 16, 1987 Decided: November 20, 1987

BEFORE **WARD R. YOUNG**, ALJ:

Petitioners (Save Our Schools) seek to set aside the May 27, 1987 action of the Board of Edcuation of the Township of Bloomfield (Board) to close its South Middle School because said action was arbitrary, capricious, unreasonable and an abuse of the Board's discretionary authority.

The Board denied the allegations and seeks dismissal of the Petition of Appeal by application of the doctrines of res judicata and/or collateral estoppel, as well as the equitable doctrines of laches and/or estoppel.

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The matter was transmitted to the Office of Administrative Law as a contested case on July 13, 1987 pursuant to N.J.S.A. 52:14F-1 et seq. A telephonic prehearing conference was held on September 3, 1987 at which, inter alia, the matter was set down for plenary hearing on December 8, 9, 10 and 11, 1987. Respondent filed a Motion to Dismiss on October 20, 1987 pursuant to N.J.A.C. 1:1-12.1 et seq. A response and reply were filed in a timely fashion and the record closed on November 16, 1987 upon receipt of the latter.

The controverted school closing has a long history which began with discussions concerning the reorganization of the Bloomfield School District in 1972. Stipulations of that history to 1985 are carefully outlined in Riccio, et als. v. Bloomfield Bd. of Ed. in an Initial Decision decided on May 16, 1985 by the Honorable Bruce R. Campbell, A.L.J., wherein the Petition of Appeal was dismissed. Petitioners in that matter contested Board actions of June 18, 1984 which consisted of a district reorganization creating a 7-8 middle school and 9-12 high school, and consolidating the North and South middle schools at North and closing South. Judge Campbell determined the Board actions to have been "without arbitrariness, caprice, or even sensitivity." The Commissioner affirmed in a decision under date of July 8, 1985. Both decisions are incorporated herein by reference.

The Board proceeded to implement its reorganization plan but did not close its South Middle School. The Board again acted on May 27, 1987 to transfer pupils attending South Middle to North Middle and close the former as of September 1, 1987.

Riccio and citizens other than those listed in the 1984 Petition field a Petition of Appeal on July 10, 1987 to contest the Board's May 27, 1987 action and incorporated a request therein for interim relief and immediate stay. Prior to the assignment of the matter to the undersigned, oral argument was heard on the request by the Honorable Stephen G. Weiss, A.L.J., which was denied in an Order entered on July 24, 1987 for failure to demonstrate that irreparable harm would occur and the unlikelihood that petitioners would prevail on the merits. The Commisisoner affirmed with modifications in a decision rendered on August 12, 1987. Both determinations are incorporated herein by reference.

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The modifications required compliance by the Board with N.J.A.C. 6:22-1.1(a) and (b) as well as N.J.A.C. 6:22-3.1. The final paragraph of the Commissioner's decision states:

> Petitioners' Motion for a Stay is hereby denied and the record in this matter is remanded to the Office of Administrative Law for a plenary hearing on the merits of petitioners' remaining allegations set forth in their Petition of Appeal.

Because petitioners refer to a plenary hearing as being expressly ordered by the Commissioner in his August 12, 1987 decision on motion, it must be noted that the perception held here does not require a literal interpretation of that portion of the Commissioner's decision. Firstly, only the record of oral argument and the Order of denial of emergent relief by Judge Weiss was transmitted to the Commissioner for review. The contested case consisting of the substantive issue and its file remained with the Office of Administrative Law. There was no remand. Secondly, the language in the Commissioner's decision concerning plenary hearing, absent any knowledge of Motions filed pursuant to N.J.A.C. 1:1-12.1 et seq., is not perceived here to preclude either party of such a right as provided by the regulatory scheme.

The doctrine of res judicata bars a party from relitigating what was previously litigated and finally determined. Lubliner v. Bd. of Alcoholic Beverage Control, 33 N.J. 428 (1960). The doctrine of collateral estoppel, distinguished from res judicata, generally acts as a bar to relitigation of questions distinctly put in issue and directly determined adversely to the party against which the estoppel is asserted. Eatough v. Bd. of Medical Examiners, 191 N.J. Super. 166, 175 (App. Div. 1983) and cases cited therein.

It is clear that the doctrine of res judicata and collateral estoppel are available in administrative proceedings. City of Hackensack v. Winner, 82 N.J. 1 (1980). The party precluded from relitigating the issue must have had a full and fair opportunity to litigate the issue in the first action. The application of res judicata requires a final judgment on the merits by a court of competent jurisdiction, identity of the parties and the same claim

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or cause of action. Eatough, at 173. In Bango v. Ward, 12 N.J. 415, 420 (1953) the Court held:

> When a party who is afforded a fair opportunity to litigate a claim or cause of action before a court which has jurisdiction over the parties and the subject matter suffers a final judgment adverse to him on the merits, the parties in whose favor the judgment is entered, and their privies, may assert the judgment as a bar in a subsequent action on the same claim or cause of action.

In Hackensack v. Winner, the New Jersey Supreme Court stated:

> The policy considerations which support these judicial doctrines [res judicata, collateral estoppel, the single-controversy doctrine "and the like"] - namely, finality of repose; prevention of needless litigation; avoidance of duplication; reduction of unnecessary burdens of time and expenses; elimination of conflicts, confusion and uncertainty; and basic fairness have an important place in the administrative field. (at 32, 33).

It is recognized that in this proceeding the petitioners, other than Riccio, are different residents of the community of Bloomfield than the petitioners in the 1985 matter, although with an identical community of interest. State v. Gonzalez, 75 N.J. 181 (1977) more than adequately disposes of that seeming bar to apply the doctrine here. While Gonzalez is a criminal case, Justice Pashman had the opportunity to review the history of collateral estoppel in a civil context and he specifically addressed the traditional insistence upon mutuality of estoppel prior to the application of the doctrine. Justice Pashman, in noting that the modern trend is away from the mutuality requirement, noted as follows:

> This Court has recently adopted the modern view in United Rental Equipment Co. v. Aetna Life and Cas. Ins. Co., 74 N.J. 92, 101 (1977). We quoted from the tentative formulation by the American Law Institute restatement, Judgements 2d § which is set forth at length at footnote 5 below [footnote 5 omitted here]. We had earlier foreshadowed that approach in McAndrew v. Mularchek, 38 N.J. 156, 161 (1962), saying:
>
> > Generally, the question to be decided is whether a party has had his day in court on an issue, rather than whether he has had his day in court on that issue against a particular litigant. . . .

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In this case, petitioner Riccio and other Bloomfield residents had their opportunity for their day in court before Judge Campbell. The very same issue Judge Campbell and the Commissioner ruled upon, the closing of the South Middle school, petitioners seek to reopen here. Given the circumstances wherein Judge Campbell and the Commissioner have already entered a determination that the Bloomfield Board "acted without arbitrariness, caprice, or even insensitivity", it is time to put to rest the factual dispute regarding an administrative rule that petitioners seek to litigate here. Repose and finality are desirable goals in an administrative arena. The assertion of petitioners that there is no identity of issues and parties and, accordingly, cannot be given collateral estoppel effect is rejected. One must remember that the Commissioner's July 8, 1985 decision is the law of the case until and if reversed on appeal by a higher authority.

I **FIND** the parties and issues in the instant matter to be substantially the same as the 1985 litigation, and **CONCLUDE** that petitioners are barred through collateral estoppel and res judicata from relitigating in this forum whether the Bloomfield Board acted arbitrarily, carpiciously, or abused its discretionary authority when it determined to close its South Middle School. The application of collateral estoppel and res judicata serve the several purposes of finality of repose, avoidance of duplication, reduction of unnecessary burdens of time and expense, and basic fairness.

I **FIND** no compelling reason to address the equitable doctrines of laches and/or estoppel.

The Board's Motion to Dismiss is **GRANTED. IT IS THEREFORE ORDERED** that this Petition of Appeal shall be and is hereby **DISMISSED WITH PREJUDICE.**

The Board is reminded, however, of its obligation to fully comply with the direction of the Commissioner in his August 12, 1987 Decision on Motion concerning the modifications incorporated with the adoption of findings and conclusions of Judge Weiss.

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This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

20 November 1987
DATE

WARD R. YOUNG, ALJ

NOV 24 1987
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

NOV 25 1987
DATE

Mailed To Parties:

FOR OFFICE OF ADMINISTRATIVE LAW

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SAVE OUR SCHOOLS ASSOCIATION ET AL.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWN OF BLOOMFIELD, ESSEX COUNTY,	:	
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioners' exceptions and the Board's reply thereto were timely filed pursuant to N.J.A.C. 1:1-18.4 and are summarized below.

Petitioners except to the ALJ's dismissal of the instant matter arguing that they are not relitigating the issues of Riccio et al., supra, but rather are raising new issues as to a new action of the Board. In particular, they point to the entire count of the petition relating to the Board's failure to follow N.J.A.C. 6:22-1.1 et seq. as a new set of facts, as well as the allegations of personal bias and animus by some of the 1987 Board members, and the issue of the Building and Space Utilization Committee (BSUC) report. As such, petitioners contend that there is not an identity of issues between the instant matter and the prior litigation in that the recent Board action, the reasons supplied and the impact of the two decisions are totally different. More specifically they argue:

> If [the cases are not different], why did the Board conduct more public hearings? Why did it (erroneously and misleadingly) claim to rely upon the 1986 Building and Space Utilization Committee report in reaching its 1987 decision if it was simply re-enacting a prior resolution adopted before that committee existed? There is no issue raised as to the decision to maintain a two-year middle school in the present case, yet that was the primary issue in 1984. See Riccio, supra.
>
> In point of fact, a decision on a challenge to a resolution adopted in 1984 cannot be res judicata as to a totally new resolution, with different content, adopted in 1987. Even if the Board did do everything right in 1984, how does that prove it did it right in 1987? Clearly, the decision on interim relief by the Commissioner in this

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> case makes it obvious that the Board did not even comply with minimal regulatory requirements in 1987. How can it be assumed that any aspect of what it did was correct?
>
> Indeed, the Commissioner was fully aware of the prior decision, yet he expressly ordered a plenary proceeding. (Ra 60) The doctrine of res judicata cannot be asserted to stop that order based on the ludicrous notion that all votes to close a school, even those three (3) years apart, are identical "issues." Some claims raised, and only a few, may be similar, but the fact that those claims went unproven in 1984 does not mean that the wholly new set of facts in 1987 might not result in a different result, simply because different actions by different people (e.g., a new superintendent) are involved. The allegations in this petition go directly to the conduct of this Board and administration. There is no duplication. For these reasons, the doctrine of res judicata cannot apply herein.
> (Petitioners' Exceptions, at pp. 4-5)

The Board characterizes petitioners' attempt to manufacture new legal issues as self-serving and meritless. It avows that it is self-evident that the legal issues in both cases are identical inasmuch as an allegation of arbitrary, capricious and unreasonable action by the Board is the only recognized legal challenge that could contravene a Board's discretionary authority. Moreover, the Board argues that not even the facts alleged to be new are germane in that its compliance with N.J.A.C. 6:22-1.1 et seq. has already been addressed by the Commissioner and cannot therefore be resurrected to constitute a newly continued legal issue or fact. Likewise, it argues that the alleged new issues regarding the BSUC and personal bias and animus of certain Board members can hardly be deemed new legal issues or facts. As to this, it avers:

> Petitioner[s] [seem] to believe that any fact or issue not in existence when the prior litigation took place is thereby automatically transformed into a bar to the application of res judicata and/or collateral estoppel. In the former case, this is clearly not true because the factors alluded to fail to establish any new legal issue. Assuming, arguendo, that said facts are new, the underlying legal issue is the same: whether this Board acted in an arbitrary, capricious or unreasonable manner. To follow Petitioners' argument to its logical conclusion would lead to an absurd result; every time any event transpires subsequent to a prior final judgment, that judgment would thereby be rendered

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> vulnerable to relitigation. Minimal unconsequential change as a function of time passage is not enough to prohibit the legal doctrines from application herein. Regarding the impact of the factors raised by Petitioners with respect to collateral estoppel, a careful comparison of the prior and the present litigation demonstrates that the underlying facts are substantially the same. (See Rb-16 to 29.) When one probes beneath the surface of Petitioners' allegations, it becomes evident that the facts in dispute in both pieces of litigation deal with enrollment projections, financial cost analysis, facilities reorganization options, public input, community dissent, and integrity. Nothing has changed, save the occurrence of events inevitable with the passage of time. Petitioners cannot transform those de minimus occurrences into a justification for relitigation simply by citing the possible but remote impact of a Committee or allegation of bias and animus on the part of certain Board members.
>
> Petitioners question the motives of the Board (Pb-4). They point to the creation of the BSUC and question the Board's reasons for holding additional public hearings, and so on. They reason that if the decision of the Board in 1984 is the same as its 1987 decision, then such additional activities would not have been required. Again, Petitioners miss the point; the underlying legal issue has been decided. That issue rests squarely upon the same fact that Petitioners here seek to overturn: the closing of South Junior High School. That fact was present in the 1985 litigation and it is present now. Petitioners cite no authority for their ability to probe the underlying motives of the Board as it exercises its discretion.
>
> (Board's Reply, at pp. 6-7)

Upon review of the record in this matter, the Commissioner agrees with and adopts as his own the findings and conclusions of the Administrative Law Judge and thus accepts his recommended decision dismissing the Petition of Appeal on the basis of res judicata and collateral estoppel. Examinations of the submissions in this matter make it clear that no new substantive issue has been raised by petitioners, notwithstanding their arguments to the contrary. That there may be circumstances present in 1987 which were not before the Commissioner in 1985, i.e., allegations of failure to comply with N.J.A.C. 6:22-1.1 et seq., Board member animus and failure to consider the BSUC report, does not alter the fact that the Commissioner has already rendered a final decision

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that the closing of South Middle School is not an arbitrary, capricious or unreasonable action, a decision which remains law of the case until and if reversed by a higher authority. Moreover, the fact the Board deferred carrying out the closing until 1987 does not render the decision to close the school subject to relitigation unless it can be demonstrated that new substantive issues are present to compel reconsideration of the closing.

Further, the Board correctly argues that the issue of its failure to follow rules and regulations with respect to facilities has already been addressed by the Commissioner in the August 12, 1987 Decision on Motion, the directives of which the Board was required to meet before physically shutting down South Middle School. These procedural directives unto themselves, however, do not mean that the decision to close the school is once more subject to challenge before the Commissioner since a final determination has previously been rendered on the appropriateness of closing the facility.

Accordingly, the Commissioner adopts the initial decision as the final decision in this matter for the reasons expressed therein. Consequently, the instant Petition of Appeal is dismissed with prejudice. As noted by the ALJ the Board is reminded of its obligation to comply with the directives of the August 12, 1987 Decision on Motion before actual closing of the school.

COMMISSIONER OF EDUCATION

January 4, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 465-87
(EDU 2898-86 - on remand)
AGENCY DKT. NO. 98-4/86

ELMA MILWIT,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY; JERSEY CITY LEARNING CENTER; AND WILLIAM A. BEEBE, DIRECTOR,
Respondents.

Mary Ann Murphy, Esq., for petitioner (Coyle & VanDorn, attorneys)

William C. Gerrity, Esq., for respondents

Record Closed: October 13, 1987 Decided: November 24, 1987

BEFORE **ARNOLD SAMUELS**, ALJ:

This decision is the result of a remand to the Office of Administrative Law from the Commissioner of Education.

PROCEDURAL HISTORY

The petitioner, Elma Milwit, was employed by the respondent, Jersey City Board

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of Education, as a full-time adult basic skills teacher until her employment was terminated on January 24, 1986. Ms. Milwit filed a petition of appeal with the Commissioner of Education and requested reinstatement, compensation for lost wages and other expenses, attorneys fees and restoration of benefits.

The matter was first transmitted to the Office of Administrative Law for hearing and determination as a contested case on April 29, 1986. The issues to be decided at that time were: (a) whether respondents' termination action was improper and in violation of petitioner's rights under the school laws; (b) whether the petitioner was tenured in her position; and (c) whether any of her rights were violated even if she was not tenured.

At the Office of Administrative Law hearing in September 1986, the petitioner stated that she knew she was not tenured, because she was aware of the fact that the Board did not require more than a high school diploma to qualify for her position: a teaching certificate was not required. In petitioner's post-hearing brief, her attorney also acknowledged that Ms. Milwit was not tenured. Since petitioner thereby relinquished her claim relating to tenure, the Initial Decision (OAL DKT. EDU 2898-86 (Dec. 1, 1986)) was rendered based upon the two remaining issues, (a) and (c) above, dealing with violation of petitioner's rights in connection with her termination. For purposes of discussing those rights, petitioner was treated as a nontenured teaching staff member, even though the parties did not indicate or argue any question relating to whether or not Ms. Milwit had the status of a teaching staff member.

The petitioner's termination was upheld, even though the Board's action was characterized as being inconsiderate and lacking in decency towards an employee who had served for approximately 16 years. In the absence of any claim or showing by the petitioner that she possessed rights under the education laws that would have insulated her from the abrupt termination, it was held that the Board's action was not shown to be unjustified or unlawful to the point where it should be overturned.

On January 20, 1987, the Commissioner of Education decided that he was unable to accept the foregoing decision, and he remanded the matter to the Office of

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Administrative Law for further proceedings. The Commissioner recognized that the petitioner acknowledged she was not tenured and did not pursue that issue in her post-hearing brief. The Commissioner nevertheless held that in determining the propriety of the Board's action to terminate Ms. Milwit it was necessary, despite her relinquishment of the tenure question, to determine if she was a teaching staff member as defined by N.J.S.A. 18A:1-1 and to determine whether she was eligible for and attained tenure in such position pursuant to N.J.S.A. 18A:28-5. The matter was remanded to the Office of Administrative Law for further proceedings.

The Initial Decision of the Office of Administrative Law, dated December 1, 1986, and the Decision of the Commissioner of Education, dated January 20, 1987, are incorporated herein by reference, in their entireties. The further proceedings in the Office of Administrative Law are authorized pursuant to N.J.S.A. 52:14B-10(c) and N.J.A.C. 1:1-18.7.

A prehearing conference was held in the remanded matter on February 20, 1987, and a Prehearing Order was filed, defining and limiting the issues to be decided, fixing a hearing date, providing for discovery and regulating other procedural aspects of the forthcoming hearing.

The issues listed in the Prehearing Order were limited to those issues discussed in the Order of Remand:

A. To determine the specific requirements of the State Department of Education for a person to teach in an adult basic education program, particularly the applicability of N.J.A.C. 6:44-2.3(b).

B. To determine if petitioner was a teaching staff member as defined by N.J.S.A. 18A:1-1.

C. To determine if petitioner achieved the legislative status of tenure pursuant to N.J.S.A. 18A:28-5 and Spiewak v. Rutherford Board of Ed., 90 N.J. 63 (1982).

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D. To determine if Bergen County Vocational-Technical Schools Education Association v. Board of Education of the Bergen County Vocational School District, Bergen County, OAL DKT. EDU 5971-82 (Aug. 15, 1983), modified, N.J. Dept. of Ed. (Oct. 3, 1983), is applicable to the instant matter.

E. To decide if petitioner's rights were violated by the Board when she was terminated, if she is determined to be tenured.

F. To determine if N.J.S.A. 18A:27-3.1, N.J.S.A. 18A:27-3.2 and N.J.A.C. 6:3-1.20 apply to petitioner's termination if she occupied a tenure-eligible position; or if she did not occupy a tenure-eligible position, to determine the propriety of the Board's action if she is not deemed to be a teaching staff member and/or not tenured or tenure-eligible.

The hearing was held on July 20, 1987, at the Office of Administrative Law in Newark, New Jersey. The petitioner testified in her own behalf, and two witnesses testified for the respondent. One document was marked in evidence as Exhibit P-1: a copy of the petitioner's teaching certificate issued by the State Board of Examiners in August 1968, certifying her as a Secondary School Teacher of General Business Studies. Post-hearing briefs were requested of both parties, in view of the fact that several complex legal questions not adequately addressed in prehearing submissions were involved. The respondents' brief was filed in a timely manner on August 24, 1987. No brief was received from petitioner's attorney, despite several letters written to her by this Judge, and no replies or other communications of any kind were received in answer to these inquiries. The record was closed on October 13, 1987, despite the failure of petitioner's attorney to file a post-hearing submission or otherwise communicate with the Office of Administrative Law.

TESTIMONY

The petitioner, Elma Milwit, testified in her own behalf. She referred to her

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teaching certificate as a Secondary School Teacher of General Business Studies. Ms. Milwit indicated that at the time it was issued to her in 1968, the subjects which were expected to be taught pursuant to such a certification included math, English, grammar, economics and sociology. The English category included grammar, business forms, letter writing and preparation of resumes. Mathematics instruction was expected to include all levels from basic arithmetic dealing with fractions, decimals, percentages and arithmetic functions through bookkeeping.

Ms. Milwit testified that she never actually taught general business studies in a secondary school. Instead, she was employed by the Jersey City Learning Center, approximately 16 years ago, to teach basic skills to adults. She remained in that position until her termination in January 1986.

Ms. Milwit stated that she obtained her teaching certificate immediately after she completed college, because she thought she should have a certification. However, she was aware that neither the college degree nor her teaching certificate was required of her by the learning center as a prerequisite to her employment there.

In teaching basic studies to adults at the learning center, Ms. Milwit gave instruction in subjects such as basic mathematics or arithmetic, English, including grammar, and reading skills. The makeup of her students, as well as the orientation and organization of the subjects she needed to teach them, changed from time to time.

John Cash, Director of Adult Programs in the Jersey City school system, testified about the organization of the adult educational system in the City. He said that the Learning Center is but one of several adult programs. He drew a distinction between those who teach secondary school subjects that would qualify the students for a high school diploma and those who teach more elementary subject matter. Mr. Cash said that the teachers involved in the high school direction must be certified, whereas the people who teach adults on an elementary school level need not be certified in order to obtain

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employment. He also stated that the City employs many part-time teachers who are paid hourly and are not eligible for tenure.

Mr. Cash also testified that those who teach business courses in the regular high school today must have a secondary school certificate in the particular subject matter area that they instruct. To the best of his knowledge, general business studies today has nothing to do with English. Instead, that subject deals with computer science, data processing, typing, bookkeeping, business machines, business law and distributive education. He does not expect a general business studies teacher to possess specific skills that would enable her to teach English or math.

Referring to the position held by Ms. Milwit, Mr. Cash said that she was teaching zero to grade four level skills to adults not capable of high school level work. He feels that her secondary school certificate is too far removed from such instructional duties. Furthermore, Mr. Cash did not think that the petitioner would be eligible to teach reading or math, which require specific certificates other than the one she holds.

However, when questioned further, Mr. Cash acknowledged that some teachers in the district who are certified to teach math and English in secondary school are teaching those subjects on a lower remedial level to special education students.

William A. Beebe, Director of the Jersey City Learning Center, testified that the State Department of Education has monitored the Jersey City basic skills programs each year since 1971. The monitoring is done by representatives who visit the schools and then submit reports. According to Mr. Beebe, N.J.A.C. 6:44-2.3(b), which states that "each class unit in the [adult basic education] instructional program will be conducted by a teacher holding a valid New Jersey teacher's certificate" has never been enforced or implemented by the State.

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FINDINGS OF FACT*

The petitioner was employed at the Jersey City Learning Center, a daytime adult education school, as a full-time teacher since April 1970, more than 15 years before her position was terminated by the respondent in January 1986 (Transcript of September 23, 1986 [T.], pp. 2, 12).

When she first began teaching at the learning center, petitioner taught a general education development (GED) course in a high school equivalency program. This consisted primarily of teaching reading (T., p. 2). Approximately five years ago, the adult education programs were reoriented to emphasize individualized basic skills training. This system is designed to help each individual with those subjects in which he or she lacks proficiency. In other words, a person who knows mathematics but lacks reading or language skills receives training in reading and language, not mathematics. The program allows the school to concentrate on areas of need for each individual (T., pp. 35, 36). State officials indicated that they wanted each basic skills teacher to teach all appropriate subjects such as language, reading, and math, as needed, rather than having separate teachers for each such subject (T., p. 37).

In accordance with the above program changes, the petitioner, who formerly had concentrated on English and reading, began teaching a cross-section of adult basic skills to her adult pupils, beginning three or four years before her termination. The subjects she dealt with in teaching such basic skills were reading, math, English and language (T., p. 29).

Petitioner holds a valid New Jersey teacher's certificate as a Secondary School Teacher of General Business Studies, issued in August 1968.

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* Facts adduced at the earlier hearing on September 23, 1986, are included in these findings of fact, when necessary, with consent of respondents' attorney. Petitioner's attorney did not object to this procedure (although no reply was received from her when the stipulation was sought).

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There is no separate certification for basic skills.

In all aspects of her employment, petitioner was treated and regarded as an employee without any status as a teaching staff member who might occupy a tenure-eligible position. She was paid on an hourly basis, and the only leave time given her was five personal days a year, without vacation benefits, sick time, pension benefits, or group health insurance.

Petitioner did not object to the above status of her employment. She believed she was not tenured, and she accepted the status given her by the Board.

Petitioner was removed from her position by oral advice of the Director of the Learning Center on January 9, 1986. One week later she received a letter, dated January 13, 1986 (Exhibit P-1 marked on September 23, 1986, in the first hearing), stating that the employment was terminated for lack of a sufficient number of students in her class. Petitioner was advised that the number of students did not justify continuation of the class or of her services (T., pp. 6, 38-40).

Since she was not considered to be tenured, no consideration was given by the Board to any possible seniority rights Ms. Milwit might have had, and she was not placed on a preferred eligible list for reemployment in the event of a vacancy.

After petitioner was terminated from her position, at least three basic skills teachers remained at the Learning Center. Only one of those teachers has length of service approximately as long as the petitioner. Others have been employed since 1974-75 and one was employed in 1985 (T., p. 42).

LEGAL DISCUSSION AND CONCLUSIONS

(1) What are the specific requirements of the State Department of Education for one to teach in an adult basic education program?

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The regulation is clear:

> Each class unit in the instructional program will be conducted by a teacher holding a valid New Jersey teacher's certificate. Noncertified subprofessionals may include those made available in work-study programs. N.J.A.C. 6:44-2.3(b).

While acknowledging the existence of the above regulation, respondent claims that it (the regulation) has never been applied to the basic skills program in the Jersey City Learning Center, which has been in existence, in one form or another, since 1969. Respondent further claims that the State Department of Education has never carried this requirement into the contract approval process for adult basic education programs in Jersey City. Furthermore, the Board argues that application of the regulation to the adult basic education program is further precluded by funding limitations. The money to pay for the program is not derived from general revenues through taxation, but by allotment of Federal funds apportioned by the Commissioner of Education under rules approved by the State Board, pursuant to N.J.S.A. 18A:50-3.

The respondent also takes the position that the wording of N.J.A.C. 6:44-2.3(b) should not be construed as mandatory or imperative, but as permissive, noting the absence of the word "shall."

In addition, the Board points to its general powers and responsibilities for the appointment of teaching staff members and other employees, pursuant to N.J.S.A. 18A:10-1, N.J.S.A. 18A:11-1 and N.J.S.A. 18A:27-1 et seq. Respondent states that, in accordance with its managerial prerogatives to operate the educational system in Jersey City, it is duly empowered to appoint instructors to the adult basic education program without requiring that they hold positions for which teaching certificates are required. The only past and current requirement for employment in the program is a high school diploma. The Board further points out that the Division of Adult Education of the State Department of Education has monitored the Jersey City program for many years and is aware of the Board's policy that does not require teaching certificates for instructors in the adult basic education program.

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It is **CONCLUDED** that the State Department of Education, in a duly promulgated regulation, requires that each class unit in the adult basic education instructional program will be conducted by a teacher holding a valid New Jersey teacher's certificate. N.J.A.C. 6:44-2.3(b). The respondent has not demonstrated sufficient reasons why the Jersey City program should be exempt or excepted from this requirement. The fact that the regulation has been ignored by the Jersey City Board over the years does not invalidate the application of the regulation, nor is it invalidated by the fact that the requirement has not been enforced by appropriate State or county authorities over the years. The local board of education may have broad managerial powers and prerogatives in accordance with the statutes mentioned above. However, these powers and prerogatives cannot be used by the Board to disregard and set aside a valid State regulation.

The statutory construction of N.J.A.C. 6:44-2.3(b) urged by the Board is also rejected. The word "will" is no less mandatory than "shall." Both verbs are used to express futurity and usually to express determination and command as well. Will is defined as "an auxiliary verb commonly having the mandatory sense of 'shall' or 'must.' It is a word of certainty, while the word 'may' is one of speculation and uncertainty. " Black's Law Dictionary, 1433 (rev. 5th ed. 1979). The regulation in question is mandatory. It would be permissive if the word 'may' was used instead of 'will.'

Respondents' contention that the regulation should not be applied because of the different source of funding for the Jersey City program is also without merit. It is well settled that the source of funding for teachers' salaries does not matter in determining tenure eligibility so long as legal conditions are met. Spiewak, 90 N.J. at 81, 82.

(2) Is petitioner a teaching staff member as defined by N.J.S.A. 18A:1-1?

> "Teaching staff member" means a member of the professional staff of any district or regional board of education, or any board of education of a county vocational school, holding office, position or employment of such character that the qualifications, for such office, position or employment, require

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> him to hold a valid and effective standard, provisional or emergency certificate, appropriate to his office, position or employment, issued by the state board of examiners and includes a school nurse. N.J.S.A. 18A:1-1.

Respondent claims that petitioner was not a teaching staff member in accordance with the above definition because the certificate she holds, Secondary School Teacher of General Business Studies, was not appropriate to her position as teacher of adult basic studies, where she generally taught reading, math, language, arithmetic, grammar or English to adults on a zero to grade four level. The Board claims that the appropriate certificate would have been as an elementary teacher for grades K-8.

It has been stipulated that there is no specific certificate for a teacher of basic skills on any grade level. In addition, no specific certificate is required by regulation for a person to teach adult basic skills. The only requirement is that the teacher hold a valid New Jersey instructional certificate. N.J.A.C. 6:44-2.3(b).

During the time that petitioner taught adult basic skills in the Jersey City Learning Center she held a valid New Jersey Instructional Certificate. That is all that is required as a licensed credential in order to teach in that area.

In Spiewak, the petitioners provided special educational assistance on a tutorial basis to students with learning disabilities. They were deemed to hold appropriate teaching certificates even though the learning capabilities of the students they taught were generally far below students without learning disabilities who could have been taught by these teachers on much higher grade levels with the use of the same certifications.

Therefore, it is **CONCLUDED** that petitioner held a valid and effective standard certificate appropriate to her position, issued by the State Board of Examiners. She therefore was a teaching staff member as defined by N.J.S.A. 18A:1-1.

(3) Has petitioner achieved the legislative status of tenure pursuant to N.J.S.A. 18A:28-5 and Spiewak?

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> The services of all teaching staff members . . . as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect, shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause. . . . after employment in such district or by such board for:
>
> (a) three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or
>
> (b) three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
>
> (c) the equivalent of more than three academic years within a period of any four consecutive academic years; . . . .
>
> N.J.S.A. 18A:28-5.

Spiewak provided a clear and uncluttered interpretation of the above statute, brushing aside many previous limitations and exceptions that had been carved out to meet special situations.

> We hold that all teaching staff members who work in positions for which a certificate is required, who hold valid certificates, and who have worked the requisite number of years, are eligible for tenure unless they come within the explicit exceptions in N.J.S.A. 18A:28-5 or related statutes such as N.J.S.A. 18A:16-1.1. The remedial and supplemental teachers in the cases decided today are covered by the statutory language. We find no exception in any statute that would deny them eligibility for tenure. We hold that those teachers who have satisfied the statutory conditions are entitled to tenure, no matter what the source of the funding for their salaries. Spiewak at 81.

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In deciding Spiewak the Supreme Court emphasized the generally unconditional nature of the statute, which was held to supersede contractual terms, special funding situations and exceptions that were previously cut out for supplemental, Title 1, part-time and ultimately, adult school teachers.

The guidelines of Spiewak in the light of petitioner's situation lead to the following **CONCLUSIONS:**

A. As set forth above, petitioner worked in a position for which a teaching certificate was required.

B. Petitioner held the appropriate certificate.

C. Petitioner has shown, by a preponderance of the credible evidence, that she was employed in the district as a teacher of adult basic skills for at least three consecutive academic years together with employment at the beginning of the next succeeding academic year.

It is therefore **CONCLUDED** that, in accordance with N.J.S.A. 18A:28-5 and Spiewak, petitioner had achieved (despite her previous disclaimer) the legislative status of tenure.

(4) Is Bergen County Vocational-Technical Schools Ed'n Assoc. v. Bd. of Ed. of Bergen County applicable to the instant matter?

Bergen Vo-Tech dealt with teachers in a daytime adult educational facility whose tenure rights and entitlement to other positions in the district upon closing of the facility and abolition of their positions were not recognized by the board because the petitioners taught in a nonmandatory educational program. The adult basic skills program

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in the Jersey City Learning Center, in which Ms. Milwit taught, is a nonmandatory program. It need not lead to a high school diploma.

Bergen Vo-Tech applied the same Spiewak principles discussed above to the mandatory/optional program question. In much the same manner as the Spiewak court eliminated nonstatutory exceptions to tenure eligibility previously carved out for supplemental instructors, teachers involved in remedial programs, teachers engaged in compensatory education programs, Title I federally funded teachers and those whose initial positions depended upon a contractual offer and acceptance of temporary employment, the Bergen Vo-Tech decision extended the same rationale and simplified standards to the nonmandatory adult vocational education program. The time served by teachers in such a program was counted for purposes of seniority, effective upon the acquisition of tenure. The following facts were found to exist as to the petitioners: (1) they worked in positions for which a teaching certificate was required; (2) they all held the appropriate certificates; (3) they all served or were in the process of serving the requisite period of time for tenure eligibility under the statute.

Respondent claims that the instant case is not similar to Bergen Vo-Tech because there each of the petitioners possessed certificates qualifying them to teach one or more of their subjects and because certifications in those subjects were a requirement of their employment. Both of these factors, as applied to Ms. Milwit, were discussed above and rejected. It has been concluded that an adult basic education teacher must hold a valid New Jersey teacher's certificate. N.J.A.C. 6:44-2.3(b). It has also been concluded that petitioner's Secondary School Teacher of General Business Studies certificate qualified her to teach in the basic skills program.

It is therefore **CONCLUDED** that the principles set forth in Bergen Vo-Tech are applicable to the instant matter.

(5) If petitioner is determined to be tenured, were her rights violated by the Board when it terminated her?

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Since it has been determined that petitioner is tenured and entitled to rights that flow from that status, this question is not applicable. However, her seniority rights, which might have entitled her to other positions in the school district, are discussed below.

It has been established that petitioner's employment was terminated because of a reduction in force. (See, Elma Milwit v. Jersey City Board of Ed., OAL DKT. EDU 2898-86 (Dec. 1, 1986) at 3,4.) It has also been found as a fact that one or more basic skills teachers who were not tenured, or if tenured had less seniority than petitioner, remained at the Learning Center after Ms. Milwit's removal.

> Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article. N.J.S.A. 18A:28-9.
>
> Dismissals resulting from any such reduction shall not be made by reason of residence, age, sex, marriage, race, religion or political affiliation but shall be made on the basis of seniority according to standards to be established by the commissioner with the approval of the state board. N.J.S.A. 18A:28-10.
>
> In the case of any such reduction the board of education shall determine the seniority of the persons affected according to such standards and shall notify each such person as to his seniority status, ... N.J.S.A. 18A:28-11.
>
> If any teaching staff member shall be dismissed as a result of such reduction, such person shall be and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified and he shall be reemployed by the body causing dismissal, if and when such vacancy occurs and in determining seniority, and in computing length of service for reemployment, full recognition shall be given to previous years of service, ... N.J.S.A. 18A:28-12.

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It is **CONCLUDED** that the respondent violated petitioner's seniority rights when it removed her from her position and left other teachers, who had less seniority or no seniority at all, employed in the same position. Because no recognition was given to petitioner as a teaching staff member, no consideration was given to her seniority rights as set forth in the foregoing statutes. That was an error and should be rectified.

ORDER

Based upon the foregoing, it is **ORDERED** that petitioner be restored to her position as a teacher of adult basic skills in the respondent school district, in accordance with her seniority rights as a tenured teaching staff member; and it is

FURTHER ORDERED that petitioner be compensated with an award of back pay from the date of the termination of her employment until restoration to her position, at the same contractual rate of pay that she was receiving at the time of her termination, less wages or salary received by her in substitute employment since that date.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN** , who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

November 24, 1987
DATE

ARNOLD SAMUELS, ALJ

NOV 30 1987
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

DEC 1 1987
DATE

Mailed To Parties:

FOR OFFICE OF ADMINISTRATIVE LAW

ms/e

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ELMA MILWIT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY ET AL., HUDSON COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record and initial decision on remand rendered by the Office of Administrative Law have been reviewed. Exceptions were timely filed by the Board pursuant to N.J.A.C. 1:1-18.4. They raise no new point of law but rather reiterate those legal arguments contained in the Board's post-hearing brief, arguments which have been summarized and considered by the ALJ in the initial decision.

The Board alleges that the ALJ erred when concluding that:

1. The adult basic education course must be conducted by a teacher holding a valid New Jersey teaching certificate;

2. Petitioner held a valid certificate appropriate to her position and was a teaching staff member under N.J.S.A. 18A:1-1;

3. Petitioner met the requirements of Spiewak, supra, and N.J.S.A. 18A:28-5 when the ALJ used the premise that she worked in a position for which a teaching certificate is required; and

4. Bergen County Vocational-Technical Schools Ed. Assoc., supra, was applicable to the adult program in Jersey City.

Upon consideration of the record, the Commissioner is in full agreement with and adopts the findings and conclusions of the ALJ contained in the initial decision on remand. Contrary to the Board's arguments, N.J.A.C. 6:44-2.3(b) is quite clear in its mandate that each class unit in adult basic education programs operated by a local board, such as the Board's program herein, be conducted by an individual who possesses a valid New Jersey teacher's certificate. As correctly determined by the ALJ, the word "will" is not permissive in its meaning, but mandatory. Further, the ALJ is correct in determining that petitioner is a teaching staff member as defined by N.J.S.A. 18A:1-1 and that she has acquired tenure in the position of teacher in the Jersey City School District in accordance with N.J.S.A. 18A:28-5 and the dictates of the New Jersey Supreme Court in Spiewak, supra.

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As to this the Commissioner fully concurs with the ALJ that:

> ***The fact that the regulation has been ignored by the Jersey City Board over the years does not invalidate the application of the regulation, nor is it invalidated by the fact that the requirement has not been enforced by appropriate State or county authorities over the years. The local board of education may have broad managerial powers and prerogatives in accordance with the statutes mentioned above. However, these powers and prerogatives cannot be used by the Board to disregard and set aside a valid State regulation. (Initial Decision, ante)

The Commissioner likewise agrees with the ALJ's determination that in order to teach adult basic education the teacher only has to possess a valid New Jersey instructional certificate, not one with a specific or particular subject area endorsement on it. N.J.A.C. 6:44-2.3(b) Thus, he too finds as meritless the Board's arguments that petitioner could not be a teaching staff member or tenured because she does not possess certification appropriate to the position held.

Given petitioner's tenure status she cannot be removed from her teaching position except by way of the Tenure Employees Hearing Act (N.J.S.A. 18A:6-10 et seq.) or a reduction in force (N.J.S.A. 18A:28-9 et seq.). The record indicates that while she was allegedly removed due to a reduction in force, adult basic education teachers with less seniority or no tenure status were retained. As correctly determined by the ALJ, such action violates petitioner's seniority rights. She is, therefore, to be restored to a teaching position to which her seniority entitles her together with those emoluments and benefits accruing to her tenure status as a teacher in Jersey City, less mitigation of any monies earned during the period of her wrongful termination.

Accordingly, the recommended decision of the ALJ is adopted for the reasons stated therein. The Board is ordered to comply with the directives of the ALJ. Moreover, the Commissioner directs that the county superintendent of schools review the credentials of all adult basic education teachers in the district to assure compliance with N.J.A.C. 6:44-2.3(b).

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

January 8, 1988

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ELMA MILWIT	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY ET AL., HUDSON COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, January 8, 1988

For the Petitioner-Respondent, Coyle and Vandorn
(Mary Ann Murphy, Esq., of Counsel)

For the Respondent-Appellant, William C. Gerrity, Esq.

The State Board of Education affirms the decision of the Commissioner for the reasons expressed in that decision. In affirming that decision, we also affirm his directive that the County Superintendent review the credentials of all adult basic education teachers in the district so as to insure compliance with the N.J.A.C. 6:44-2.3(b).

June 1, 1988

Pending NJ Superior Court

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4438-87
AGENCY DKT. NO. 140-5/87

RONALD FISCHER,
Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,
Respondent.

Ronald Fischer, petitioner pro se

Melvin C. Randall, Esq., for respondent
(Love & Randall, attorneys)

Record Closed: November 6, 1987 Decided: November 30, 1987

BEFORE **JAMES A. OSPENSON**, ALJ:

Ronald Fischer, a teaching staff member employed by the Board of Education of the City of East Orange, Essex County, advised the Board on November 10, 1986, that he intended to resign his position no earlier than 60 days from that date. The Board accepted the resignation on December 2, 1986, effective December 23, 1986. Petitioner informed the Board on December 22, 1986, that his resignation would become effective January 16, 1987. The Board modified its acceptance of resignation at its meeting of January 30, 1987,

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to make the effective date January 10, 1987. Petitioner's last date of work was December 23, 1987. In a petition of appeal filed with the Commissioner of the Department of Education on May 18, 1987, he alleged that he had intended January 16, 1987, to be his effective resignation date. He alleged, therefore, that he was owed salary by the Board from January 10, 1987 to January 16, 1987. The Board denied petitioner's claim generally and raised the defense of the bar of the limiting period of N.J.A.C.6:24-1.2. The Commissioner transmitted the matter to the Office of Administrative Law on June 25, 1987, for hearing and determination as a contested case in accordance with N.J.S.A.52:14F-1 et seq.

On notice to the parties the matter came on for prehearing conference in the Office of Administrative Law on August 7, 1987, and an **ORDER** was entered establishing, inter alia, a hearing date on November 6, 1987. It was established that at issue in the matter were the following:

A. Whether petitioner effectively resigned his position as of a date certain; if so, whether he is entitled to salary correction.

B. Whether petitioner filed his petition of appeal in timely fashion under N.J.A.C. 6:24-1.2.

EVIDENCE AT HEARING

Petitioner, a teacher of mathematics at the high school, testified that he wrote a letter to the Board on November 10, 1986, directed to "To whom it may concern:

> I resign my mathematics position no earlier than 60 days from today." [R-1]

The letter was mailed on November 11, 1986, he said, although he had orally informed his principal the day before of his intention.

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He then received a letter from Kenneth D. King, assistant superintendent for personnel, dated December 4, 1986, to the effect that the Board of Education at its meeting on December 2, 1986, approved December 23, 1986, as the date his resignation would become effective. (P-2).

On December 22, 1986, petitioner said, he wrote assistant superintendent King the following letter:

> I wish to resign effective Jan. 16, 1983 [sic], the last day of mathematics midyear. I do not wish to resign earlier than 60 days from my last letter. [R-1]. I believe that would be Jan. 11, 1986 [sic]. (R-2).

Petitioner said he intended his last day of work to be January 16, 1987 since mathematics mid-year examinations were over then. He next heard from his principal, he said, that he was not to report for work after December 23, 1986.

He then received a letter from assistant superintendent King, dated February 18, 1987, which informed him that the Board at its January 30, 1987 meeting took action to change the effective date of resignation from December 23, 1986 to January 10, 1987 [P-1].

Petitioner said his last working day was December 23, 1986; he admitted that he was paid his salary through January 10, 1987.

Called by the Board, Kenneth D. King testified he is presently assistant superintendent for personnel and was so employed in 1986. He received from petitioner his November 10, 1986 letter of resignation. He then arranged to prepare an appropriate agenda for the Board to consider the resignation. P-2 in evidence was his letter notifying petitioner of the Board's acceptance of his resignation, effective December 23, 1986. At the time, King said, he and the principal were concerned over an orderly transition of

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petitioner's math class and believed the best time for petitioner to leave would be before the Christmas holiday. In that way classes would be convened after Christmas under a replacement teacher and continuity of education in the class, he and the principal felt, would be fostered. He confirmed petitoner was subsequently paid his salary through January 10, 1987. P-1 in evidence, King's letter to petitioner dated February 18, 1987, was a subsequent action taken by the Board to correct acceptance of the original resignation date so as to allow a full 60 days to elapse from November 10, 1986. The corrected effective date of acceptance of resignation was January 10, 1987. In effect, he said, the corrective action was taken to make the resignation process consistent with the obligation of a teacher to give his employer 60 days' notice.

DISCUSSION

Petitioner argued that his original letter of November 10, 1986, was not an outright resignation but rather merely his notice of an "intent to resign." He argued that he was entitled to salary from January 10, 1987 until January 16, 1987, in accordance with his actual resignation letter of December 22, 1986.

The Board argued that its actions were proper because the original resignation of November 10, 1986 was just that — a resignation that was not ambiguous. The Board urged that its later action in correcting the effective day of acceptance of resignation from December 23, 1986 to January 10, 1987, was merely to afford petitioner his full salary for at least a period of 60 days, as is implied under and by virtue of N.J.S.A. 18A:28-8, which provides:

> Any teaching staff member, under tenure of service, desiring to relinquish his position shall give the employing board of education at least 60 days written notice of his intention, unless the board shall approve of a release on shorter notice...

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Based on the foregoing, I make the following Findings of Fact:

1. Petitioner by notice, resigned his teaching staff position on November 10, 1986 unambiguously, to become effective no earlier than 60 days from that date.

2. The Board accepted the resignation effective December 23, 1986, by action on December 2, 1986.

3. Petitioner worked until that date and no later but was paid full salary through January 10, 1987.

4. Thereafter, the Board modified the effective date from December 23, 1986 to January 10, 1987, and paid petitioner his salary until then in order to afford him a full 60 days of paid service in the notice period.

CONCLUSION

I **CONCLUDE** petitioner's original resignation, being unambiguous, was effective to serve appropriate notice to the Board under N.J.S.A. 18A:28-8, in writing, of an intention to resign. Since it was unambiguous, and since it was accepted by official Board action, it became effective according to its terms. Petitioner was paid compensation for a full 60 days after November 10, 1986 until January 10, 1987. Unilaterally, he was not able by his own act to change that to suit his purposes. He is not entitled to further compensation beyond January 10, 1987. An unambiguous resignation is a voluntary relinquishment of position and after acceptance by the Board is no longer subject to recision or unilateral modification of terms by the resignee. Cf., O'Toole v. Forestal, 211 N.J. Super 394, 402 (App. Div. 1986); Kozak v. Board of Ed. Township of Waterford, 1976 S.L.D. 633, 639-40; Cohen v. Bd. of Ed., Town of Hackettstown, 1979 S.L.D. 439, 441-42; and Klinka v. Bd. of Ed., Twp. of Florence, OAL Dkt. EDU 645-83 (Aug. 11, 1983), adopted, N.J. Dept. of Ed. (Sept. 26, 1983).

The petition of appeal is **DISMISSED.**

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This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **SAUL COOPERMAN** for consideration.

November 30, 1987
DATE

James A. Ospenson
JAMES A. OSPENSON, ALJ

DEC - 2 1987
DATE

Receipt Acknowledged:
Seymour Weiss
DEPARTMENT OF EDUCATION

December 3, 1987
DATE

Mailed To Parties:
Ronald L. Rauhauser/ks
OFFICE OF ADMINISTRATIVE LAW

ft/js

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RONALD FISCHER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful review of the record in this matter the Commissioner agrees with the findings and the conclusions of the Office of Administrative Law that petitioner's unambiguous resignation submitted on November 10, 1986, which was accepted by formal action of the Board on December 2, 1986, and later modified by the Board to assign the effective date from December 23, 1986 until January 10, 1987, thereby entitles petitioner to no further compensation after January 10, 1987.

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law dismissing the Petition of Appeal and adopts it as the final decision in this matter for the reasons expressed in the initial decision.

COMMISSIONER OF EDUCATION

January 11, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

ORDER
PARTIAL SUMMARY DECISION
OAL DKT. NO. EDU 2179-87
AGENCY DKT. NO. 42-3/87

SHAIL KHURANA,
Petitioner,
v.
BOARD OF EDUCATION OF
THE BOROUGH OF DUNELLEN,
Respondent.

Stephen E. Klausner, Esq., for petitioner (Klausner, Hunter & Oxfeld, attorneys)

David B. Rubin, Esq., for respondent (Rubin, Rubin & Malgran, attorneys)

BEFORE **RICHARD J. MURPHY, ALJ:**

Petitioner, Shail Khurana, appeals from the respondent Board's determination of her teaching contract under a 30-day notice clause some 17 days before she would have obtained tenure. She maintains that her Fourteenth Amendment property rights were violated by the Board's failure to provide a pretermination hearing and demands reinstatement as well as reimbursement of any monies wrongfully withheld, together with any benefits and emoluments of office. Respondent Board maintains that petitioner had no protectable property interest in the job after receiving notice of termination and is entitled only to a hearing for damages under the contract, as to whether the termination was without good cause. Both parties move for summary decision. For the reasons stated below, partial summary decision is granted for respondent dismissing the request for reinstatement, but denied as to damages under the contract pursuant to N.J.S.A. 18A:6-30.1, pending further proceedings on the issue of good cause.

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FACTS

The facts required to decide this motion are not in dispute, although the question of good cause remains to be explored at a hearing. Petitioner was a certified but nontenured learning consultant (LDTC) employed by the Board since January 2, 1984, until December 16, 1986, when she was terminated by the Board. On April 22, 1986, petitioner entered into an employment contract with the Board, which provided for termination by either party on 30 days' written notice. On December 10, 1986, petitioner was given notice by the Board superintendent, who advised that the subject of her termination would be considered at the Board meeting on December 16. At that meeting, the Board voted to terminate petitioner's contract immediately with one month's compensation. Petitioner was not given a hearing before, during or after the Board's vote to terminate, and filed her appeal with the Commissioner on March 16, 1987, which was transferred to the Office of Administrative Law as a contested case on March 31, 1987. The petition demanded judgment voiding respondent's action of December 16, declaring that petitioner's fourteenth amendment property rights had been violated, and immediately reinstating her with reimbursement for monies wrongfully withheld. A prehearing conference was held on May 27, and summary decision motions were subsequently submitted on the issue of whether the petitioner was entitled to a pretermination hearing before the Board acted to terminate her employment and, further, if so entitled, what remedy is appropriate.

ISSUE

Was petitioner constitutionally entitled to a pre-termination hearing and, if so, is she now entitled to reinstatement because she did not receive one?

ARGUMENTS

Petitioner argues that she had a contractual entitlement to employment amounting to a protectable property interest under the Fourteenth Amendment, which was violated by the Board's termination of her before the expiration of her contract without a hearing prior to termination. She requests the remedy of reinstatement and cites Buff v. North Bergen Board of Education, 1981 S.L.D. 340, as an instance where the Commissioner filed a right to a pretermination hearing based on a contractual entitlement amounting to a property right. Petitioner also relies on the underlying Supreme Court

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decisions in Perry v. Sinderman, 408 U.S. 593 (1972) and Board of Regents v. Roth, 408 U.S. 564 (1972), as well as several Third Circuit decisions.

Respondent argues that the existence of property interests are determined by state and not federal law and argues that petitioner's contract was subject to the provisions of N.J.S.A. 18A:6-30.1, providing for a post-termination appeal and compensation where the termination is without good cause:

> When the dismissal of any teaching staff member before the expiration of his contract with the board of education shall be decided, upon appeal, to have been without good cause, he shall be entitled to compensation for the full term of the contract, but it should be optional with the board whether or not he shall continue to perform his duties for the unexpired term of the contract.

Because petitioner's rights were limited to damages by the above provision, the Board contends that she has no legitimate expectation to continue employment after termination. The Board also cites Canfield v. Board of Education of Pine Hill Borough, 51 N.J. 400 (1968), for the proposition that tenure is acquired by service, not contract.

DISCUSSION AND CONCLUSIONS

The parties do not dispute that state law determines whether a property interest protectable under the Federal Constitution exists and that federal law defines the procedural due process to which such an interest is entitled. Under N.J.S.A. 18A:6-30.1 nontenured teachers on contract are entitled to a post-termination appeal to challenge their discharge for good cause and to seek compensation for the term of the contract; they have no contractual entitlement to continue employment after receiving notice of termination. As such, the Board was not constitutionally obligated to afford petitioner a pretermination hearing. Nontenured teachers have property interest in their salary during the 30-day notice period, as well as the balance of the contract, but they do not have a right to continue working during that 30-day period after receiving notice of termination. Whether a teacher continues to work during the period between the giving of notice and the date of termination is left to the discretion of the board of education. See, N.J.S.A. 18A:27-9. Thus, although a nontenured teacher has a contractual right to receive compensation for a 30-day period after receiving a notice of termination of employment,

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there is no right to continue teaching during that period and it is upon the act of teaching, of actually discharging the terms of employment contract by service, that tenure depends. This is settled law in New Jersey under the case of Canfield v. Board of Education of Pine Hill Borough. There the Supreme Court adopted a dissenting opinion by Judge Gaulkin, 97 N.J. Super. 483 (App. Div. 1967), holding that tenure can only be established by a length of service and not by contractual rights and stating that:

> . . . [T]enure and contract are two different concepts; tenure is statutory and arises only by the passage of time fixed by statute, and the discharge of an employee before the passage of the required time bars tenure, even if the discharge is in breach of an employment contract which, if not breached, would have extended to a date which would have given tenure. . . [T]he contract was properly cancelled (subject to the plaintiff's right to [30 days'] salary) when the notice of cancellation was given, but even if the contract had not become legally terminated until [30 days] after the notice of dismissal, the notice itself barred tenure. [Citation omitted.] [97 N.J. Super. at 490-491.] [Emphasis added.]

The U.S. Supreme Court cases of Roth and Sinderman do not require a different result from that reached in Canfield because even under a federal constitutional claim, it is state law which determines whether a property right to continued employment exists.[1] State law under N.J.S.A. 18A:6-30.1 and the Canfield decision established that nontenured teachers do not have any legitimate claim of entitlement in the form of a property interest to continued employment after receiving notice of termination. The most such a teacher would be entitled to would be salary during a 30-day period, as well as compensation for the full term of the contract in event that dismissal was without good cause. Canfield's conclusion that teacher tenure is a matter of service and not of contract has been followed in New Jersey, as well as the federal courts. See, Shelko v. Board of Education of Mercer County, 97 N.J. 414 (1984); Mozier v. Board of Education of Cherry Hill Township, 450 F. Supp. 742 (DDC 1978). Furthermore, the Commissioner has upheld termination of employees under notice provisions of employment contracts. See, e.g., Arzberger v. Board of Education of the Township of Neptune, 1976 S.L.D. 835, affirmed State Board of Education, 1977 S.L.D. 1271, affirmed App. Div. Oct. 13, 1977.

[1] Other federal cases cited by petitioner also recognized that property rights entitled to procedural due process are established by state and not federal law. See, Perri v. Aytch, 724 F. 2nd 362 (3rd Cir. 1983); Stana v. Pittsburgh School District, 775 F. 2nd 122 (3rd Cir. 1985).

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These prior decisions did not involve situations where the terminated teacher would have obtained tenure had he or she continued employment during the notice. The only case cited by the petitioner in which that happened was Buff v. Board of Education of North Bergen, Hudson County, 1981 S.L.D. 340. In Buff, a board was found to have acted in a shocking and illegal manner in terminating the contract of an untenured teacher in violation of the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq., without any formal resolution, and without any written notice of termination. In addition to these four grounds for reversing the Board's action, the administrative law judge included dicta that Canfield had been overruled by Roth and Sinderman. The Commissioner's decision did not address this dicta in finding that the action of the Board was invalid because of the egreciously unlawful manner in which it was accomplished. No such shocking and illegal conduct on the part of the Board is present in this case: The contract was terminated in accordance with its terms. Buff is therefore distinguishable and the administrative law judge's dicta has no precedential value. This also is not a case where termination was carried out in such a way as to stigmatize the discharged employee so as to infringe upon constitutionally protected liberty interests entitled to a pretermination hearing. See, Nicoletta v. North Jersey District Water Supply Commission, 77 N.J.. 145 (1978). Here, the petitioner was terminated in a manner which did not affix any stigma to her by publicly accusing her of any wrongdoing or incompetence that might later bar her from obtaining employment as a teacher. The Board merely exercised its clear constitutional right to terminate the contract and did so without any comment as to cause.

For the reasons set forth above, I **CONCLUDE** that the petitioner was not constitutionally entitled to a pretermination hearing because she lacked a property interest in continued employment under state law and was not stigmatized by her discharge so as to have a claim of infringement of her liberty interest entitled to procedural due process under the Federal Constitution.

I further **CONCLUDE** that the petitioner's employment was terminated upon notice given under the contract and that she therefore did not obtain tenure, although she had a continued right to salary for a 30-day period and a right to take an appeal to attempt to demonstrate that her dismissal was without good cause, and she is therefore entitled to compensation for the balance of the contract.

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ORDER

On the basis of the above findings of fact and conclusions of law, I **ORDER** that the respondent Board's motion for summary decision is granted as to the petitioner's claim for reinstatement and denied as to the issue of whether petitioner is entitled to compensation for the full term of the contract under N.J.S.A. 18A:6-30.1. Further proceedings are hereby **ORDERED** to determine whether petitioner's dismissal was without good cause under the terms of that statute.

This order may be reviewed by **SAUL COOPERMAN, COMMISSIONER, DEPARTMENT OF EDUCATION**, either upon interlocutory review pursuant to N.J.A.C. 1:1-14.10 or at the end of the contested case pursuant to N.J.A.C. 1:1-18.6.

Dec. 16, 1987
DATE

Richard J. Murphy
RICHARD J. MURPHY, ALJ

ds

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SHAIL KHURANA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF DUNELLEN, MIDDLESEX COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

This matter has been appealed interlocutorily by the Dunellen Board of Education (Board) pursuant to the provisions of N.J.A.C. 1:1-12.5(e) and N.J.A.C. 1:1-14.10. The Board's appeal is taken before the Commissioner of Education by virtue of an Order of Partial Summary Decision issued by the Office of Administrative Law on December 26, 1986 in the above-captioned matter.

The issue giving rise to the matter controverted herein appears in the ALJ's Order of Partial Summary Decision, ante, and is recited below:

> Was petitioner constitutionally entitled to a pre-termination hearing and, if so, is she now entitled to reinstatement because she did not receive one? (Order, ante)

In granting partial summary decision the Commissioner observes that the ALJ concluded as follows:

> For the reasons set forth, I CONCLUDE that the petitioner was not constitutionally entitled to a pretermination hearing because she lacked a property interest in continued employment under state law and was not stigmatized by her discharge so as to have a claim of infringement of her liberty interest entitled to procedural due process under the Federal Constitution.
>
> I further CONCLUDE that the petitioner's employment was terminated upon notice given under the contract and that she therefore did not obtain tenure, although she had a continued right to salary for a 30-day period and a right to take an appeal to attempt to demonstrate that her dismissal was without good cause, and she is therefore entitled to compensation for the balance of the contract. (Id.)

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In reaching those conclusions stated above, the ALJ ordered that the Board's Motion for Summary Decision be granted in part as to petitioner's claim for reinstatement to employment and denied in part as to the issue regarding whether petitioner is entitled to compensation for the full term of her contract pursuant to N.J.S.A. 18A:6-30.1. With regard to the latter the ALJ ordered further proceedings to determine whether her dismissal by the Board was without good cause pursuant to the provisions of N.J.S.A. 18A:6-30.1. The statute of reference reads as follows:

> When the dismissal of any teaching staff member before the expiration of his contract with the board of education shall be decided, upon appeal, to have been without good cause, he shall be entitled to compensation for the full term of the contract, but it should be optional with the board whether or not he shall continue to perform his duties for the unexpired term of the contract.

In its letter brief the Board, in support of its application for interlocutory review, rejects that portion of the ALJ's decision on partial summary judgment which holds that petitioner pursuant to the provisions of N.J.S.A. 18A:6-30.1 is entitled to proceed to a plenary hearing to establish that the Board acted without "good cause" in invoking the 30-day provision of her contract on December 16, 1986 when it terminated her employment. The Board maintains that this finding and determination reached by the ALJ must be construed as a misapplication of the provisions of N.J.S.A. 18A:6-30.1, given the undisputed facts contained in the record of this matter. The Board asserts that there exists a definite distinction between "dismissals" and "terminations" from employment for the following reasons:

> The Commissioner has long recognized a distinction between "dismissals" and "terminations." See Leon Gager v. Board of Education of Lower Camden County Regional High School District No. 1, 1964 S.L.D. 81; Constantine Cheston v. Board of Education of the Township of Cherry Hill, Camden County, 1979 S.L.D. 262. The statute relied on by Judge Murphy, N.J.S.A. 18A:6-30.1, applies to summary dismissals. It creates no substantive right to compensation for the balance of the contract term, where the Board has invoked a contractual termination clause, and paid the employee for the notice period stated in the contract. Since a termination (as opposed to summary dismissal) need not be a disciplinary action, the Board has no duty to demonstrate "good cause." The rights of a teacher in such a situation certainly can rise no higher than those of a non-tenured teacher, who has no legally protectable expectancy of continued employment.
>
> (Board's Letter Brief, ante)

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In opposing the Board's application for interlocutory review petitioner rejects the Board's arguments and claims that the ALJ correctly found that:

> Petitioner "had a right to take an appeal to attempt to demonstrate that her dismissal was without good cause and she is therefore entitled to compensation for the balance of the contract" (slip, at p. 5).
>
> Respondent argues that it had a right to terminate Petitioner's employment in mid-contract with neither notice nor an opportunity to be heard. Respondent relies upon Cheston v. Cherry Hill Board of Education, 1979 S.L.D. 262. Cheston is distinguishable and, in fact, supports Petitioner's position. Cheston was terminated by the Cherry Hill Board of Education subsequent to a hearing in which the Board was to determine whether or not just cause existed for the dismissal. Prior to the start of the new school year, the hearing was held and the Board determined that just cause had existed for the termination.
>
> Herein, Petitioner in the middle of the school year was summarily dismissed from her position as an LDTC with neither reasons nor notice and an opportunity to be heard. The A.L.J. on this issue correctly determined that Petitioner is entitled to prove that no cause existed for her termination.
>
> (Petitioner's Opposing Letter Brief, at pp. 1-2)

The Commissioner has reviewed the respective arguments of the parties in connection with the Board's application for interlocutory review. In his judgment the ALJ erred in denying the Board's motion for summary decision of the entire proceedings in this matter which would have resulted in the dismissal of the instant Petition of Appeal.

Initially, the Commissioner concurs with that part of the ALJ's order which concluded that petitioner was not entitled to a pretermination hearing by the Board at the time it exercised the 30-day termination provision in her employment contract. In this regard the ALJ, relying on pertinent case law recited in his order, found and concluded that

> ***she lacked a property interest in continued employment under state law and was not stigmatized by her discharge so as to have a claim of infringement of her liberty interest entitled to procedural due process under the Federal Constitution. (Order, ante)

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The Commissioner adopts as his own the ALJ's finding and conclusion set forth above. The Commissioner also adopts as his own that portion of the ALJ's Order which holds that petitioner's employment was terminated on notice given to her under her contract and therefore she did not obtain tenure, although she was entitled to and received 30 days' salary pursuant to the notice provision contained in her employment contract.

However, the ALJ's reliance on the provisions of N.J.S.A. 18A:6-30.1 in reaching that finding and conclusion which allows petitioner to proceed to a plenary hearing in order to demonstrate that her dismissal was without good cause is hereby reversed for the following reasons:

1. The ALJ's finding and conclusion in this regard exceeds the scope of the issue contained in the order, ante, which had already been decided in the negative by the ALJ and affirmed herein by the Commissioner.

2. Given the undisputed facts set forth in the record of this matter, the ALJ erroneously applied the provisions of N.J.S.A. 18A:6-30.1 instead of the relevant provisions of N.J.S.A. 18A:27-9.

In the Commissioner's view N.J.S.A. 18A:6-30.1 applies to summary dismissals from employment pursuant to the provisions of an enforceable employment contract. The actions related to such dismissal on appeal must be for good cause shown. It entitles the affected teaching staff member to demonstrate that the Board has failed to show good cause. In the event that failure to show good cause can be demonstrated by the affected teaching staff member on appeal, then he or she shall be entitled to full compensation for the full term of the contract. (N.J.S.A. 18A:6-30.1)

Conversely, however, as is the case in the instant matter, the Commissioner finds and determines that petitioner, the affected teaching staff member, was terminated on notice pursuant to the provision of N.J.S.A. 18A:27-9 which reads as follows:

> If the employment of a teaching staff member is terminated on notice, pursuant to a contract entered into with the board of education, it shall be optional with the board whether or not the member shall continue to perform his duties during the period between the giving of the notice and the date of termination of employment thereunder. (emphasis supplied)

In reaching the above finding and determination the Commissioner relies on those distinctions between "termination on notice"

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and "dismissal with cause" that he previously ruled upon in Cheston which are recited below in pertinent part:

> Thus, the statutes recognize that there is a distinction between termination on notice and dismissal with cause.
>
> In the Commissioner's judgment that distinction assumes that when a teaching staff member is terminated, a board of education has an option of allowing that person to teach for the remaining 60 days pursuant to the contract, or to terminate immediately giving 60 days' salary. Where a person is dismissed with cause, as in the instant matter, there is no option of continuing that person's services. In effect this teaching staff member has, in the eyes of the board, rendered himself incapable of performing his duties, causing the contract to be impossible of performance.
>
> The Commissioner has previously held that a teacher under contract may not be summarily dismissed without notice and without good cause. In Leon Gager v. Board of Education of Lower Camden County Regional High School District No. 1, 1964 S.L.D. 81, the Commissioner found that the board, dissatisfied with petitioner's work, attempted to dismiss him summarily. The Commissioner held that the evidence did not establish good cause for such dismissal and that petitioner was entitled to compensation for the 60 day period of notice of termination provided in his contract. In Anthony Amorosa v. Board of Education of Jersey City, 1964 S.L.D. 126, the Commissioner distinguished even more sharply between the rights available in R.S. 18:13-11 and 18:13-11.1 (now N.J.S.A. 18A:6-30.1 and 18A:27-9). As in Gager, the board had attempted to "dismiss" petitioner rather than terminate a contract which provided for a 60 day notice of intention to terminate. In finding that Amorosa was entitled to compensation for 60 days following his purported dismissal, the Commissioner said, at page 128:
>
> > "***In Gager ***, for example, the Commissioner held that when a board determines that a teacher's work is unsatisfactory to the degree that it does not wish to continue his employment, it may terminate such employment only under the conditions of the contract. Such a course was open to

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> respondent in the instant matter; it could have, for any reason or no reason, given petition 60 days' notice in writing of its intention to terminate his contract, and, pursuant to R.S. 18:13-11.1, elected not to have him teach during the period of notice. The Commissioner recognizes that possibility of circumstances constituting good cause within the contemplation of R.S. 18:13-11, supra, under which the summary dismissal of a teacher could be upheld.***" (Emphasis added.)

> Thus "dismissal" as used in N.J.S.A. 18A:6-30.1 contemplates that "good cause" must exist therefor. Given the status of the law today regarding the non-reemployment of nontenure teachers (N.J.S.A. 18A:27-10 et seq.), the Commissioner holds that termination - which is equally available to both employee and employer - must be for reason given to the employee.
>
> (1979 S.L.D. at 264-265)

In the instant matter, the Commissioner finds that the record before him fails to establish that petitioner ever requested the reasons for her termination nor did the Board proffer such reasons. Consequently, the absence of reasons being either requested or provided precludes petitioner from asserting the right to demonstrate that her termination was without good cause. Therefore, the ALJ's finding that petitioner should be accorded the right to demonstrate lack of good cause was in error and is hereby set aside.

Consequently, in view of the above finding and determination, the Commissioner holds that petitioner's employment was terminated on 30 days' notice in accordance with the provisions of N.J.S.A. 18A:27-9. In so finding, the Commissioner further determines that there is no further cause of action cognizable before him in the instant matter.

Accordingly, the ALJ's Order of Partial Summary Decision is affirmed in part and reversed in part for the reasons stated herein.

The Commissioner further finds and determines that the instant Petition of Appeal can be and is hereby dismissed.

COMMISSIONER OF EDUCATION

January 12, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 976-87
AGENCY DKT. NO. 7-1/87

DORIS C. JENNINGS,
Petitioner,
v.
BOARD OF EDUCATION OF
THE BOROUGH OF DUNELLEN,
Respondent.

Stephen E. Klausner, Esq., for petitioner (Klausner, Hunter & Oxfeld, attorneys)

David B. Rubin, Esq., for respondent (Rubin, Rubin & Malgran, attorneys)

Record Closed: October 21, 1987 Decided: December 3, 1987

BEFORE **BRUCE R. CAMPBELL**, ALJ:

Doris C. Jennings, petitioner, alleges and the Dunellen Board of Education (Board), respondent, denies that the Board improperly compensated the petitioner for the period September 1 - October 15, 1986. The Board counterclaims it overpaid the petitioner.

To be determined is whether the Board properly calculated the petitioner's compensation for September 1 - October 15, 1986 under any applicable rules of the State Board of Education and the labor agreement then covering Dunellen teachers and what corrective action, if any, should be taken.

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This matter was transmitted by the Department of Education to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. The parties have submitted a stipulation of facts, which I have reviewed. No essential facts are in dispute and the matter now proceeds to summary judgment on the stipulation and written arguments of counsel.

STIPULATION OF FACTS

1. Petitioner Doris C. Jennings ("Jennings"), is a tenured teaching staff member employed by respondent Board of Education of the Borough of Dunellen, ("Board"), since 1979.

2. Respondent Board is responsible for the operation of the Dunellen Public School District in Middlesex County.

3. On or about April 29, 1986, petitioner signed a renewal contract for school year 1986-87 at a salary of $20,200 (J-1).

4. On or about June 30, 1986, petitioner filed a letter with the Board secretary:

   A. Requesting a disability leave of absence as of September 2, 1986 to September 30, 1986 (21 sick leave days);

   B. Requesting a maternity leave of absence as of October 1, 1986 to December 31, 1986;

   C. Enclosing a physician's statement dated April 3, 1986, that her estimated delivery date was September 1, 1986 (J-2).

5. On or about July 10, 1986, petitioner filed a letter with the secretary requesting that her maternity leave of absence be extended from December 31, 1986 to September, 1987 (J-3).

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6. On or about July 25, 1986, the superintendent of schools sent a letter to petitioner stating that the Board had approved her request for a maternity leave of absence without pay from September 1, 1986 to June 30, 1987 (J-4).

7. On or about September 29, 1986, petitioner filed a letter with the Board secretary:

A. Confirming that she would receive a check for 31 sick leave days;

B. Enclosed a cpoy of her accumulated sick leave report (J-6).

9. On or about October 15, 1986, petitioner was sent a check representing 31 sick leave days calculated on the basis of her 1985-86 school year salary.

10. Petitioner was advised by the superintendent of schools that her sick leave compensation was calculated based on her 1985-86 school year salary.

11. As of July 10, 1986, it was petitioner's intention not to work at all during the 1986-87 school year. In fact, petitioner did not work at all during the 1986-87 school year.

12. The terms and conditions of petitioner's employment are governed by the collective negotiations agreement between the Board and the Dunellen Education Association.

DISCUSSION AND DETERMINATION

The petitioner argues that once the Board fixed her salary for the 1986-87 school year, it could not unilaterally modify the salary. As set forth in stipulation 9, the petitioner was sent a check, on or about October 15, 1986, representing 31 sick leave days calculated on the basis of her 1985-86 salary. The petitioner cites a series of cases dealing with the detection and attempts at correction of errors in placement on salary guides. Generally, where errors are unilateral, that is, errors made by the Board or its

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agents, and where there has been no misrepresentation by the staff member, monies paid may not be recouped.

The Board contends that although the petitioner was paid for 31 days of sick leave arising from her delivery on September 16, 1986, the petitioner was entitled to no sick leave whatever. The Board counterclaims and seeks recoupment of the sick leave compensation it says it mistakenly paid.

The Board cites Article XVII(B)(4) of the negotiated labor agreement then in effect between the Board and the Dunellen Education Association:

> A teacher, secretary, custodial and/or maintenance employee returning from maternity leave shall be placed on the salary guide according to the following procedure:
>
> > If she/he has taught at least five (5) calendar months of the school year, she/he shall be given one full increment.

Because the petitioner would not be working at all during the 1986-87 school year, and would, accordingly, fall below the five-month threshold in the contract, she would not be entitled to her increment during the 1986-87 school year, as the superintendent understood the contract language. The petitioner, conversely, argues that this clause of the contract relates solely to what compensation would be upon her return from maternity leave in September 1987.

Both parties concede the language of the contract is susceptible of more than one interpretation. The parties agree that the superintendent's decision was based purely on his interpretation of the cited contract language and was not intended as disciplinary in any respect.

The Board argues further that the jurisdiction of the Commissioner of Education extends to controversies and disputes arising under the school laws, N.J.S.A. 18A:6-9 and does not extend to disputes arising from a collective negotiations agreement. Belleville Educ. Ass'n v. Belleville Bd. of Educ., 209 N.J. Super. 93 (App. Div. 1986).

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Compensation during maternity leave is a mandatorily negotiable term and condition of employment, provided the negotiated agreement does not contravene any preemptive statutory policy. Hackensack Bd. of Ed. v. Hackensack Ed. Ass'n, 184 N.J. Super. 311 (1982), certif. den. 91 N.J. 217 (1982).

The Board also addresses the question of recoupment of erroneous payments. However, as set forth immediately below, it will not be necessary to address this question.

Having reviewed the record, I **FIND** that the determination of this matter rests on two points. The first is whether the cited contract language controls or has any effect on the rate of pay for the controverted sick leave days. The second is whether the Board and Association would be free to negotiate compensation during maternity leave. Neither party now cites N.J.A.C. 6:3-1.10(b). In any event, I **FIND** that that rule speaks only to seniority determination and sheds no light on the present case. I further **FIND** that where a Board of Education allegedly violates a collective negotiations agreement, the controversy usually is not a school law dispute and, therefore, is not subject to the Commissioner's primary jurisdiction. See, Conti and Cutler v. Montgomery Tp. Bd. of Ed., decis. of State Board (July 2, 1986), slip opinion at 6. See also, Belleville, above, at 98.

Inasmuch as the petitioner's claims rests on such questions, I **CONCLUDE** that they belong before the Public Employment Relations Commission. Agreements as to terms and conditions of employment should be and are collective. Legislative policy favors collective negotiations. Belleville, above, at 97, citing Lullo v. Intern. Assoc. of Firefighters, 55 N.J. 409, 425-426 (1970).

Accordingly, I **ORDER** the petition of appeal **DISMISSED** for lack of jurisdiction.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

3 DECEMBER 1987
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

DEC - 7 1987

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

DEC 8 1987
DATE

OFFICE OF ADMINISTRATIVE LAW

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DORIS C. JENNINGS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF DUNELLEN, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were timely filed by petitioner pursuant to N.J.A.C. 1:1-18.4 as was the Board's reply thereto.

Petitioner excepts to the ALJ's finding and conclusion at page 5 of the initial decision that the Commissioner lacks jurisdiction in this matter because petitioner's claims rest on questions related to a collective negotiations agreement and therefore belong before the New Jersey Public Employment Relations Commission (PERC). As to this, she contends that such conclusion ignores her entire argument and completely mistakes her position. More specifically, she avers that she is neither seeking, nor does she allege, a violation of a collective bargaining agreement; rather, she is seeking enforcement of the contract renewal she signed on April 29, 1986 issued by the Board pursuant to N.J.S.A. 18A:27-5 and 6.

Regarding this, petitioner argues that once the school year began and once the Board had fixed her salary, the superintendent could not unilaterally modify same. She cites in support of her position Harris v. Pemberton Bd. of Ed., 1939-49 S.L.D. 164; Galop v. Hanover Bd. of Ed., 1975 S.L.D. 358, aff'd State Board 366; DeRenzo v. Passaic Bd. of Ed., 1973 S.L.D. 236; Anson et al. v. Bridgeton Bd. of Ed., 1972 S.L.D. 638; and Bree v. Boonton Bd. of Ed., decided by the Commissioner August 6, 1984, aff'd in part/rev'd in part State Board, February 6, 1985, aff'd in part/rev'd in part N.J. Superior Court, Appellate Division, January 7, 1986, cases which, petitioner asserts, have established that when a board of education sets a teacher's salary for a particular school year, it cannot at a later date reduce the amount because of a clerical or administrative error.

Petitioner also argues that the ALJ miscites Conti and Cutler (decided by the Commissioner June 10, 1985, rev'd St. Bd. July 2, 1986, aff'd N.J. Superior Court, Appellate Division October 13, 1987) in that the case specifically recognized that a board cannot change placement on a salary guide during the year in question even if it made a mistake. At best, she avers, a board can freeze the salary for the following year which, she says, is exactly her legal argument herein.

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In response to these exceptions, the Board relies on its letter memorandum of October 16, 1987 filed with and summarized by the ALJ in the initial decision.

Upon review of the record, the Commissioner is in full agreement with the ALJ that where a matter rests upon interpretation of a collective bargaining provision, PERC has jurisdiction. Thus, he declines to consider the question as to whether the superintendent's action to modify petitioner's salary was consistent with the disputed collective bargaining agreement provision as such issue falls under PERC's jurisdiction.[1]

Notwithstanding the above, the Commissioner does not accept the recommended decision of the ALJ because he does not agree with the finding and conclusion that the matter rests upon interpretation of the controverted contract provision. Rather, he is in agreement with petitioner's position that the matter rests upon a determination as to whether the superintendent could, after the commencement of the 1986-87 school year and after the Board had acted in April 1986 to set petitioner's salary (with increment), unilaterally modify said salary.

Consequently, the matter is remanded to the Office of Administrative Law for further proceedings pursuant to the authority granted by N.J.S.A. 52:14B-10(c) to ascertain whether the superintendent's action to modify the salary set by the Board in April 1986 was inconsistent with the body of law previously cited by petitioner, as well as Stockton v. Trenton Bd. of Ed., decided by the Commissioner November 19, 1984, rev'd St. Bd. April 3, 1985, rev'd/rem'd N.J. Superior Court 210 N.J. Super. 150 (App. Div. 1986), Decision on Remand February 20, 1987 and Trenton Teachers Association v. Bd. of Ed. of Trenton, decided by the Commissioner October 6, 1986. Also to be considered is the Board's counterclaim that on the basis of the decision of the State Board in Logandro v. Bd. of Ed. of Cinnaminson, 1980 S.L.D. 1511, petitioner was not entitled to use her accumulated sick leave at the commencement of the 1986-87 school year.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

January 13, 1988

Pending State Board

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[1] While the Commissioner declines to consider the dispute herein in relation to the collective bargaining provision in question, he does note that a salary increment is in the nature of a reward for meritorious service. Bernards Twp. Bd. of Ed. v. Bernards Township Ed'n. Assoc., 79 N.J. 311 (1979); North Plainfield Educ. Ass'n v. Bd. of Ed. of North Plainfield, 96 N.J. 587 (1984). Since an increment may not be withheld after the commencement of the school year in which it is to take effect (Newark Tchrs. Ass'n. and Edna Smith v. Bd. of Ed. of Newark, decided June 13, 1984), the award or denial of a salary increment must, therefore, be based upon consideration of a teacher's performance in the prior year, not the year it is to take effect.

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4530-87
(OAL DKT. NO. EDU 8824-86, REMANDED)
AGENCY DKT. NO. 386-11/86

WAYNE E. PICKERING,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF NORTH PLAINFIELD,
Respondent.

John J. Barry, Esq., for petitioner

Sanford C. Vogel, Esq., for respondent (Vogel, Vastola & Gast, attorneys)

Record Closed: October 23, 1987 Decided: December 4, 1987

BEFORE **BRUCE R. CAMPBELL**, ALJ:

Wayne E. Pickering, petitioner, alleged and the North Plainfield Board of Education (Board), respondent, denied that the Board violated his tenure rights, violated the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq., and breached a contract of employment between the parties, all in connection with the Board's termination of the petitioner's employment as of December 31, 1986.

The matter was transmitted by the Department of Education to Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. The parties stipulated all material facts and the matter proceeded to summary disposition on the papers.

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On May 15, 1987, I issued an initial decision concluding that the resolution of the North Plainfield Board of Education of September 29, 1986, conferring tenure upon the petitioner was void ab initio. I also concluded that, at its meeting of October 31, 1986, the Board acted to rescind its offer of a contract to the petitioner. The Board attempted to notify the petitioner of its action by telegram. Per stipulation, delivery of the telegram was delayed by circumstances beyond the control of either party. On November 3, the Board secretary sent a letter to the petitioner indicating the text of the undelivered telegram, including the 60-day notice of termination. It appears the petitioner was paid through December 31, 1986, and ceased employment in the North Plainfield School District at the close of business on that day. Slip opinion at 13.

I found no Open Public Meetings Act defect that had not been cured. I further found that the 60-day notice period actually ended on January 2, 1987, and I **ORDERED** Pickering paid the appropriate salary for January 1 and 2, 1987. In all other respects, the petition of appeal was dismissed.

On June 25, 1987, the Commissioner remanded for the limited purposes of clarifying whether the petitioner was the only untenured elementary school principal in the district at the time in question and then considering what implication, if any, this fact has relevant to the intent of the North Plainfield Board of Education when it passed certain resolutions on September 29, 1986.

A brief hearing was held on October 9, 1987. Six persons who are Board members or were Board members at the pertinent time, the superintendent and the Board secretary - business administrator testified.

It was established that the status of principals in the district on September 29, 1986, was as follows:

PRINCIPAL	DATE WORK COMMENCED	DATE OF TENURE
Mr. Robert Axmann	9/18/72	9/18/75
Mr. Peter Fagone	8/01/59	8/01/62
Mr. Wayne Pickering	1/16/84	1/16/87*
Mr. Roger Weber	7/21/86	7/21/89*
Ms. Mary Elizabeth O'Connor	1/01/86	1/01/88*

*Date to be acquired if still employed. (R-1)

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The Board member who moved to grant the early tenure that underlies this controversy testified that she had no experience with early tenure prior to September 29, 1986. She also stated that the question was first raised at a public session, not in an executive session. She recalled asking the Board attorney, immediately prior to making the motion, if she could indeed make such a motion. When assured that she could, she moved to grant Pickering tenure effective immediately and included in her motion a statement that it was not to be deemed precedential.

The witness also stated she knew Mr. Weber had been hired the previous July. Her intent was to include him in the motion but she did not say to other members of the Board or to the public that her motion was applicable to all principals.

On cross-examination, the witness stated she had asked the Board attorney to express an opinion immediately before she made the motion and he stated that because the motion granted tenure to one person only, it was invalid. The witness further testified that she did not say at any subsequent public session of the Board that it was not her intent on September 29 to grant early tenure to all principals. In fact, her intent never was clarified publicly.

Another Board member testified that she recalled the action of September 29, 1986. She specifically recalls the language, "with the understanding that this motion shall not set a precedent." Neverthless, she believed Mr. Weber was included in the motion. She took no issue with the Board attorney's statement that the Pickering motion was invalid. She later voted not to hire Mr. Pickering and to rescind the September 29 motion.

At Board meetings of October 29 and 31, 1986, no one asked her what intent was on September 29. On October 29, she learned that a Board could not give early tenure to an individual, but only to a category. She voted in good faith on the September 29 motion. She believed Mr. Weber was included but never stated or heard a statement that early tenure was intended for all principals. The witness could recall no questions or discussion between the making of the motion and the vote on September 29.

A third Board member testified that she voted against the September 29, motion. She believed than that it would not apply to anyone other than Mr. Pickering and further that it would not set a precedent.

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A fourth Board member, who also voted against the motion, believed that the motion would confer tenure on Mr. Pickering only.

The Board president testified that he presided at the September 29 meeting, voted for the motion and believed it affected Mr. Pickering only. He asked no question nor did he discuss the motion. When he cast his vote, he considered the motion valid.

Another Board member testified that she voted against the motion, that there was no discussion of the motion and that she believed the motion would confer tenure upon Mr. Pickering and no one else.

This tribunal also heard testimony that two Board members, the superintendent and the Board secretary met in the Board attorney's office on or about October 28 to set procedures for the October 29 meeting. The Board member who made the September 29 motion read Rall v. Bd. of Ed. of the City of Bayonne, 54 N.J. 373 (1969). On the basis of Rall, she believed that her motion had to apply to all principals. At the October 29 Board meeting, the witness stated:

> I made my decision based on what was presented and that I still firmly believe, alright [sic] based on the facts presented, that the decision to rehire is a correct one, that the granting of as you want to call it early tenure was one where we put the matter to rest and we could get on with educating the kids because having controversy for another three months — I'm not asking you to agree with my reasoning but that is my reasoning. Alright [sic] ? (R-2).

When this Board member presented the motion on October 31, 1986 to rescind the motion granting Mr. Pickering tenure, she again did not state or otherwise convey to members of the Board that her intent, when she presented the original motion, was that there be application of early tenure to all within the category of principal. (R-2).

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DISCUSSION AND DETERMINATION

From the parol and documentary evidence, I FIND:

1. A majority of the Board as constituted on September 29, 1986, testified that their intent was to confer tenure on Mr. Pickering immediately and that the motion was to have no other application.

2. This view was expressed by those members who voted for the resolution and by those who voted against it.

3. It was not the intent of the Board to set a precedent in this regard and the motion of September 29 so stated.

4. There was some testimony to the effect that the Board had granted early tenure to two other individuals. However, exhibits R-3 and R-4, excerpts of pertinent Board minutes, merely show references in the motions that the individuals will acquire tenure the period of reappointment. In neither instance was the category granted tenure before the statutorily created time.

As exhibit R-1 indicates, Mr. Pickering, Mr. Weber, and Ms. O'Connor, part-time administrator of the adult high school, did not enjoy a tenured status on September 29, 1986. Nevertheless, a majority of the seven-member Board as constituted on September 29, 1986, believed that the purpose of the motion was to confer tenure upon Mr. Pickering immediately and that it was to have no other application. While it is true that Mr. Pickering was the only untenured elementary principal, that is not material to a determination in this matter.

Case law no longer makes distinctions among elementary, secondary and evening or adult school principals. Williams v. Plainfield Bd. of Ed., 176 N.J. Super. 154 (App. Div. 1980); Howley v. Ewing Tp. Bd. of Ed., 1982 S.L.D. 1328. The certification requirements for the principal certificate do not differentiate between elementary and secondary principals. N.J.A.C. 6:11-10.8. Only when it becomes necessary to determine seniority is the separation between elementary and secondary principal germane. N.J.A.C. 6:3-1.10(l).

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Irrespective of their intent, the Board members who voted on the September 29 resolution conferred tenure on all principals who did not enjoy that status upon service of two years, eight months and two weeks in the district. Spadoro v. Coyle, 1965 S.L.D. 134; Rall v. Bd. of Ed. of the City of Bayonne, 54 N.J. 373 (1969).

The Commissioner, in his remand, required a determination as to whether the petitioner was, in fact, the only nontenured principal in the district on September 29, 1986. It has been shown that he was not. The Commissioner also required that I ascertain the intent of the Board on September 29, 1986. The above-recited testimony, which I accept as credible, shows that the majority of the Board members voting on the motion, whether for or against, believed that the motion applied only to Mr. Pickering. The maker of the motion included the language, "with the understanding that this motion shall not set a precedent."

I **CONCLUDE** that the intent of a majority of the Board members on September 29, 1986, was to limit the scope of its resolutions to Mr. Pickering. Nevertheless, the mere saying of an incantation cannot make case law go away. Irrespective of their intent, the Board members conferred early tenure on all nontenured pricipals, that is, Mr. Pickering, Mr. Weber and Ms. O'Connor upon service of two years, eight months and two weeks.

Rall and Spadoro instruct that a Board is not entitled to select an individual member of an employment category who has served less than three years and confer tenure upon him alone. As in my initial decision of May 15, 1987, I **FIND** and **CONCLUDE** that the resolution of the North Plainfield Board of Education of September 29, 1986, conferring tenure immediately upon the petitioner was void ab initio. The determinations and orders set forth in the May 15, 1987 initial decision are incorporated herein as if set forth in full.

The petitioner sought to inject issues in and after hearing that are utterly beyond the scope of this limited hearing on remand. In light of the clear definition of the remand by the Commissioner, these issues cannot be countenanced.

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This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

4 DECEMBER 1987
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

DEC 7 1987
DATE

Dr. Saul Cooperman /rs
DEPARTMENT OF EDUCATION

Mailed To Parties:

DEC 9 1987
DATE

Ronald L. Parker /rs
OFFICE OF ADMINISTRATIVE LAW

ds

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WAYNE E. PICKERING,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NORTH PLAINFIELD, SOMERSET COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record and initial decision on remand rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions and the Board's reply exceptions thereto were timely filed pursuant to N.J.A.C. 1:1-18.4.

Petitioner posits three exceptions which are summarized, in pertinent part, below:

EXCEPTION I

THE DECISION ON REMAND IS BASED UPON ERRONEOUS FINDINGS OF FACT

Petitioner contends that the ALJ erred in finding that the Board's attorney, when asked for an opinion on whether the motion to grant him early tenure was valid, said it was invalid. Rather, petitioner avers that the testimony of the movant of said motion established that she believed the attorney considered the motion legal and that, in reliance on that opinion, the Board acted to grant tenure to petitioner.

Petitioner concedes on page 2 of his exceptions that there were two other nontenured principals at the time the Board voted to confer early tenure on him. Petitioner suggests, however, that one such employee was promoted from within the system and only required two years' service for tenure, thus rendering the acquisition of tenure after service of two years, eight months, and two weeks, as this decision would otherwise require, of no effect on her. The other nontenured employee, petitioner argues, was told days after the Board passed its resolution regarding Mr. Pickering, that he too was granted tenure. Petitioner cites the transcript of the hearing on remand in this regard but does not specify a particular cite therein.

EXCEPTION NO. 2

THE CONTRADICTORY FINDINGS OF THE COURT CANNOT BE RECONCILED

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Petitioner refutes the finding of the ALJ in the initial decision on remand, ante, that the intent of the Board is an irrelevant inquiry in the instant matter inasmuch as the Board members conferred early tenure on all nontenured principals, that is, Mr. Pickering, Mr. Weber and Ms. O'Connor, upon service of two years, eight months and two weeks. Petitioner avers this finding is contradictory to another on the same page wherein the ALJ concluded that the intent of a majority of the Board members on September 29, 1986, was to limit the scope of its resolution to Mr. Pickering. Petitioner finds these findings contradictory and irreconcilable.

EXCEPTION NO. 3

THE DECISION FLAUNTS THE PRINCIPLES OF RALL

Citing Tr. 2.10, petitioner avers Mr. Pickering was advised by the Board's attorney that he could not attend the executive session held on September 29, 1986, wherein the Board met to consider his employment status. Again relying on the transcript on remand at Tr. 11-12 and Tr. 6-8, petitioner reiterates his version of the facts that transpired at the closed session and thereafter in open session stating, "In reliance upon that opinion [of the Board attorney] the motion in question was made, seconded and voted upon. The members of the Board were convinced by reason of said opinion that the motion complied with the statutory requirements." (Petitioner's Exceptions, at p. 6) Petitioner claims the facts as he avers them comport with the ruling in Rall v. Board of Education of the City of Bayonne, 54 N.J. 373 (1969) wherein it states that the Board "intended to act in consonance with the statutory grant of power***." (Exceptions, at p. 7, quoting Rall at 377) Petitioner contends the Board

> "believed the form of resolution *** was a proper legal method of accomplishing the purpose." Accordingly, the action of the Board should be "construed broadly to do what it was intended to do, i.e., meet and satisfy the requirements of the statute." When this is done, the only conclusion that can be reached is that Petitioner was granted tenure by the Board on September 29, 1986. (Exceptions, at p. 7, quoting Rall, at 377)

Finally, petitioner notes that on the date the initial decision on remand was served upon counsel for petitioner, December 15, 1987, he requested a transcript. He asks that the Commissioner not decide this matter until he has the benefit of reviewing said transcript.

The Board's reply exceptions frame the issues in this case as follows:

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WHAT DID THE BOARD OF EDUCATION DO AND WHAT DID IT INTEND TO DO?

Citing Tr. 14 and 15, the Board recites its version of the facts, averring that a motion was made at its meeting of September 29, 1986 by Mrs. Hitchcock that petitioner be granted tenure effective September 29, 1986 "with the understanding that this motion shall not set a precedent" and further averring that said motion was seconded, no discussion followed and that it was passed four votes to three.

Based on these alleged facts, the Board contends that the hearing on remand established that on September 29, 1986 there were three principals employed by the Board, including petitioner, who did not on that date enjoy tenure. The Board further avers that said hearing also produced testimony that its intent was to confer tenure on Mr. Pickering immediately and that the motion was to have no other application. The Board cites the initial decision on remand in support of these two propositions.

Relying on Spadoro v. Coyle et al., 1965 S.L.D. 134 and Rall, supra, among other cases, the Board contends that the resolution seeking to confer tenure on the petitioner alone was void ab initio. The Board argues, "The language of the resolution plainly stated it was not its purpose to be similarly applicable to all principals as a class either at the adoption of the resolution or thereafter for 'this motion shall not set a precedent.'***" (Board's Reply Exceptions, at pp. 2-3)

The Board avers that the hearing on remand, wherein testimony was presented by those Board members who voted, established that the majority of the Board voting intended to vote on a motion conferring tenure on petitioner and that it was to have application to no other principals employed by the Board. Thus, the Board submits that the initial decision on remand be adopted by the Commissioner.

Initially, the Commissioner notes that although petitioner requested a transcript of the hearing be sent to this office, it has not been forthcoming. Because of the constraints placed upon the Commissioner by N.J.S.A. 52:14B-10(c) which requires he issue the final decision no later than 45 days from his receipt of the initial decision, the Commissioner is unable to grant petitioner's request that he delay his decision until receipt of said transcript.

Moreover, if petitioner had deemed the exact testimony of this matter essential to establishing proof of his contentions, he was obligated to order the transcript at the time of the conclusion of the hearing or, in the alternative, no later than at the close of the record so as to assure the availability of said transcripts for the Commissioner's consideration without the necessity of delaying the final decision or an extension of the statutorily prescribed time limit.

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Based upon the record which has been developed through the remand of this case, the Commissioner is able to render his decision without benefit of said transcript however. Both sides have now conceded, and the ALJ has incorporated into the record, his finding that there were, in fact, two nontenured principals employed by the Board in addition to petitioner on September 29, 1986, the date when the Board voted to extend the benefit of early tenure to petitioner. It is undisputed by the Board in its reply exceptions that one such principal, Ms. O'Connor, "was promoted from the system and only required two years service for tenure. Hence, granting tenure to Petitioner after service of two years, eight months and two weeks could not have any effect upon her (See page 2 of the Decision)." (Reply Exceptions, at p. 2) The Commissioner concurs with petitioner, based on this uncontested assertion, that only one other principal, then, Mr. Roger Weber, could have been affected by the grant of early tenure on the basis of petitioner's term, two years, eight months and two weeks. The Commissioner so finds.

Said finding that there was in fact one other nontenured principal on September 29, 1986 establishes, unequivocally, that the action taken by the Board on said evening is void ab initio, for the reasons that follow.

The Commissioner first notes his accord with the ALJ that insofar as tenure is concerned, no distinction exists among elementary, secondary and evening or adult school principals. See Williams v. Plainfield Bd. of Ed., 176 N.J. Super. 154 (App. Div. 1980). See also Initial Decision on Remand, ante. Thus, the Commissioner finds without merit any suggestion that the capacity in which the nontenured principals served has bearing on whether they were included among the class of employees for whom early tenure was to be granted.

Moreover, the Commissioner concurs with the ALJ that "Rall and Spadoro instruct that a Board is not entitled to select an individual member of an employment category who has served less than three years and confer tenure upon him alone." (Initial Decision on Remand, ante) However, the Commissioner rejects the ALJ's suggesting the following contradictory statements:

> Irrespective of their intent, the Board members who voted on the September 29 resolution conferred tenure on all principals who did not enjoy that status upon service of two years, eight months and two weeks in the district. Spadoro v. Coyle, 1965 S.L.D. 134; Rall v. Bd. of Ed. of the City of Bayonne, 54 N.J. 373 (1969).
>
> ***
>
> I CONCLUDE that the intent of a majority of the Board members on September 29, 1986, was to limit the scope of its resolutions to Mr. Pickering.

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>
> ***As in my initial decision of May 15, 1987, I FIND and CONCLUDE that the resolution of the North Plainfield Board of Education of September 29, 1986, conferring tenure immediately upon the petitioner was void ab initio. The determinations and orders set forth in the May 15, 1987 initial decision are incorporated herein as if set forth in full.

The above language obfuscates and confuses the simple requirements of Rall and Spadoro. Should a board choose to grant early tenure on one member of a class, it must do so for all such members in the class. Any attempt to limit the benefit of tenure to one in the category voids the action from its inception.

The Commissioner's remand asked for, and the ALJ provided, his considered evaluation of the Board's intent in voting on the resolution in question. The intent of the individual members is not at issue; rather, the body corporate's intent is. Having now established that there was at least one additional nontenured principal who would be affected by any legally correct grant of early tenure, the Commissioner finds its action bestowing early tenure on petitioner "with the understanding that this motion shall not set a precedent" (Tr. 14-15) was in direct contravention of the holdings of Rall, supra, and Spadoro, supra, in that it attempted to bestow tenure only on him. Said action, thus, is void.

The Commissioner so finds notwithstanding any argument raised by petitioner in exceptions and countered by the Board as to exactly what the advice of Board counsel was concerning the legality of such a motion or whether its action was taken in good faith. There can be no question now that including language in the motion stating that it was the Board's intent not to "set a precedent" can only be construed, after the vote was seconded and passed, as excluding from this benefit the other nontenured principal in the district.

Accordingly, the Commissioner affirms that part of the initial decision on remand and the initial decision dated May 15, 1987, which established that the resolution of the Board of September 29, 1986, conferring tenure, effective on that date, solely upon petitioner was viod ab initio, but for the foregoing reasons, rather than those set forth in the initial decisions. Thus, without tenure, the Board was free to consider dismissing or terminating petitioner without invoking N.J.S.A. 18A:6-10 et seq.

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Having resolved that petitioner was not granted tenure as of the meeting of September 29, 1986, the issues concerning salary and alleged violations of the Open Public Meetings Act will now be addressed. In this regard, the Commissioner adopts as his own the findings and conclusions of the ALJ at pages 13-14 of the initial decision dated May 15, 1987 with the following amplification pertaining to the contract that was in effect on October 31, 1986, the date when the Board properly and finally resolved to rescind its offer of a contract to petitioner. (J-6)

The document marked J-3 in evidence, NOTICE TO PROFESSIONAL EMPLOYEES HAVING TENURE OF SERVICE UNDER THE PROVISIONS OF 18:13-16 and ACCEPTANCE OF SALARY TERMS BY PROFESSIONAL EMPLOYEES HAVING TENURE OF SERVICE UNDER THE PROVISIONS OF 18:13-16 are not contracts, as alleged by petitioner. Rather, they are, respectively, 1) a notice of tenure and 2) acknowledgment of acceptance of salary terms for tenured employees. The only contract admitted into evidence is J-1, signed by petitioner on April 16, 1986. It was the contract in effect on October 31, 1986 not only because it was the only contract in question, but also because it has been established that the Board's attempt to confer tenure early on petitioner was void ab initio. Therefore, no documents relying on petitioner's having acquired tenure have any force or effect. Thus, as noted by the ALJ, the mutual 60-day notice clause, which is the fourth paragraph of J-1, was in force on October 31, 1986.

Based on the record before him and the above findings, the Commissioner concurs with the finding of the ALJ below that petitioner received 60 days' notice on the date he was formally apprised by letter of the Board's final action in regard to his employment status, November 3, 1986. Sixty days from that date is January 2, 1987. Consequently, since the Board was required in said contract to provide petitioner 60 days' notice of its intention to terminate, said period expired on January 2, 1987, rendering the Board liable for two days' pay, prorated, for January 1 and 2, 1987.

Accordingly, the Commissioner directs the North Plainfield Board of Education to pay petitioner the appropriate salary for January 1 and 2, 1987 and, further, directs that the balance of the instant Petition of Appeal be dismissed with prejudice. The initial decision on remand is affirmed, as modified herein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

January 20, 1988

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WAYNE E. PICKERING,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NORTH PLAINFIELD, SOMERSET COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, January 20, 1988

For the Petitioner-Appellant, John J. Barry, Esq.

For the Respondent-Respondent, Vogel, Vastola & Gast
(Sanford C. Vogel, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

June 1, 1988

Pending N.J. Superior Court

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8076-86
AGENCY DKT. NO. 349-10/86

DONALD A. COOK,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF BRICK, OCEAN COUNTY AND WARREN WOLF, SUPERINTENDENT,
Respondents.

John J. Anastasio, Esq., for the petitioner

Jay C. Sendzik, Esq., for the respondents (Anton & Sendzik, attorneys)

Record Closed: October 28, 1987 Decided: December 11, 1987

BEFORE BEATRICE S. TYLUTKI, ALJ:

PROCEDURAL HISTORY

This matter concerns the claim of Donald A. Cook, the petitioner, for sick leave benefits pursuant to N.J.S.A. 18A:30-2.1, which were denied by the Board of Education of the Township of Brick, Ocean County (Board). Mr. Cook filed a petition and the matter was transmitted to the Office of Administrative Law on November 25, 1986, for a hearing pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

During the prehearing conference held on January 30, 1987, John J. Anastasio, Esq., on behalf of the petitioner, withdrew the second count of the petition which relates to the Board's submission of certain information regarding the petitioner to the Division of Pensions.

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In addition, at the prehearing conference, the parties indicated that there was a case regarding the same injuries in the Workers' Compensation Court, and there was a discussion as to whether this matter should be placed on the inactive list pending a determination in the workers' compensation case.

Thereafter, both parties agreed, consistent with the decision in Forgash v. Lower Camden County School, 208 N.J. Super. 461 (App. Div. 1985), that the case should be initially decided by the Workers' Compensation Court. Prior to the issuance of an order placing the matter on the inactive list of cases, Mr. Anastasio informed me that the workers' compensation matter had been concluded by an order approving a settlement.

The parties then entered into extensive discussions regarding a settlement of this matter. Since the settlement negotiations were not successful, on July 20, 1987, Mr. Anastasio filed a motion for summary judgment. A response to this motion was filed by Jay C. Sendzik, Esq., on behalf of the respondents. After several subsequent filings by the parties, testimony relating to the motion was taken on October 28, 1987, at the Office of Administrative Law in Trenton, New Jersey. The record in this matter closed on that date.

FINDINGS OF FACT

I FIND that the relevant facts in this matter are not in dispute.

Mr. Cook was employed as a teaching staff member by the Board pursuant to an annual 10-month contract.

On November 26, 1984, during a physical education class, Mr. Cook injured his right shoulder while demonstrating a wrestling position. This accident arose out of and in the course of his employment as a teaching staff member.

Mr. Cook continued to work after his injury; however, due to this injury, surgery was scheduled for May 17, 1985.

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8076-86
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On April 17, 1985, the petitioner, while on bus supervision duty, assisted two vice principals who were restraining an unruly student on a bus and he reinjured his shoulder. This accident also arose out of and in the course of his employment as a teaching staff member.

Mr. Cook continued to work after this second accident until his operation for the injuries on May 24, 1985. Mr. Cook did not return to work during the remainder of the 1984-85 school year. For this period, four weeks and two days, Mr. Cook received his full salary from the Board. The Board received temporary disability payments from its workers' compensation insurance carrier for the period Mr. Cook was out of work at the end of the 1984-85 school year. These payments were not given to Mr. Cook; rather, they were retained as a recoupment of part of his regular salary payments for that period. In his certification of October 2, 1987, Robert K. Stutts, the business administrator for the Board, calculated that Mr. Cook would have been entitled to a temporary disability payment of $2,291.86 for the period of four weeks and two days if the Board had not paid him his full salary.

Mr. Cook requested a sick leave of absence with pay, pursuant to N.J.S.A. 18A:30-2.1, starting at the commencement of the 1985-86 school year. The Board denied this request and granted Mr. Cook a sick leave without pay for the 1985-86 school year. Petitioner made a subsequent request for a sick leave with pay, but the Board did not respond to that request.

Mr. Cook did not teach during the 1985-86 school year and he did not receive any temporary disability payments or salary payments during that year. Mr. Cook was awarded a disability retirement pension effective April 1, 1986. According to Mr. Cook, the pension payments began on July 1, 1986, because he was on the Board's payroll until the end of the 1985-86 school year.

Petitioner filed a workers' compensation action, Docket Number 85-25409, and an order approving a settlement in that matter was entered on January 15, 1987. In that settlement, it is stated that the award for temporary disability had been "paid in full" and that the petitioner is entitled to an award for permanent disability in the amount of $71.43 a week for 105 weeks, a total of $7,500. Mr. Cook has received this amount less fees.

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For the 1984-85 school year, the petitioner's salary was $29,750 plus a longevity payment of $1,020, for a total of $30,770. I recognize that in his October 2, 1987 certification, Mr. Stutts stated that the petitioner's salary for that year was $30,770; however, that amount is inaccurate since it is not consistent with the petitioner's record which is attached to Mr. Stutts' certification or with the information in Mr. Cook's certification. If he had worked during the 1985-86 school year, Mr. Cook would have been entitled to a salary of $31,745 plus a longevity payment of $1,020, for a total of $32,765.

Both Mr. Anastasio and Mr. Stutts stated that it is the Board's position that since Mr. Cook did not receive any temporary disability benefits in the workers' compensation case for any period during the 1985-86 school year, he is not entitled to any benefits pursuant to N.J.S.A. 18A:30-2.1 during that period.

In his brief and at the hearing, Mr. Anastasio argued that, pursuant to N.J.S.A. 18A:30-2.1, the petitioner is entitled to $29,907.80, plus interest and reasonable attorney's fees. Mr. Anastasio arrived at this figure by taking $32,765, Mr. Cook's projected salary for the 1985-86 school year, and subtracting $2,857.20 from that amount. The $2,857.20 figure represents $71.43 per week (the permanent disability benefit awarded in the workers' compensation case) muliplied by 40 weeks (estimated weeks in the 1985-86 school year).

CONCLUSIONS OF LAW

Based on the facts, I **CONCLUDE** that Mr. Cook was entitled to and did receive sick benefits, pursuant to N.J.S.A. 18A:30-2.1, for the period he was out of work at the end of the 1984-85 school year, and this matter only involves the question of his eligibility for such benefits in the 1985-86 school year.

Initially, it is necessary to clarify the apparent confusion as to the settlement approved by the Workers' Compensation Court. Based on my review of the documents and the testimony, I **CONCLUDE** that the statement in the order that the temporary disability award was paid in full refers to the fact that temporary benefits were paid by the Board's insurance carrier for the period of four weeks and two days at the end of the 1984-85 school year. Also, I **CONCLUDE** that the other amount of money awarded to the petitioner was for the permanent disability, which by law is different than a temporary disability award, N.J.S.A. 34:15-12. Therefore, contrary to Mr. Anastasio's argument, the

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amount of the permanent disability award is not subject to the setoff provision in N.J.S.A. 18A:30-2.1, nor does this award signify a determination that Mr. Cook was temporarily disabled for any period during the 1986-87 school year.

Since the petitioner agreed to a settlement as to his temporary disability benefits in the workers' compensation case, the issue then is whether he can now reopen the matter of his temporary disability benefits and seek benefits, pursuant to N.J.S.A. 18A:30-2.1, for a period beyond that provided in the workers' compensation settlement.

N.J.S.A. 18A:30-2.1 provides:

> Whenever any employee, entitled to sick leave under this chapter is absent from his post of duty as a result of a personal injury caused by an accident arising out of and in the course of his employment, his employer shall pay to such employee the full salary or wages for the period of such absence for up to one calendar year without having such absence charged to the annual sick leave or the accumulated sick leave provided in section 18A:30-2 and 18A:30-3. Salary or wage payments provided in this section shall be made for absence during the waiting period and during the period the employee received or was eligible to receive a temporary disability benefit under chapter 15 of Title 40, Labor and Workmen's Compensation, of the Revised Statutes. Any amount of salary or wages paid or payable to the employee pursuant to this section shall be reduced by the amount of any workmen's compensation award made for temporary disability.

In the Forgash case, the court recognized the expertise of the Workers' Compensation Court in matters involving work-related injuries and determined that the Workers' Compensation Court has primary jurisdiction in such cases. Further, the court stated that "as the express function of N.J.S.A. 18A:30-2.1 is to complement workers' compensation benefits for a strictly limited time period, a proceeding pursuant to that statute may not be utilized to supplant the function of the compensation court." Id. at 466-67.

Also, it has been established that when an issue of fact or law is determined by a valid and final judgment, the determination is a conclusion in a subsequent action between the parties regarding the same issue. The reasons and policy concerns behind the doctrine of collateral estoppel were stated in the decisions in City of Hackensack v. Winner, 162 N.J. Super. 1 (App. Div. 1978), mod., 82 N.J. 1 (1980). In that case, the Appellate Division stated that res judicata and collateral estoppel are based upon "policy

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considerations which seek to guard the individual against vexatious repetitious litigation and the public against the serious burdens which such litigation imposes on the community," 162 N.J. Super. at 28. Later, the Supreme Court stated that these doctrines are applicable to administrative tribunals and agency hearings for the same policy reasons as the courts: finality and repose; prevention of needless litigation; avoidance of duplication; reduction of unnecessary burdens of time and expenses; elimination of conflicts, confusion and uncertainty; and basic fairness, 82 N.J. at 32-33.

In this case, I **CONCLUDE** that the doctrine of collateral estoppel is applicable and bars any further litigation as to the question of Mr. Cook's temporary disability during the 1985-86 school year. Also, I **CONCLUDE** that the application of collateral estoppel in this matter seems particularly appropriate in light of the Forgash decision.

In addition, I **CONCLUDE** that an acceptable argument can be made that any further litigation regarding the matter is barred by the doctrines of equitable estoppel and waiver since Mr. Cook voluntarily settled his workers' compensation claim for temporary disability benefits. If this matter were opened and Mr. Cook was determined to have been temporarily disabled for additional periods of time, the Board would not be entitled to any additional setoff payments from its insurance carrier.

Therefore, I **CONCLUDE** that Mr. Cook is not entitled to any additional payments pursuant to N.J.S.A. 18A:30-2.1.

Even if Mr. Cook were determined not to be foreclosed from pursuing this matter, I **CONCLUDE** that a decision regarding his claim for sick benefits during the 1985-86 school year pursuant to N.J.S.A. 18A:30-2.1, could only be made after a full hearing, and the burden would be on Mr. Cook to show that he was unable to return to work during the 1985-86 school year due to his injuries. Also, it should be noted that the sick benefits provided by N.J.S.A. 18A:30-2.1 are limited to a period of one calendar year after the accident or after the respondent's first absence for said injury, Williams v. Deptford Township Board of Education, 192 N.J. Super. 31 (App. Div. 1983), affirmed on other grounds, 98 N.J. 319 (1985). Therefore, I **CONCLUDE** that even if Mr. Cook were entitled to any additional benefits pursuant to N.J.S.A. 18A:30-2.1, said benefits would not extend beyond May 25, 1986.

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Based on the above, I **CONCLUDE** that the Board correctly denied Mr. Cook's request for additional benefits pursuant to N.J.S.A. 18A:30-2.1, and I **ORDER** that this matter be **DISMISSED.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

December 11, 1987
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

DEC 14 1987
DATE

Seymour Wells
DEPARTMENT OF EDUCATION

Mailed To Parties:

DEC 16 1987
DATE

OFFICE OF ADMINISTRATIVE LAW

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5723-87
AGENCY DKT. NO. 237-7/86
(EDU 5303-86, Remanded)

JOSEPH ROSANIA,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF MIDDLESEX,
Respondent.

Stephen B. Hunter, Esq., for petitioner (Klausner, Hunter & Oxfeld, attorneys)

Malachi J. Kenney, Esq., for respondent (Kenney & Kenney, attorneys)

Record Closed: November 1, 1987 Decided: December 14, 1987

BEFORE **BRUCE R. CAMPBELL**, ALJ:

Joseph Rosania (petitioner) alleged and the Middlesex Borough Board of Education (Board) denied that the Board improperly withheld his employment and adjustment increments for the 1986-87 school year.

The matter was joined before the Commissioner of Education, who transmitted it on August 12, 1986, to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. The matter was heard on February 19, 1987 in the Middlesex Borough Municipal Court. An initial decision issued on July 10, 1987, concluding the petitioner failed to show by a preponderance of the credible evidence that the Board had improperly withheld his salary, adjustment and longevity

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increments for the 1986-87 school year and concluding that the petitioner was aware of deficiencies in his performance and of the Board's intent to keep his salary at $30,300.

The Commissioner of Education, on August 20, 1987, remanded the matter for a determination of the precise language of the resolution adopted by the Board establishing the petitioner's salary for 1986-87. No other aspect of the matter is directed to my consideration in the remand and, therefore, all other questions and issues must be deemed settled.

The minutes of the April 14, 1986 Middlesex Board of Education meeting state at page 39

> Motion by Mr. Kizis, seconded by Mr. Oliver to approve the personnel actions as presented on the attached sheets - Attachment M - No Increment.
> Carried by roll call vote 8-0.
>
> Ayes: Mr. Benitz, Mr. Kizis, Mr. Masessa, Mrs. Muglia, Mr. Oliver, Mrs. Platten, Mrs. Robinson, Mr. Griesser
>
> Nays: None

The attachment referred to states:

> ATTACHMENT M - No Increment
>
> Joseph Rosania - $30,300.00

The precise language of the Middlesex Board of Education is unambiguous. The Board intended to withhold all increments that Mr. Rosania otherwise would have received for the 1986-87 school year. As found in the initial decision of July 10, 1987, the fact that the petitioner' salary is clearly identified as being $30,300 for the ensuing year makes it obvious that the intent of the Board was to withhold all increments.

Further, both the motion and Attachment M as recorded in the minutes of April 14, 1986 use the phrase "No Increment." While it might be argued, under other circumstances, that this might more clearly have been stated "No Increments," in the

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present context it clearly means no increment of any type. The combination of the phrase "No Increment" and the precise inclusion of the petitioner's salary at the 1985-86 level manifest the intent of the Board.

In consideration of the foregoing, I **FIND** and **CONCLUDE** that the petitioner has failed to show by a preponderance of the credible evidence in the record that the decision of the Middlesex Borough Board of Education to withhold his salary, adjustment and longevity increments for the 1986-87 school year is illegal, arbitrary or in contravention of N.J.S.A. 18A:29-14.

Accordingly, the petition of appeal is **DISMISSED**. It is so **ORDERED**.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

14 December 1987
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, A.L.J.

DEC 15 1987
DATE

Receipt Acknowledged:
Seymour Cain
DEPARTMENT OF EDUCATION

DEC 17 1987
DATE

Mailed To Parties:
Rachel D. Parker
OFFICE OF ADMINISTRATIVE LAW

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JOSEPH ROSANIA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MIDDLESEX, MIDDLESEX COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

The record and initial decision on remand have been reviewed. Exceptions to the recommended initial decision on remand were timely filed by petitioner pursuant to N.J.A.C. 1:1-18.4. Incorporated into this decision are all submissions filed by the parties relative to the earlier initial decision dated July 10, 1987, as well as the Commissioner's summaries of those arguments made a part of his decision on remand dated August 20, 1987.

Petitioner avers in exceptions to the remanded initial decision that the ALJ in his initial decision on remand "misses the point of the Commissioner of Education's prior decisions that have dealt with the appropriate language to be utilized by the Board of Education in withholding of increment matters when he concludes that the precise language of the Middlesex Board of Education is unambiguous***." (Exceptions, at p. 1) Petitioner claims that the listing of a salary, without the appropriate language being used by the Board of Education with regard to whether the Board is withholding the employment, adjustment or longevity increments, or any combination thereof, certainly does not establish the intent of a local board. (Id., at p. 2)

Relying on his prior submissions, which are incorporated herein by reference, petitioner claims that administrative precedent establishes that the reference made to "no increment" in this matter may only permit the Board to withhold the employment increment of a teacher. He further argues that including the $30,300 figure in the Board minutes "may have been viewed as delineating the salary of Joseph Rosania, given only the withholding of his employment increment." (emphasis in text) (Id.) To have intended the withholding of all increments, argues petitioner, the Board should have used language such as "employment, adjustment, and longevity increments" be withheld for the 1986-87 year or, in the alternative, used language such as "increments" or "all increments" or by making reference to "the freezing of Joseph Rosania's $30,300 salary during the 1985-86 school year for the 1986-87 school year." (Id.)

Having failed to incorporate any of the above options in its action to withhold petitioner's increment, petitioner contends

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that the Board's intent remains unclear and, as a matter of law, could only have withheld his employment increment for the 1986-87 school year. Thus, petitioner submits that the Board should be directed to restore to him for the 1987-88 school year his adjustment and longevity increments, with interest.

Having carefully reviewed the record on remand, which has as an exhibit now admitted to the record the official Board minutes of April 14, 1986, the Commissioner may now properly consider the disposition of this matter. It bears reinforcing that while a board agenda may provide some clue as to the body's intent on a given matter, only the official board minutes attest to the action taken by a board and can be the only reliable source of information in determining the import of said action. Hence, the remand of this matter for inclusion of the actual official Board minutes.

For the reasons stated below, the Commissioner agrees with the ALJ that while it could have been expressed more clearly, the Board Resolution embodied in the Board minutes of April 14, 1986 made plain the Board's intent to withhold all increments for the 1986-87 school year that might otherwise have been available to petitioner, had his service warranted such meritorious compensation.

Citing Ormosi v. Kingwood Township Bd. of Ed., Hunterdon County, decided by the Commissioner July 15, 1980, petitioner argues that the Board of Education cannot, pursuant to the language of N.J.S.A. 18A:29-14, withhold his adjustment increment in addition to his employment increment absent specific references to the adjustment increment within the applicable Board minutes and operative Board resolution. The Commissioner agrees with the ALJ that Ormosi is distinguishable from the instant matter where the Board herein made specific reference in its Board minutes to the amount that petitioner would be receiving as his salary for the 1986-87 school year. In the Ormosi case, no figure at all was noted in the Board minutes or in any other document elaborating on the board's intent in withholding Ormosi's "increment." Rather, the minutes reflected that Ormosi "remain at step 9 BA" (Slip Opinion, at p. 5). As the ALJ notes in the instant matter, "[T]he fact that the petitioner's salary is clearly identified as being $30,300 for the ensuing year makes it obvious that the intent was to withhold all increments. Had the Board intended to withhold only the salary increment, the $30,300 figure would have been different." (Initial Decision of July 10, 1987)

However, the Commissioner notes that Exhibit P-3 in evidence, a salary notification notice addressed to petitioner dated November 25, 1985, establishes the uncontested fact that petitioner received $31,060 as a total salary for the 1985-86 school year. Said document states, "Your 1985-86 contracted salary is $30,300 + $760 longevity." (P-3) As noted above, the minutes of the April 14, 1986 Board meeting specify in Attachment M that Joseph Rosania is to receive $30,300 as his salary for the 1986-87 school

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year and, further, that he is to receive no increment. While the Commissioner agrees with the ALJ that "the fact that the petitioner's salary is clearly identified as being $30,300 for the ensuing year makes it obvious that the intent was to withhold all increments" (Initial Decision of July 10, 1987) to afford petitioner only $30,300 as total compensation in the instant matter would clearly be in contravention of N.J.S.A. 18A:28-5, which states in pertinent part:

> The services of all teaching staff members *** shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause ***.

Since petitioner's actual salary for the 1985-86 school year inclusive of longevity was $31,060, he could not be reduced in compensation to the lesser amount of $30,300, which the Board intended absent the certification of tenure charges. Consequently, the Commissioner finds that in conformity with the requirements of Ormosi, supra, petitioner herein shall be entitled to a salary for the 1986-87 school year in an amount not less than that amount he actually received for the preceding year, but excluding any increment payment in excess of that amount, because the Board's intent to withhold all increments was demonstrated to the ALJ and the Commissioner, albeit based on a figure which was inaccurate. The above finding is made based on the Commissioner's consideration of the allegations posited by petitioner in his post-hearing submissions and Exceptions Three, Four and Five to the original initial decision of July 10, 1987, discussion of which follows below.

Exceptions Three, Four and Five take issue with the ALJ's review of the facts and record before him. The Commissioner notes that petitioner's sole citation in objecting to the ALJ's findings of fact is to the Court's remand in In the Matter of the Tenure Hearing of Patrick Caporaso, School District of the Township of Belleville, Essex County, decided by the Commissioner October 15, 1985, aff'd State Board May 7, 1986, rev'd New Jersey Superior Court, Appellate Division, March 19, 1987, decision on remand July 17, 1987. The Caporaso standard of review is that which establishes the agency head's review of any decision rendered by a hearing officer or an ALJ, as compared to a judicial standard of review. It requires the agency head to conduct an independent review of the record before him. In this matter, as in all others before him, the Commissioner has assiduously met the requirements articulated in Caporaso, as evidenced by his having considered P-3 in evidence in this determination herein.

The Commissioner emphasizes, however, that the matter before him now is an increment withholding case. As such, the Commissioner's standard of review is that established in Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288 (App. Div. 1960). The

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Commissioner's review of such matters is "not to substitute his judgment for that of those who made the evaluation but to determine whether they had a reasonable basis for their conclusions." (at 296) In this regard, the Commissioner determines:

> (1) whether the underlying facts were as those who made the evaluation claimed, and (2) whether it was unreasonable for them to conclude as they did upon those facts, bearing in mind that they were experts, admittedly without bias or prejudice, and closely familiar with the mise en scene***. (at 296-7)

The Court further set forth in Kopera that "the burden of proving unreasonableness is upon the appellant." (emphasis supplied) (at 297) Thus, petitioner herein is charged with the burden of convincing the Commissioner that the Board had no reasonable basis for its conclusion to withhold his increment. To the extent, then, that reliance is placed on the Caporaso standard, petitioner's arguments are deemed to be misplaced and without merit.

The Commissioner having applied the standard as set forth in Kopera, supra, finds petitioner has failed to establish, by a preponderance of the credible evidence, that the Board's decision to withhold his increments for the 1986-87 school year was unreasonable. It is undisputed that petitioner lost the attendance cards which had been entrusted to his care. See Letter dated March 19, 1986, P-13. Petitioner would excuse such commission by stating "[t]here was again no factual evidence submitted that would indicate that Joseph Rosania was negligent in the storage of the student attendance cards at issue, given the delineated security problems regarding the office." (Petitioner's Post-Hearing Brief, at p. 12) Similarly, petitioner does not dispute that he left his class unattended on February 27, 1986. See petitioner's Post-Hearing Brief at p. 10. In this instance, petitioner would absolve himself of responsibility for his duty of supervision and instruction by suggesting that "he left his students for a very brief period of time to get another VCR tape for his class while his students were doing aerobics." (Id., at p. 10)

These instances of admitted dereliction of his duty as a physical education instructor entrusted with the education and supervision of student charges are prima facie evidence of petitioner's unsatisfactory performance. That petitioner attempts to rationalize away responsibility for his actions is further indication of his abdication of responsibility. Concerning these episodes and the other instances before him, the Commissioner adopts as his own the findings and conclusions of the ALJ as set forth in the prior initial decision. He adds that any one instance of unsatisfactory performance might be adequate to justify an increment withholding. See Initial Decision of July 10, 1987, where the Board

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cites Friedelbaum v. Manalapan-Englishtown Regional School District, decided by the Commissioner July 26, 1984. Therein it states:

> The evaluation process is not a numbers game; even if there are only a few areas of the Petitioner's performance which are deemed to be either unsatisfacatory (sic) or needing improvement, they may be viewed by supervisors to be so serious and significant to the teaching process that they themselves may justify an increment denial even if overall the other areas of the teacher's performance are either good or excellent.

Because "the scope of the Commissioner's review is *** not to substitute his judgment for that of those who made the evaluation but to determine whether they had a reasonable basis for their conclusion" (Kopera, supra, at 296; see also Lawrence Littman v. Bd. of Ed. of the Township of Cranford, 1981 S.L.D. 897), it is not appropriate that the Commissioner "***'redetermine for himself whether petitioner had in fact been unsatisfactory as a teacher.'***" (Kopera, at 295) He does find, however, based upon his independent review of the record, that the Board herein did not exceed its authority in denying petitioner an increase in salary for the school year 1986-87. He further finds that petitioner had specific and timely notice of his unsatisfactory performance as noted in the comment section of the Observation Reports dated October 23, 1985 (P-1); December 12, 1985 (P-4); January 6, 1986 (P-5); February 24, 1986 (P-6); and in the memo dated March 19, 1986 (P-13), among others.

Moreover, the Commissioner rejects as being without merit the argument posited by petitioner, citing Robert Gollob v. Englewood Board of Education, 1980 S.L.D. 1354 and Walter Carney v. Freehold Regional High School District Board of Education, decided by the Commissioner July 20, 1984, aff'd State Board February 6, 1985, aff'd N.J. Superior Court, Appellate Division, November 8, 1985 that he was provided inadequate notice and opportunity to remediate deficiencies in his performance. The Commissioner agrees with counsel for the Board that the requirements set forth in those two cases have been met. The language contained in the Observation Reports is clear and unambiguous as to the need for improvement. See comment section of Observation Reports (P-1), (P-4), (P-5), (P-6), and in the memo (P-13), among others. The problems noted in the comment section of the Observation Reports both before the first of January 1986 and thereafter referred to petitioner's PIP and specified ways to improve his performance.

Moreover, the Commissioner finds that petitioner knew or should have known during the course of the 1986-87 school year of the areas of concern expressed by the administration concerning his performance, in that his increment had been withheld for similar reasons the year before. Reference to said areas of deficiency are noted in his evaluations. See, e.g., P-4, Section IV "Recommenda-

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tions" wherein it states at Subsection C, "Mr. Rosania is to work very closely with the high school administration and Mr. Freeman on any 'needs improvement' areas in his 1984-85 yearly evaluation, which resulted in the denial of an increment. These areas are also pointed out in his 1985-86 Professional Improvement Plan." In no way is it reasonable for petitioner to contend that he was surprised, without help in remediating his deficiencies or without sufficient opportunity to remediate the noted inefficiencies or deficiencies cited by the administration. The Commissioner so finds. In this regard the Commissioner adopts as his own the findings of the ALJ as set forth in the initial decision of July 10, 1987. He does note and corrects the comment made by the ALJ in the initial decision, however, wherein he states: "As the petitioner correctly notes, Gollub (sic), above, and related decisions point out that the purpose behind an evaluation procedure is to ensure that a teacher receives adequate notice of any unsatis- factory performance and ways of improving future performance suffi- ciently far in advance of any economic sanctions against him." (emphasis supplied) The Commissioner notes the substitution of the word an for the, as it appeared in the text of Gollob, supra, at 1359. The use of the definite article "the" in the Gollob case referred to a particular evaluation procedure within the district in Englewood, as set forth in that district's contract. While later case law, such as Carney, supra, and Donald C. Kouba v. Board of Education of the Borough of Leonia, Bergen County, decided by the Commissioner June 25, 1984, aff'd State Board October 3, 1984, establishes the requirement of some notice and opportunity to correct defects in a withholding case, the Commissioner emphasizes that the requirement of notice and opportunity to correct defects in a withholding of increment matter certainly do not rise to that required in a tenure matter, as noted above.

Accordingly, the initial decisions of July 10, 1987 and of December 14, 1987 are adopted as modified herein. The Commissioner adopts that part of the earlier initial decision which finds and determines that petitioner has failed to show by a preponderance of the credible evidence in the record that the decision of the Middlesex Borough Board of Education to withhold his salary, adjustment and longevity increments for the 1986-87 school year was without a reasonable basis. However, the Commissioner corrects that part of the two initial decisions which determined petitioner's salary to have been properly established by the Board at $30,300 for 1986-87. To the extent that the Commissioner has found herein that the Board's action in setting his salary at $30,300 for the 1986-87 school year was in error based upon P-3, the Commissioner modifies the initial decisions to reflect the proper amount, less all increments, as $31,060. He directs that the Board compensate petitioner in an amount not less than that amount he received for the preceding year, but excluding any increment payment in excess of that amount.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

January 22, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5021-87
AGENCY DKT. NO. 183-6/87

NEWARK FOOD SERVICE EQUIPMENT COMPANY,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY,
Respondent.

Charles M. Wadro, Contract Sales Manager, Newark Food Service Equipment Company, Inc., appearing pursuant to N.J.A.C. 1:1-5.4(a)5

Victor E.D. King, Esq., for respondent
(King, King & Goldsack, attorneys)

Record Closed: December 10, 1987 Decided: December 15, 1987

BEFORE **PHILIP B. CUMMIS**, ALJ:

Newark Food Service Equipment Company (petitioner) responded to solicitations for bids advertised by the Board of Education of the City of Plainfield, Union County, for

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supply of ovens known as "Blodgett Oven, No. 123" or "Equal." Petitioner's bid was for supply of a "Market Forge" convection oven. All bids were received on March 23, 1987, at which time the bids were opened. On May 12, 1987, petitioner met with the administrators concerning the substituted brand of oven. On July 18, 1987, following a recommendation of its finance committee, the Board rejected all bids. In a petition of appeal filed with the Commissioner of the Department of Education on June 12, 1987, petitioner alleged that it was the lowest responsible bidder and that judgment should be entered awarding it the contract. The Board admitted the sequence of events concerning its advertisement and solicitation for bids, but contended that the Board acted properly and within its managerial prerogative to reject all bids as it did on July 18, 1987, pursuant to rights reserved in its invitation to bid under N.J.S.A. 18A:18A-22. The Board further contends that such action has made the issues moot and that the petition should therefore be dismissed. The Board also contended that petitioner's bid failed to conform to specifications, as required under N.J.S.A. 18A:18A-22, in that its substituted "Market Forge" oven was not the equal of the "Blodgett" oven otherwise specified.

The case was forwarded to the Office of Administrative Law on July 21, 1987, and was later assigned to Administrative Law Judge Philip B. Cummis by the Acting Director of the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

A prehearing conference was held before Administrative Law Judge James A. Ospenson on October 5, 1987. At the prehearing conference, the issues were defined and all procedural matters were fixed. The case was set to be heard on December 7 and 8, 1987, at 9:00 a.m., at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey.

On December 7, 1987, the respondent Board of Education, through its attorney, Victor E. D. King, moved that this case be dismissed based upon the fact that since the bid was rejected, the matter was moot. I agreed with Mr. King's position as set forth in the annexed stenographic transcript of proceedings which are inclusive of all matters concerning motion and decision.

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This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However. if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

12/15/87
DATE

PHILIP B. CUMMIS, ALJ

Receipt Acknowledged:

DEC 17 1987
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

DEC 18 1987
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

PAR/e

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NEWARK FOOD SERVICE EQUIPMENT COMPANY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision have been reviewed. No exceptions were filed by the parties.

Upon a comprehensive review of the record of this matter, including the transcript of the proceedings, the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law establishing that because the Board rejected all the bids on the contract in question herein, the matter is moot.

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law dismissing the Petition of Appeal and adopts it as the final decision in this matter for the reasons expressed in the initial decision.

COMMISSIONER OF EDUCATION

JANUARY 22, 1988

DATE OF MAILING - JANUARY 25, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3128-86
AGENCY DKT. NO. 95-4/86

FRANK CERELLI,
Petitioner,
v.
BOARD OF EDUCATION OF THE HUDSON COUNTY VOCATIONAL AND TECHNICAL SCHOOLS,
Respondent.

Sanford R. Oxfeld, Esq., for petitioner
(Oxfeld, Cohen, Blunda, Friedman, LeVine & Brooks, attorneys)

Mark E. Gold, Esq., for respondent

Record Closed: October 27, 1987 Decided: December 10, 1987

BEFORE **ELINOR R. REINER**, ALJ:

On or about April 2, 1986, petitioner, Frank Cerelli, appealed to the Commissioner of Education alleging that respondent violated his tenure and seniority rights by failing to appoint him to a vice-principal position. Respondent filed an answer on May 6, 1986, asking the Commissioner of Education to dismiss the appeal. On May 8, 1986, this matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

A prehearing conference was scheduled for June 25, 1986, and was adjourned to July 23, 1986. On that date, the following issues were isolated:

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(a) Did respondent properly calculate petitioner's seniority rights pursuant to N.J.S.A. 18A:28-11 when it abolished his position as director for pupil personnel services and placed him in the position of guidance counselor?

Did respondent calculate for seniority purposes the period of time petitioner served as assistant to the principal/student personnel services?

(b) If petitioner is successful, to what relief is he entitled?

The parties agreed to stipulate as to certain pertinent facts, and the hearing was scheduled for September 22, 1986. It was adjourned on September 22, 1986, and again on October 22, 1986, due to a possible settlement. It was rescheduled for November 5, 1986, then adjourned to January 20, 1987, since counsel for respondent had another court appearance. It was once again adjourned to March 13, 1987, because counsel for respondent was ill, and the matter was finally heard on that date. A briefing schedule was established, which requested all briefs by May 8, 1987. By letter dated July 7, 1987, this judge again requested that the parties file briefs in this matter. A brief was filed by petitioner on July 30, 1987, and despite repeated requests, respondent's brief was not received. This judge was advised on several occasions that the case would probably be settled, but that a settlement required action by the Board. No settlement was forthcoming and respondent's brief was filed on October 6, 1987. No reply was received by petitioner, and the record closed on October 27, 1987.

UNDISPUTED FACTS

The parties submitted a stipulation on March 13, 1987 as to a number of essential facts. The stipulation of facts (J-1) is incorporated here by reference and constitutes this tribunal's findings of fact. The stipulated facts indicate that petitioner, Frank Cerelli, is employed by respondent, the Board of Education of the Hudson County Vocational and

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Technical Schools (Board). He possesses certifications for Science for secondary education, student personnel services and principal/supervisor. Petitioner was hired by the Board in October 1976 as a guidance counselor. He served in that capacity from October 1976 to June 1980. During the 1979-80 school year, petitioner functioned as head of the guidance department and reported directly to the building principal.

In September 1980, petitioner was given the title of "assistant to the principal/student personnel services." In this position, he reported directly to the building principal. He functioned as the chief administrator of the guidance department at the North Bergen building, and handled such duties as the assignment of substitute teachers and the discipline of students. Petitioner served in this capacity until June 1982.

Beginning with the 1982 school year (September 1982) and continuing until January 27, 1986, petitioner's title was "director for pupil personnel services." This position included responsibilities for the entire district, including both the North Bergen and the Jersey City facilities. In this position, he was responsible for budgeting and for evaluation of guidance counselors, attendance officers and school nurses. He reported directly to the superintendent of schools.

On January 27, 1986, the position of "director for pupil personnel services" was abolished. Petitioner was notified by the Board that a resolution had been passed on November 26, 1985, approving abolition of the position. On January 6, 1986, petitioner had written to the superintendent of schools requesting that he be advised of his seniority rights and that he receive notification of positions to which he may have had seniority rights pursuant to N.J.S.A. 18A:28-11. Petitioner received no response to his letter, but on February 13, 1986, he was notified by letter to report to the North Hudson facility and begin employment as a guidance counselor.

Respondent currently employs two vice-principals, both of whom have less seniority as vice-principals than petitioner had in the position of assistant to the principal.

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DISPUTED FACTS

Petitioner asserts that his job responsibilities as assistant to the principal/student personnel services were equivalent to the responsibilities of a vice-principal, and that he effectively served as a vice-principal. In support of this position, petitioner relies on his own testimony. He testified that, as assistant to the principal/student personnel services, he reported to the principal, covered for the principal when he was out sick, made substitute assignments, held parental conferences, was involved in disciplinary procedures, and made sure that the building was running properly. He stated that there was no vice-principal at that time.

Referring to the job description for high school vice-principal (Exhibit D of J-1), he stated that he was involved in the performance responsibilities of a vice-principal: attendance, guidance and disciplinary procedures. More particularly, he stated that he was involved in in-service training and that he administered the operational aspects of the instructional program (an employment orientation program). Referring to the third performance responsibility, he contended that he dealt with attendance officers, parents, and teachers, regarding attendance and discipline. He set up a committee to formulate an attendance improvement plan, and followed Board policy in regard to discipline. He monitored the faculty's attendance for substitute purposes. In regard to coordinating the guidance and special and student personnel services, he indicated that he ran the guidance department: there were three guidance counselors under his supervision. He was responsible for guidance and for special and student personnel services, and he held bi-monthly meetings with counselors. He was responsible for textbooks and for in-service training. Referring to communications between administration, teachers, and the community (Id., No. 5), he clarified that he held parent, teacher and pupil conferences, and recruited for the high school. He indicated that he kept the lines of communication open with the home schools (the academic high school the student was slated to attend) for recruitment purposes. Questioned as to how he acted as a liaison for the high school administration with community sources, he indicated that he set up an adult program. He met with individuals in the labor force (he spoke at the Kiwanis Club) to get adults into the school for training. In further testimony he revealed that he was involved in

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administering the upkeep of the high school plant and equipment, and that part of his function was to keep the guidance areas properly equipped. He set up a career center for students and teachers to use and, if the principal was out, dealt with maintenance. Testifying as to his involvement in the implementation of the high school budget, he indicated that he dealt with the guidance budget, the graduation budget, and the budget for counselor or teacher conferences. In regard to organizing, coordinating and administering the procedures to carry out all school functions, he recalled that he accomplished this with the building principal in regard to the attendance policy. He further stated that he acted in accordance with Board policy (Id., No. 10).

Regarding his employment as "director for pupil personnel services," petitioner submitted a memorandum (P-1), which he had submitted to the Superintendent on or about December 16, 1985. The memo gives an overview of his responsibilities as director for pupil personnel services. Noting that it encompassed the major part of the responsibilities he had as director, he stated that the responsibilities revealed that he did a number of things during the course of the day which did not refer simply to district-wide responsibility: he talked to administrators and was involved in job placement.

On cross-examination, Cerelli admitted that he had never held the title of vice-principal and that it was possible that the vice-principal job description was not complete, since a job description never fully explains the actual job. He stated that the job of assistant principal was established by Board resolution and that the first vice-principals were established in 1982. Although he admitted that the job description for assistant to the principal (J-1, Exhibit C), did not enumerate the responsibilities of assistant to the principal, he believed he had functioned as a vice-principal. No other testimony was adduced, and although a job description for director for pupil personnel services was to be submitted as a joint exhibit, it was never received as such. Rather, a copy of P-1 in evidence was attached to respondent's brief as Schedule A, with the statement that it reflected the relevant responsibilities under the title of "director for pupil personnel services."

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FINDINGS OF FACT

At issue in the instant case is whether petitioner's job responsibilities as assistant to the principal/student personnel services were equivalent to the responsibilities of a vice-principal, and whether the position of assistant to the principal/student personnel services was equivalent to the position of "director for pupil personnel services." have reviewed the testimony and evidence submitted in this matter and find that petitioner's position as assistant to the principal/student personnel services was equivalent to the position of vice-principal. It appears clear from a review of the job descriptions of assistant to the principal and vice-principal that both jobs were essentially the same. The goal of both jobs was to assist the principal in the general administration of the school and to assume responsibility as assigned by the principal. More particularly, it is clear from the stipulation of facts that the assistant to the principal was responsible for duties such as the assignment of substitute teachers and the imposition of discipline on students, which are responsibilities of a vice-principal. Moreover, petitioner's undisputed testimony established that, as assistant to the principal/student personnel services, he had the performance responsibilities of a vice-principal. He testified, and I accept as fact, that he accomplished the responsibilities set forth in the job description for vice-principal. This conclusion appears particularly reasonable in light of the fact that the position of vice-principal was first established in 1982. In sum, petitioner has demonstrated by a preponderance of the believable evidence, which was not refuted by respondent, that he functioned as vice-principal while assistant to the principal/student personnel services.

Of further import is the factual determination to be made as to whether petitioner's service as assistant to the principal/student personnel services was equivalent to his responsibilities as director for pupil personnel services. In order to reach a determination on this question, I have referred to the memorandum petitioner submitted to the superintendent regarding his responsibilities as director for pupil personnel services (P-1), as compared to the job description for assistant to the principal (J-1, Ex. C). A comparison of the documents reveals that the position of director for pupil personnel services is essentially a district-wide position. It involves coordination of recruitment

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procedures, review of application forms, budget responsibilities, district-wide testing procedures, organization and dissemination of student information, district-wide monitoring, district-wide medical procedures and district-wide meetings. Although petitioner stated that he did a number of things during the course of the day which were not simply district-wide responsibilities, that evidence alone does not prove that the position of director for pupil personnel services was equivalent to the position of assistant to the principal. Petitioner did not demonstrate by a preponderance of the believable evidence that the position of director for pupil personnel services was anything other than a district-wide position. I therefore find that petitioner's duties and responsibilities as director for pupil personnel services consisted primarily of district-wide responsibilities, and were not the same as his responsibilities in the position of assistant principal (or vice-principal).

In addition to the above, petitioner contends that his service as head of the guidance department was equivalent to his service as assistant to the principal/student personnel services. There were no facts presented to substantiate this determination. Petitioner did not testify or present evidence to support the contention that the duties he performed as head of the guidance department were equivalent to the duties of assistant to the principal/student personnel services. That being so, I do not find these two positions to be the same.

ARGUMENTS OF COUNSEL

Petitioner asserts that he acted as a vice-principal from September 1979, when he assumed the functions of head of the guidance department and reported directly to the building principal, Joseph Panepinto, until June 1982. He points out that the job descriptions for assistant to the principal and high school vice-principal reveal that the two positions are basically the same. He argues that the question of whether the Board appointed him to these positions or whether his administrators had him perform the duties without a formal appointment, is irrelevant. He contends that he possessed the requisite certification for the positions in question, served the requisite period of time to achieve tenure, and, even if he did not achieve tenure, he at least has seniority rights to the

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positions which he held. He asserts his entitlement to the position in question, provided the incumbents have less seniority or are nontenured.

In response, respondent asserts that petitioner had neither tenure as a vice-principal nor seniority rights to that position. Respondent contends that petitioner is entitled to employment only in a category in which he has seniority, the category of guidance counselor. Respondent contends that a contrary decision can only be reached if it is determined that Cerelli's position as assistant to the principal/student personnel services is equivalent to that of a vice-principal. Respondent contends, however, that petitioner's employment from 1980 to 1982 as assistant to the principal/student personnel services was primarily a student personnel services position, and thus seniority would be counted in only that position. Likewise, his employment from 1979 to 1980 as head of the guidance department was also a supervisor-category position. It is apparently also respondent's position that petitioner's time as director for pupil personnel services may not be tacked on to his service as assistant to the principal in order to give him tenure in the latter position.

CONCLUSIONS OF LAW

I have considered the arguments of counsel as stated above and must agree with the position espoused by respondent.

More particularly, I am of the view that petitioner did not attain tenure in the position of assistant to the principal/student personnel services. N.J.S.A. 18A:28-6 provides as follows:

> Any such teaching staff member under tenure or eligible to obtain tenure under this chapter, who is transferred or promoted with his consent to another position covered by this chapter on or after July 1, 1962, shall not obtain tenure in the new position until after:
>
> (a) the expiration of a period of employment of two consecutive calendar years in the new position unless a shorter period is fixed by the employing board for such purpose; or

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(b) employment for two academic years in the new position together with employment in the new position at the beginning of the next succeeding academic year; or

(c) employment in the new position within a period of any three consecutive academic years, for the equivalent of more than two academic years.

Clearly, petitioner had tenure as a guidance counselor. The question is whether petitioner attained tenure as assistant to the principal/student personnel services. It is undisputed that petitioner served in that position from September 1980 until June 1982 (two academic years). It is therefore necessary, in order for petitioner to have obtained tenure in that position, for him to have essentially served in that new position for a greater period of time. To obtain tenure he would have had to have continued in that position at the beginning of the next succeeding academic year or have been employed in the position during a period of any three consecutive academic years for a total of more than two academic years.

Clearly, petitioner did not serve as assistant to the principal/student personnel services at the beginning of the 1982-83 school year. In order to gain tenure in the position of assistant to the principal/student personnel services, his service as director for pupil personnel services at the beginning of the academic year 1982, would have to be equivalent to his service as assistant to the principal/student personnel services. I have found as fact that this was not the case; I have determined that the two positions were not identical. Further, since I have determined that his prior position as head of the guidance department was also inequivalent to the position of assistant to the principal/student personnel services, petitioner has only served as assistant to the principal/student personnel services for two academic years. Petitioner therefore did not obtain tenure in the position of assistant principal, pursuant to N.J.S.A. 18A:28-6(a), (b) or (c).

The ramifications of this are quite clear. Since petitioner did not obtain tenure in the position of assistant to the principal/student personnel services, he has no seniority

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rights to that position. As was stated in King v. Keansburg Borough Bd. of Ed., OAL DKT. EDU 8251-83 (Apr. 4, 1984), adopted N.J. Dept. of Educ. (May 21, 1984):

> Seniority rights follow the acquisition of tenure. Without tenure in the employ of the Board, seniority rights for purposes of a reduction in force do not exist. Petitioner's argument that all tenurable service in the employ of the board of education counts towards seniority is a valid argument. However, it is not true that petitioner can acquire a seniority claim . . . to a position in which he has not acquired tenure. Id. at 7.

The result of this is set forth in N.J.S.A. 18A:28-6, which provides that when a teacher is transferred to a new position, ". . . in the event the employment in such new position is terminated before tenure is obtained therein, if he then has tenure in the district or under said board of education, such teaching staff member shall be returned to his former position at the salary which he would have received had the transfer or promotion not occurred." See, also, N.J.A.C. 6:3-1.10(i). It is therefore clear that upon abolishment of a position, petitioner was entitled to placement only in a position for which he has tenure and seniority.

Although it is true that seniority decisions should not be based strictly on the basis of job title but in accordance with the duties performed, N.J.A.C. 6:3-1.10(g), such a conclusion does not help petitioner. Since petitioner has not obtained tenure as assistant to the principal/student personnel services, a determination that his service as assistant to the principal/student personnel services was equivalent to the position of vice-principal is of no moment and cannot accord him seniority in that position. I therefore conclude that petitioner did not have tenure in the position of assistant to the principal/student personnel services, and therefore has no seniority rights to that position or to the equivalent position of vice-principal. I further conclude that, pursuant to N.J.S.A. 18A:28-6, respondent did not violate petitioner's tenure and seniority rights by transferring him to the position of guidance counselor.

For the foregoing reasons, it is hereby **CONCLUDED** that respondent properly calculated petitioner's seniority, pursuant to N.J.S.A. 18A:28-11, when it abolished his

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position as director for pupil personnel services and placed him in the position of guidance counselor. It is therefore **ORDERED** that petitioner's appeal is **DISMISSED** and the relief requested by petitioner is **DENIED**. It is **FURTHER ORDERED** that respondent properly calculate petitioner's seniority by crediting him as a guidance counselor with all subsequent periods of employment. See, N.J.A.C. 6:3-1.10(l).

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

December 10, 1987
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

DEC 11 1987
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

DEC 15 1987
DATE

Mailed To Parties:
FOR OFFICE OF ADMINISTRATIVE LAW

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FRANK CERELLI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HUDSON COUNTY VOCATIONAL AND TECHNICAL SCHOOLS, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties. For the reasons that follow, the initial decision is reversed.

The initial inquiry in this matter concerns whether the unrecognized title of assistant to the principal is equivalent to that of vice principal in respondent's district. The Commissioner notes that there is incorporated into the record a job description for both positions, the former of which notes at the bottom: "date submitted: June 18, 1981, date approved: June 18, 1981" (J-1, Attachment C). However, nowhere in the record can the Commissioner find the county superintendent's approval of said unrecognized title as required by N.J.A.C. 6:11-3.6(b), which states:

> (b) If a district board of education determines that the use of an unrecognized position title is desirable, or if a previously established unrecognized title exists, such district board of education shall submit a written request for permission to use the proposed title to the county superintendent of schools, prior to making such appointment. Such request shall include a detailed job description. The county superintendent shall exercise his or her discretion regarding approval of such request, and make a determination of the appropriate certification and title for the position. The county superintendent of schools shall review annually all previously approved unrecognized position titles, and determine whether such titles shall be continued for the next school year. Decisions rendered by county superintendents regarding titles and certificates for unrecognized positions shall be binding upon future seniority determinations on a case-by-case basis.

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The Commissioner surmises that the approval noted on the job description labeled "assistant to the principal" was that of the local board. The Commissioner admonishes the Board for its apparent failure to comply with the strictures of the regulation concerning the submission of proposed unrecognized titles to the county superintendent not only because in so doing, a determination is made concerning the appropriate certificate and endorsement and title required for said position, but also because permission to use that title is thereby established.

In comparing the two job descriptions, the Commissioner concurs with the ALJ that the position of assistant to the principal/student personnel services was equivalent to that of vice principal in the Board's district. As noted by the ALJ in the initial decision, ante, the stipulation of facts (J-1, Attachments A-D) submitted by the parties establishes that among petitioner's duties as assistant to the principal were responsibilities such as the assignment of substitute teachers and the imposition of discipline on students, which are normal responsibilities of a vice principal. Additionally, both positions indicate the goal of assisting the principal in the general administration of the school and the assumption of responsibilities as assigned by the principal. Thus, the Commissioner adopts as his own the finding of fact as set forth by the ALJ in the initial decision, ante, that "petitioner has demonstrated by a preponderance of the believable evidence, which was not refuted by respondent, that he functioned as vice-principal while assistant to the principal/student personnel services." See R. Thomas Jannarone, Jr. et al. v. Board of Education of the City of Asbury Park et al., 1976 S.L.D. 520 (duties of job, not title, determined seniority rights).

Further, the Commissioner notes that the aforesaid job description adopted by the Board for the unrecognized title of assistant to the principal/student personnel services requires the holder of such position to have a principal's certificate. Thus, pursuant to Spiewak v. Rutherford Board of Education, 90 N.J. 63 (1982), petitioner has met the criteria laid down by the Supreme Court of the State of New Jersey for the acquisition of tenure, namely:

1. Hold a position requiring a certificate;

2. Hold the required certificate; and

3. Serve the requisite period of time for the acquisition of tenure.

Moreover, the Commissioner concurs with the ALJ's finding that petitioner has failed to demonstrate that his service as director for pupil personnel services was equivalent to his duties as assistant to the principal/student personnel services. No job description adopted by the Board was submitted to the record. However, based on the memo petitioner submitted to the superintendent relative to his responsibilities as director for pupil

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personnel services (P-1) as compared to the job description of assistant to the principal, which was Board approved (J-1, Attachment C), the Commissioner finds that the position of director for pupil personnel services was a district-wide position, and not equivalent to an assistant principal or vice principal. The many and varied responsibilities of a district-wide position are of a substantially different nature from those within a single building, notwithstanding the fact that some of the duties petitioner may have performed in the position of director for personnel services from 1982 until the early part of 1986 may not have been district-wide. Thus, the Commissioner adopts as his own the finding of the ALJ establishing for the reasons set forth therein, that petitioner's duties and responsibilities as director of pupil personnel services "consisted primarily of district-wide responsi- bilities and were not the same as his responsibilities in the position of assistant principal (or vice-principal)."

Notwithstanding the above, the Commissioner rejects the conclusions of law that followed the ALJ's factual findings as stated above. Her analysis falls short in that she failed to properly apply N.J.S.A. 18A:28-6 in her discussion of whether petitioner has tenure in either of the above-cited positions. The statute in question reads in toto as follows:

> 18A:28-6. Tenure upon transfer or promotion
>
> Any such teaching staff member under tenure or eligible to obtain tenure under this chapter, who is transferred or promoted with his consent to another position covered by this chapter on or after July 1, 1962, shall not obtain tenure in the new position until after:
>
> (a) the expiration of a period of employment of two consecutive calendar years in the new position unless a shorter period is fixed by the employing board for such purpose; or
>
> (b) employment for two academic years in the new position together with employment in the new position at the beginning of the next succeeding academic year; or
>
> (c) employment in the new position within a period of any three consecutive academic years, for the equivalent of more than two academic years;
>
> provided that the period of employment in such new position shall be included in determining the tenure and seniority rights in the former position held by such teaching staff member, and in the event the employment in such new position is terminated before tenure is obtained therein,

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> if he then has tenure in the district or under said board of education, such teaching staff member shall be returned to his former position at the salary which he would have received had the transfer or promotion not occurred together with any increase to which he would have been entitled during the period of such transfer or promotion. (emphasis supplied)

At the time that petitioner was voluntarily transferred from his position as head of the guidance department in September 1980, he was already tenured as a guidance counselor. Upon assuming the title and duties of assistant to the principal, he 1) held the requisite principal's certificate for said position and 2) served two years in that capacity before he again was voluntarily transferred or promoted to the position entitled "Director for Pupil Personnel Services" beginning with the 1982 school year. (J-1) Even without documentation in the record establishing whether his position as assistant principal was a ten-or-twelve month position, it is clear from the record that when petitioner assumed his duties as director for pupil personnel services, "the period of employment in such new position [director of pupil personnel services] shall be included in determining the tenure and seniority rights in the former position held by such teaching staff member***." (emphasis supplied) (N.J.S.A. 18A:28-6) Thus, petitioner's service as director for pupil personnel services tacks on to his service as assistant to the principal/vice principal thereby rendering him tenured in the position of assistant to the principal/vice principal no later than the completion of service on the 1st day of September 1983 and, further, according him seniority in the position of vice principal from September 1980 to the present date by virtue of his having possessed the requisite certificate and having served the requisite period of time to achieve tenure. Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982).

Notwithstanding this finding, the Commissioner rejects petitioner's argument that an additional year's seniority accrued to his benefit in his capacity as head of guidance for the year 1979-80, because, he avers, those duties were also equivalent to those of vice principal. The term "head of the guidance department" is so vague as to render any evaluation of this title impossible, particularly in light of the fact that there is no documentation provided, such as a job description, that would convince the Commissioner of the merit of petitioner's position in this regard. Consequently, the Commissioner does not consider the 1979-80 year's service as head of the guidance department among those which accrue toward tenure and seniority in the position of vice principal.

Consequently, the Commissioner finds and determines that petitioner does, in fact, enjoy tenure in the position of vice principal and, with it, seniority dating from September 1, 1980 to date. Accordingly, the initial decision is rejected. The Board is hereby ordered to formulate a seniority list, as well as a preferred eligibility list, if necessary, which reflects the determination of

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this decision and, further, to provide petitioner with such relief as may be required by this determination and the tenure and seniority status which it has conferred.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

January 26, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6385-86
AGENCY DKT. NO. 309-9/86

SUSAN DATA-SAMTAK,
Petitioner,
v.
SCOTCH PLAINS-FANWOOD BOARD OF EDUCATION,
Respondent.

Sanford R. Oxfeld, Esq., for petitioner (Oxfeld, Cohen, Blunda, Friedman, LeVine & Brooks, attorneys)

Casper P. Boehm, Jr., Esq., for respondent

Record Closed: November 3, 1987 Decided: December 18, 1987

BEFORE **DANIEL B. MC KEOWN**, ALJ:

Susan Data-Samtak (petitioner), who has been employed by the Scotch Plains-Fanwood Board of Education (Board) a sufficient period of time to have attained the legislative status of tenure, alleges that the Board violated her tenure and seniority rights with respect to her 50 percent of full time employment for 1986-87. Petitioner alleges she has a legally enforceable superior claim to a full time position as against nontenure teachers assigned as in-school suspension teachers. After the Commissioner transferred the matter to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq., a hearing was scheduled and conducted September 14, 1987 at the Office of Administrative Law, Newark. The record closed November 3, 1987 upon receipt of the Board's reply letter memorandum.

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ISSUES

At the prehearing conference conducted in the matter, the following issues were agreed upon:

1. Whether petitioner was entitled to be appointed to the full time position of in-school suspension teacher for 1986-87 by virtue of her accrued seniority and tenure and, if so, to what relief is she entitled.

2. The Board raises the affirmative defenses of laches and the 90 day rule.

Following a recitation of the procedural history of the matter, the relevant and material facts of the matter as established by a joint stipulation of facts submitted by the parties and by the proofs at hearing shall be addressed.

PROCEDURAL HISTORY

The petition of appeal was filed before the Commissioner on September 9, 1986. The answer to the petition was filed September 23, 1986. The matter was then transferred on September 26, 1986 to the Office of Administrative Law. In the meantime, another teacher in the Board's employ, Shirley Vanderhoof, had filed a petition of appeal challenging her transfer to the position in-school suspension teacher. The Vanderhoof case was scheduled for a telephone prehearing conference on November 24, 1986. Counsel to Data-Samtak moved on November 12, 1986 to consolidate this case with the Vanderhoof case. The Board, on December 1, 1986, opposed consolidation. The motion to consolidate was denied by letter ruling dated December 29, 1986.

A telephone prehearing conference was scheduled for this case on January 26, 1987. Because of conflicts with counsels' schedules, the prehearing conference was adjourned and held February 2, 1987. During that conference, counsel to the parties agreed that a hearing was not necessary because all relevant and material facts would be stipulated by March 15, 1987. It was subsequently determined by counsel to the parties that a hearing was necessary when counsel concluded on or about July 1, 1987 that all facts could not be so stipulated. The hearing was scheduled and conducted September 14, 1987.

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STIPULATED FACTS

After the opening of hearing, the parties submitted a signed joint stipulation of facts with supporting documents. The joint stipulation of facts, which I find to contain relevant facts of the matter, is reproduced here with typographical errors corrected:

1. Data-Samtak has been employed by the Board as a tenured [teacher with seniority in the category of] Secondary Teacher (Science) under a comprehensive science certification since her date of hire, September 1, 1974. As of July 1, 1986, she possessed 11.4 years of seniority in the district (Exhibit 1). [Exhibit 1 is a seniority list compiled by the Board on July 1, 1986 for its teachers of science in the secondary schools. Petitioner's accumulated seniority according to the Board compiled list, as of July 1, 1986, is 11.4 years.] The inference is drawn that petitioner's entire employment with the Board has been in the position of teacher, category of secondary teacher of science.

2. By letter dated April 23, 1986, Data-Samtak was advised that the Board had determined at the April 22, 1986 meeting, to reduce its staff effective with the end of the 1985-86 school year. In this letter, Data-Samtak was also advised that due to this R.I.F., she would not be offered a contract for the 1986-87 school year; and that "the appropriate recall procedures will be followed." (Exhibit 2). [Exhibit 2 is a copy of the letter dated April 23, 1986.]

3. By letter dated May 2, 1986, Data-Samtak was advised that she would be offered a half time position at the rate of $14,859 (MA+30,9 1/2) for the 1986-87 school year. Data-Samtak accepted said job offer on May 20, 1986. (Exhibit 3) [Exhibit 3 is a copy of the written offer and acceptance dated May 2 and May 20, 1986, respectively, subject to Board approval.]

4. By Board action taken at its June 19, 1986 meeting, Data-Samtak was recalled from R.I.F. and assigned a one-half time science position. At the same meeting, Brian Homm was assigned to a position entitled "In School Suspension/Physical Education," while Shirley Vanderhoof was assigned to In School Suspension (Exhibit 4). [Exhibit 4 is the Board's personnel agenda for its June 19, 1986 meeting.]

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5. At its April 22, 1986 meeting, the Board employed Michael Christadore as another "In-School Suspension" teacher for the 1986-87 school year. (Exhibit 5) [While Exhibit 5 is a copy of the Board's personnel agenda for its April 22, 1986 meeting, that document by itself does not support as fact the employment of Michael Christadore as an in-school suspension teacher for the 1986-87 school year. Nevertheless, this stipulation of the fact of employment on the specific date is accepted.]

[Stipulation 6 has been stricken by the parties.]

7. Both Homm and Christadore are non-tenured teaching staff members.

8. During the 1986-87 school year, the following school schedules were in existence:

   a. Data-Samtak was employed as a half-time science teacher and had three (3) periods of teaching a day.

   b. Vanderhoof was employed as a full-time In-School Suspension teacher.

   [Subparagraph c is stricken by the parties.]

   d. Christadore was employed as a full-time teacher. He had three (3) periods a day of teaching and two (2) periods a day of In-School Suspension (Exhibit 6). [Exhibit 6 appears to be a master schedule on which Mr. Christadore is, in fact, assigned two periods of in-school suspension.]

9. By letter dated November 6, 1986, Vito A. Gagliardi, the Union County Superintendent of Schools, approved the unrecognized position title of "In-School Suspension Teacher" pursuant to N.J.A.C. 6:11-3.6. The appropriate certification for said position is "teacher" (Exhibit 7). [Exhibit 7 is a form upon which approval of the Union County Superintendent of Schools is sought for unrecognized position titles. The form asks for the appropriate certificate of each unrecognized title the applicant seeks to have

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approved. In this case the appropriate certificate of "teacher" was approved by the county superintendent of schools for the position of in-school suspension teacher.]

10. On January 15, 1987, the Board adopted a new job description for "In-School Suspension Teacher." Again the only requirement as "permanent teaching certification" (Exhibit 8). [Exhibit 8 is a job description adopted by the Board for the position in-school suspension teacher which states the requirements for the position to be "permanent teaching certification required".]

11. Data-Samtak was returned to a full time position beginning with the second semester of the 1986-87 school year.

12. Data-Samtak has again been notified that a R.I.F. will occur for the 1987-88 school year and she will again be assigned to a half-time science position.

This concludes the recitation of facts and exhibits stipulated by the parties and the inference drawn from stipulated fact 1.

PROOFS AT HEARING

Petitioner's testimony at hearing addressed three areas. One, petitioner testified that any teacher who is employed by this Board on a full time basis is assigned five teaching periods per day, plus a homeroom, one duty period, and one preparation period all sandwiched around the teacher's own lunch period. Petitioner curiously testified, nevertheless, that her schedule for the first semester of 1986-87 when she was employed on a one-half time basis was to teach a total of three science courses; biology in periods two and three, and animal behavior in combined periods four-five.

Two, petitioner testified she first realized on June 19, 1986 that her tenure and seniority rights may have been violated when she acquired knowlege that nontenure teacher Brian Homm was assigned to the position entitled in-school suspension/physical education teacher and Shirley Vanderhoof, a teacher of music for 26 years with the Board,

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was transferred to a full time position of in-school suspension teacher. Petitioner explained that when she was first advised on April 23, 1986 of the reduction in force, and was then subsequently offered to teach three periods of science on a one-half time basis, she believed that a half-time science teaching position was the only employment available to her.

It is noted here that Shirley Vanderhoof is a teaching staff member who has been employed by this Board a sufficient period of time to have acquired a tenure status and accumulate more than 26 years seniority. Until April 1, 1986 Ms. Vanderhoof had always been assigned to teach vocal and general music at either the Board's elementary or junior high school levels. On April 1, 1986 Ms. Vanderhoof returned from a medical leave of absence and was advised that she was to be reassigned to the Board's in-school suspension program at the high school level. Vanderhoof was given the same assignment for the 1986-87 school year and, according to the evidence in this record, she remains assigned to the in-school suspension program in the high school. Vanderhoof challenged the 1986-87 assignment before the Commissioner. This administrative law judge concluded that the action of the Board by which it assigned petitioner Vanderhoof to the position of in-school suspension teacher was improper because the position of in-school suspension teacher was a position not comparable to that of the position of teacher. The Commissioner reversed and concluded that because the Union County superintendent approved the title in-school suspension teacher and assigned 'teacher' certification as the appropriate certificate for appointment to the position, the position of in-school suspension teacher "* * * became that of 'teaching staff member' as defined by N.J.S.A. 18A:1-1." Shirley Vanderhoof v. Scotch Plains-Fanwood Regional School District Board of Education, 1987 S.L.D. ____ (April 15, 1987).

Three, petitioner testified at hearing that she was assigned full time employment during the second semester of the 1986-87 academic year when another science teacher went on a leave of absence. Petitioner's present assignment for 1987-88 is to teach two biology classes, a combined animal behavior class, and she has one preparation period.

Robert Raiford, the Board's personnel specialist, testified that during the 1986-87 academic year three persons had assignments to the in-school suspension program. Shirley Vanderhoof was assigned a full time schedule of six periods per day of in-school suspension; Michael Christadore was assigned two periods of in-school suspension per day; while Brian Homm was assigned one period of in-school suspension per day. Nevertheless,

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Exhibit 6, as corrected at hearing, shows Mr. Homm also was assigned an in-school suspension homeroom period of 10 minutes at the beginning of each day. As noted in the stipulated facts, Brian Homm spent the remainder of his full time schedule teaching physical education while Raiford testified Christadore spent the rest of his full time schedule teaching business courses.

Raiford testified that the current 1987-88 teacher assignments to the in-school suspension program is Ms. Vanderhoof is assigned the program full time, Michael Christadore has one in-school suspension period, while a J. Byorek, who has 32 years seniority in the Board's employ, is assigned two in-school suspension periods per day. Brian Homm has no assignments of in-school suspension classes during 1987-88. (See P-1).

This concludes a recitation of proofs offered by the parties at the time of hearing and upon which the following facts, in addition to the stipulated facts, are found to be established:

1. Petitioner initially acquired knowledge on June 19, 1986 that her tenure and seniority rights may have been violated when the Board assigned nontenure teacher Brian Homm some in-school suspension classes as part of his daily schedule of full time employment.

2. During the first semester of the 1986-87 academic year while petitioner was employed on a one-half of full time basis, nontenure teachers Christadore and Homm were employed on a full time basis.

3. During the first semester of 1986-87 Christadore, as part of his full time schedule, was assigned two in-school suspension periods while Homm, as part of his full time schedule, was assigned one in-school suspension period and one ten minute in-school suspension homeroom period.

4. The number of class periods assigned full time teachers employed by the Board cannot be precisely determined on this record. Petitioner claims full time teachers are assigned five teaching periods per day, plus a homeroom, a duty period, and a preparation period. Raiford's testimony, by inference, suggests a full time teacher is assigned six teaching periods per day as Vanderhoof's 1987-88 schedule shows (R-1). Exhibit 6 attached to the stipulation of fact affords no assistance in this regard.

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ARGUMENTS OF THE PARTIES

Petitioner's essential argument is that based on the facts in this case her certification, tenure and seniority in the Board's employ gives her a legally enforceable claim to have been assigned by the Board those in-school suspension periods it assigned nontenure teachers Christadore and Homm so that she, not they who are without any seniority claim, would have been employed on a full time basis. Petitioner relies in this regard upon Spiewak v. Rutherford, 90 N.J. 63 (1982), Rogan v. Bd. of Ed. of Edison, 1985 S.L.D. __ (May 17, 1985), Cucolo v. Bd. of Ed. of the Essex County Vocational and Technical School District, 1985 S.L.D. _____ (June 27, 1985), and Vanderhoof, supra. Petitioner argues that under Spiewak, the position of in-school suspension teacher is a tenure eligible position because it requires the assigned teacher to possess a teaching certificate. Under Rogan, petitioner points out that the Commissioner held Rogan had a superior seniority claim to the position in-school suspension teacher over a nontenure teacher because the position required only a valid instructional certificate. Petitioner points out that in Cucolo and in Vanderhoof, the Commissioner held the position of in-school suspension teacher is equivalent to a regular position of teacher as that term is defined at N.J.S.A. 18A:1-1.

The Board asserts petitioner has no legally enforceable seniority claim to the position of in-school suspension teacher or to any assignment of in-school suspension periods. The Board contends petitioner's enforceable seniority claim is only as a teacher of science because throughout her entire employment petitioner's assignment has been as a teacher of science. The Board claims that under the current seniority regulations a teacher must actually hold a specific position to acquire seniority in that position and cites Small v. Bd. of Ed. of the Borough of Westwood Regional, 1986 S.L.D. _____ (July 17, 1986). The Board maintains that certification alone will not allow an individual to acquire seniority in a particular position under N.J.A.C. 6:3-1.10(1)(15) without prior employment in that position. The Board contends that Vanderhoof, who has been assigned the position of in-school suspension teacher since April 1, 1986, has a greater seniority claim to that position than does petitioner. Furthermore, the Board points out that both Brian Homm and Michael Christadore have been assigned as in-school suspension teachers since September 1, 1985 and that therefore, "Their seniority rights are greater [to the position of in-school suspension teacher than those] of petitioner." While the Board admits the only qualification necessary for appointment to the position of in-school suspension teacher is the possession of a valid teaching certificate, it contends that any teacher who holds such a certificate cannot make an immediate claim to the position.

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With respect to the issue of timeliness, the Board notes that N.J.A.C. 6:24-1.2 obligates a person who is to challenge an action taken by the board must file a petition of appeal within 90 days after receipt of the notice by the petitioner of the order, ruling or other action concerning which the hearing is requested. The Board contends that in this case, petitioner was notified of a reduction in force determination being made by the Board April 22, 1986 by letter dated the following day. Accordingly, the Board argues that April 22 is the date upon which petitioner's cause of action arose. Accordingly, the Board says petitioner had 90 days from the date, or until July 23, 1986, to bring the action. Because the instant petition of appeal was not filed until September 9, 1986 the Board urges that petitioner's claim is time-barred under N.J.A.C. 6:24-1.2.

Petitioner argues to the contrary that when she first learned of the reduction in force on April 23, 1986 she believed because she had lesser seniority than other teachers in the Board's science department the Board was acting properly when her full time employment was reduced to half time. Petitioner claims she did not learn until she reviewed minutes of the Board's meeting held June 19, 1986 that persons with lesser seniority than she, or no seniority claims whatsoever, were being appointed by the Board to the position of in-school suspension teacher. Thus, petitioner contends the cause of action did not arise until June 19, 1986, the date upon which the 90 day period contained within N.J.A.C. 6:24-1.2 begins to run.

LEGAL ANALYSIS AND CONCLUSIONS

I
Application of N.J.A.C. 6:24-1.2

The facts in this case clearly show petitioner did not acquire requisite knowledge that she may have a claim against the Board with respect to her part time employment for 1986-87 until June 19, 1986 when she first learned nontenure teacher Homm together with Shirley Vanderhoof, were assigned as in-school suspension teachers. Prior to that date, petitioner had no reason to know the Board appointed nontenure teacher Christadore to a position to which she may have a superior seniority claim. Petitioner was not advised in the letter she received April 23, 1986 that Christadore was so appointed. Her direct testimony under oath before me at hearing stands unrefuted. There is no evidence to show petitioner should have had any reason to know on April 22, 1986 that the Board

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appointed Christadore to the position in-school suspension teacher for the 1986-87 academic year. There is no evidence to demonstrate that minutes of the Board of Education meeting conducted April 22, 1986 were prepared for distribution the following day; there is no evidence to show that any school administrator who may have been in attendance at the Board meeting April 22 advised petitioner that Christadore was appointed as an in-school suspension teacher; and, there is no evidence to show that the Board secretary advised petitioner of the fact that Christadore was appointed by the Board April 22, 1986 as an in-school suspension teacher.

Accordingly, June 19, 1986 is the date when petitioner first acquired knowledge that she may have a cause of action against the Board regarding her tenure and seniority rights. Therefore, I **CONCLUDE** that June 19, 1986 is the date when the 90 days under N.J.A.C. 6:24-1.2 began to run for petitioner to file a petition of appeal. The petition of appeal was filed September 9, 1986 well within the 90 days. Accordingly, I **CONCLUDE** that the petition of appeal was filed in a timely fashion under the provisions of N.J.A.C. 6:24-1.2. Therefore, the Board's motion to dismiss in this regard is **DENIED**.

The Board presented no written arguments in support of its affirmative defense of laches. Accordingly, I **CONCLUDE** that its affirmative defense of laches was designed to be argued through the 90 day rule. Accordingly, having denied the Board's motion to dismiss under the 90 day rule, I further **CONCLUDE** that the Board's affirmative defense of laches to this action must also be **DENIED**.

II
Petitioner's Claim of Seniority Entitlement

It is basic education law that seniority follows tenure and that without having acquired the legislative status of tenure a teacher has no enforceable claim to seniority under the law. Howley v. Ewing Bd. of Ed., 6 N.J.A.R. 509 (1982). In this case, petitioner acquired the legislative status of tenure as a teacher. She has accumulated 11.4 years seniority in the category of secondary teacher of science. N.J.A.C. 6:3-1.10(l)(15)(i). The position in-school suspension teacher is not a listed specific category at N.J.A.C. 6:3-1.10(l) within which one acquires seniority.

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Nevertheless, the Board's own stated qualification for appointment to the controverted position, and as approved by the Union County superintendent of schools, is "permanent teaching certification". Clearly, petitioner, by virtue of her instructional certificate with a comprehensive science endorsement meets the requirements for appointment to the Board as established by the Board. No other requirement is listed as being prerequisite for appointment to the position of in-school suspension teacher.

The Board's argument that Christadore and Homm have greater seniority to the position of in-school suspension teacher is rejected in view of the fact neither individual has served the requisite period of time to have acquired a tenure status. Nevertheless, the question remains whether petitioner's 11.4 years seniority in the category of secondary teacher of science creates for her an enforceable claim to the in-school suspension periods otherwise assigned Christadore and Homm in order to provide petitioner with full time employment. This question must be resolved in the affirmative. Petitioner has acquired a tenure status; she has accumulated 11.4 years seniority; the instructional certificate possessed by the petitioner is such that she is qualified for appointment to the position of in-school suspension teacher; and, her tenure status which protects employment as against nontenure teachers in the face of a reduction in force supports petitioner's claim herein.

The question then arises in what category would petitioner accumulate seniority as an in-school suspension teacher. Because the seniority standards do not list a separate category of in-school suspension teacher, the teacher who occupies such a position in light of the Board's stated requirement for appointment of "permanent teaching certification" would accrue seniority within all subject area endorsements to the instructional certificate posssessed at the time of initial appointment. N.J.A.C. 6:3-1.10(f). This conclusion is consistent with the Commissioner's conclusion in Cucolo, supra, where he said "* * * [S]eniority in the category 'in-school suspension' * * * would accrue within the secondary category to the certficate/endorsement deemed appropriate [by the county superintendent] for such a position." Cucolo, slip op. at p. - . In this case, both the Board and the Union County superintendent of schools determined that "permanent teaching certificate" is necessary for appointment to the position of in-school suspension teacher, without regard to subject area endorsements. Accordingly, a teacher who is assigned the position of in-school suspension teacher by the Board would accrue seniority in all endorsements to the instructional certificate required.

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For all the foregoing reasons, I **CONCLUDE** that petitioner Susan Data-Samtak was entitled by virtue of her tenure and seniority to have been appointed a full time teacher for the 1986-87 academic year by combining two or three periods of in-school suspension, or the number of periods necessary to allow her full time employment, with her three teaching periods of science. Petitioner did enjoy full time employment and appropriate salary and benefits the second semester of 1986-87. Accordingly, petitioner is entitled to the salary she would have received during the 1986-87 first semester had her tenure and seniority not been violated by the Board and had she been employed on a full time basis. In addition, petitioner is entitled to seniority credit for the same period of time as if she had actually been employed on a full time basis, together with all other benefits and emoluments which may have been withheld from her.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

December 18, 1987
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

DEC 19 1987
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

DEC 23 1987
DATE

Ronald L. Parker Jr.
OFFICE OF ADMINISTRATIVE LAW

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SUSAN DATA-SAMTAK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SCOTCH PLAINS-FANWOOD REGIONAL SCHOOL DISTRICT, UNION UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Board's exceptions were filed within the time prescribed by N.J.A.C. 1:1-18.4.

I. APPLICATION OF N.J.A.C. 6:24-1.2

The Board excepts to the ALJ's determination that this matter was timely filed pursuant to N.J.A.C. 6:24-1.2, reiterating its argument that petitioner was aware as early as April 23, 1986 and May 2, 1986 that she was the subject of a reduction in force and that on April 22, 1986 Mr. Christadore was appointed as an in-school suspension teacher. It further claims that the record is clear that for the 1985-86 school year, Mr. Homm and Mr. Christadore, two non-tenured teachers, were assigned to the in-school suspension periods and that petitioner knew this. As such, the Board avers that, at best, she had until August 2, 1986 to file her petition.

Upon consideration of the record and the ALJ's analysis and disposition of this claim, the Commissioner is in full agreement with the ALJ's finding and conclusion that petitioner did not acquire the requisite knowledge that she might have a claim against the Board until she reviewed the June 19, 1986 minutes of the Board meeting. Contrary to the Board's arguments otherwise, the record makes it clear that, prior to that time, petitioner had no reason to know that the Board had appointed staff to a position to which she might have had a superior claim. Thus, the Commissioner adopts as his own the ALJ's determination with respect to the time-bar issue for the reasons stated in the initial decision, ante.

II. PETITIONER'S CLAIM OF SENIORITY ENTITLEMENT

As to the substantive issue regarding petitioner's claim to entitlement to those periods of in-school suspension assigned to Mr. Christadore and Mr. Homm, the Board argues that the ALJ erred in his determination. It alleges that he seemingly confused the rights that one acquires as a tenured teacher with the rights that one acquires after serving in a position in terms of seniority.

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More specifically, the Board contends that:

> There appears to be an overlapping of tenure and seniority which is simply not provided for under the statute. There is no question that petitioner never served in the position of "in-school suspension teacher." There is no showing that this position even existed upon petitioner's initial employment in the school district. It is respectfully submitted that any decision to the contrary is inconsistent with the tenure and seniority statutes of the State of New Jersey.
>
> There is also no showing that petitioner was able to fulfill any duties as an in-school suspension teacher when those services were needed by the school district. In fact, the evidence is to the contrary since the petitioner was employed during period 4-5 in the school district and that was one of the periods that Mr. Christadore was assigned to in-school suspension.
>
> (Board's Exceptions, at p. 2)

Upon review of the record and the Board's exceptions, the Commissioner is in agreement with the ALJ's findings and conclusions and adopts them as his own with the exception of his determination on the category for seniority accrual when one serves as an in-school suspension teacher which will be addressed at a later point in this decision.

More specifically, the ALJ is correct in stating that seniority is derived from tenure and that in the absence of the legislative status of tenure, a teacher has no enforceable claim to seniority. Hence, the ALJ is correct when he rejects the Board's contention that Christadore and Homm have greater seniority to the position of in-school suspension teacher because neither is tenured and, thus, they possess no seniority whatsoever.

Petitioner, on the other hand, is tenured in the position of teacher. Thus, in the face of a reduction in force pursuant to N.J.S.A. 18A:28-9 et seq. she has a right to any position or assignment for which her seniority entitles her. The record reveals that petitioner has acquired 11.4 years seniority within the secondary category limited to those subject endorsement(s) under which she has actually served, namely, comprehensive science. Thus, as was found in Camilli v. Bd. of Ed. of Northern Highlands Reg'l High School District, decided January 3, 1985, aff'd State Board May 1, 1985, petitioner's seniority entitlement is not related merely to the subjects she has actually taught under that endorsement but also to any assignments which the instructional endorsement qualifies her to fill. While this would in the normal course of events entitle her only to those subjects authorized by the comprehensive science endorsement (N.J.A.C. 6:11-6.2(a)(21)i), the instant matter relates

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to duties/assignments of an unrecognized title which the county superintendent pursuant to N.J.A.C. 6:11-3.6 has determined requires only a permanent (standard) instructional certificate. (Exhibit P-1) This means, of course, that any endorsement on a standard instructional certificate qualifies one to fill the duties of an in-school suspension teacher.

Consequently, in the circumstances of this matter, petitioner is qualified or authorized to fulfill the duties of in-school suspension teacher since she possesses a standard instructional certificate. Therefore, she is entitled by virtue of her seniority to any assignment of that unrecognized title given to nontenured or less senior teachers.

It is also abundantly clear on the basis of Capodilupo v. Bd. of Ed. of West Orange, decided by the Commissioner May 3, 1985, aff'd/rev'd State Board September 3, 1986, aff'd N.J. Superior Ct. App. Div. July 2, 1987 and Bednar v. Bd. of Ed. of Westwood, decided by the Commissioner May 13, 1985, aff'd State Board December 3, 1986, rev'd/rem'd N.J. Superior Ct. App. Div. November 24, 1987 that even in the absence of any seniority rights to the disputed assignments, petitioner would by virtue of her tenure status be entitled to the assignments of in-school suspension teacher given to non-tenured teachers because she is qualified to fulfill those assignments by virtue of her instructional certificate.

As such, the Commissioner finds as meritless any arguments of the Board that petitioner has no right or entitlement to the assignments she claims, including the argument that there was no showing petitioner was able to fulfill the duties when needed. It is true that a board of education does not have to work out all permutations in assignments to accommodate a tenured teacher's rights in a RIF situation, Fitzpatrick et al. v. Bd. of Ed. of Weehawken, 1980 S.L.D. 595, aff'd State Board 1982 S.L.D. 1449, aff'd N.J. Superior Court, App. Div. 1982 S.L.D. 1544. However, as expressed by the State Board in Capodilupo, supra.***

> ***[W]here a board validly determines that a reduction in force is necessary, it has an obligation to attempt to recognize the tenure rights of a teacher affected by the reduction. This obligation does include consideration of the reassignment of the affected teacher to assignments filled by non-tenured teachers for which he is qualified***." (Slip Opinion, at p. 20)

As to the issue of what category of seniority service as an in-school suspension teacher accrues in this matter, the Commissioner rejects the ALJ's determination that petitioner accrued seniority in all subject area endorsements on the instructional certificate she possessed at the time of her initial employment. N.J.A.C. 6:3-1.10(f) states:

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> *** Whenever a person shall be employed simultaneously under two or more subject area endorsements or in two or more categories, seniority shall be counted in all subject area endorsements and categories in which he or she has been employed.

This requires actual service under the endorsement or category, not mere possession of endorsements since initial employment. Hence, petitioner's service as an in-school suspension teacher would be in the secondary category (N.J.A.C. 6:3-1.10(1)(15)) under the endorsement she has actually served, i.e., comprehensive science, as the in-school suspension duties do not require her to possess any other endorsement than the one under which she has served and is actually serving.

Accordingly, the Commissioner adopts the initial decision, except as modified herein, for the reasons expressed in that decision and as elaborated upon herein. Therefore, petitioner is entitled to the relief granted by the ALJ for the 1986-87 school year.

COMMISSIONER OF EDUCATION

January 27, 1988

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SUSAN DATA-SAMTAK,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE SCOTCH PLAINS-FANWOOD REGIONAL SCHOOL DISTRICT, UNION COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, January 27, 1988

For the Petitioner-Respondent, Oxfeld, Cohen, Blunda & Friedman (Sanford R. Oxfeld, Esq., of Counsel)

For the Respondent-Appellant, Casper P. Boehm, Jr., Esq.

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

June 1, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3804-87
AGENCY DKT. NO. 124-5/87

B.L., on behalf of
his son, H.L.,
Petitioners,
v.
BARNEGAT TOWNSHIP
BOARD OF EDUCATION,
Respondent.

B.L., petitioner, pro se

Kathleen W. Hofstetter, Esq., for respondent (Gelzer, Kelaher, Shea, Novy & Carr, attorneys)

Record Closed: November 2, 1987 Decided: December 16, 1987

BEFORE **DANIEL B. MC KEOWN**, ALJ:

Petitioner, on behalf of his son H.L. who is enrolled as a pupil in the public schools operated by the Barnegat Township Board of Education (Board), filed a Petition of Appeal before the Commissioner of Education in which he alleges confidential information from his son's records was publicly released in violation of N.J.S.A. 18A:36-19, rules and regulations promulgated by the State Board of Education regarding pupil records set forth at N.J.A.C. 6:3-2.1, and P.L. 93-380, section 513, the Family Educational Rights and Privacy Act of 1974. After the Commissioner of Education transferred the matter to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq., a prehearing conference was conducted July 16, 1987. Thereafter, the

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Board's motion to dismiss for the asserted failure to state a cause of action was denied by letter ruling on October 26, 1987. The matter proceeded to a plenary hearing November 2, 1987 at the Lacey Township Municipal Building, Forked River.

MOTION TO RECUSE

It is noted that at the opening of the record November 2, 1987 and prior to the taking of testimony, petitioner's motion for this judge to recuse himself was denied. (1T:3-14). Petitioner anchored his motion upon his assertions that this judge has a "close friendship" with Milton Gelzer, a named partner in the law firm representing the Board; that I already ruled against him in another case he filed against the Board; and, during a recess this judge did in response to a public open request from the school superintendent gave him a cigarette and explained that fact to petitioner.

The matter of an asserted close friendship with Milton Gelzer is wholly without a basis in fact. Petitioner, in a cover letter attached to his petition of appeal filed with the Commissioner, stated to the Commissioner:

> Please transfer the said matter to the Office of Administrative Law, to avoid the appearance of any conflict due to the facts that the Commissioner and attorney for respondents are members of the Board of Higher Education.

This judge did comment at the prehearing conference that Milton Gelzer's firm has defended boards of education in administrative matters before me over the years. This judge further stated having no knowledge that Mr. Gelzer was a member of the Board of Higher Education. Petitioner makes the quantum leap from this comment to his conclusion that a close friendship exists.

Petitioner is correct that in a prior case he filed against this Board, this judge ruled against him. (See, OAL DKT. EDU 5469-87; Agency Dkt. No. 221-7/87). So that the record is complete, this judge also ruled against petitioner in another separate case he filed against this Board of Education. (See, OAL DKT. EDU 3546-87, Agency Dkt. 116-4/87). In each instance, the initial decisions speak for themselves.

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Finally, the request for a cigarette was honored by this judge. Nevertheless, that standing by itself is not a basis to grant petitioner's motion for recusal. The transaction occurred publicly, openly, and with no effort made whatsoever to conceal it from anyone.

For the foregoing reasons, petitioner's motion to recuse made at the opening of hearing November 2, 1987 was denied.

PROOFS OF THE PARTIES

The Board conducted its reorganization meeting on April 13, 1987. Louise A. Altomare, who has been employed by the Board as a kindergarten instructional aide for the past six and one-half years, attended the meeting to witness her husband sworn into Board membership. Petitioner and others also attended the reorganization meeting. At the conclusion of the meeting, Ms. Altomare became engaged in conversation in the corridor with four other individuals. The conversation addressed an issue of pupil suspension which had been raised near the end of the reorganization meeting. Ms. Altomare testified at hearing that the following sequence of events occurred:

> [Ms. Altomare]:
> Okay. [Petitioner] came up and started giving off all these statistics and the board of education stinks and they have no right —
>
> [Petitioner]:
> Your Honor, I object. What relevance does that have to do with her releasing confidential information from my son's file?
>
> Judge McKeown:
> Overruled.
>
> [Ms. Altomare]:
> So then I said, "Oh, yeah, Bernie, you ought to know. I heard your kid's been suspended." and then he went haywire after that.
>
> (1T:29)

It is that public utterance of Ms. Altomare, a kindergarten instructional aide employed by the Board, regarding petitioner's son having been suspended which gives rise to the present dispute. At the prehearing conference conducted July 17, 1987, a major issue to be decided in this case was identified as follows:

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> Whether the words used, if any, by Louise Altomare during the meeting conducted by the Board April 13, 1987, and in the circumstances of the place, time and manner of such asserted words used, constitute a violation of N.J.S.A. 18A:36-19; N.J.A.C. 6:3-2.1 et seq., or 20 U.S.C.A. 1232.

At the plenary hearing conducted November 2, 1987 petitioner's affirmative proofs in support of his case-in-chief that the words used by Ms. Altomare constitute a violation of federal and state law, as well as State Board rules and regulations, consists solely of the admission made by the Board that the words as recited above were used. (1T:15) The Board's motion to dismiss at the close of petitioner's case-in-chief was denied in order to have a complete record of the underlying circumstances surrounding the complained of public utterance by Louise A. Altomare.

Ms. Altomare's six and one-half years of employment as a kindergarten instructional aide with the Board has been spent exclusively in a kindergarten classroom at the Board's Lillian M. Dunfee School. Ms. Altomare has never been assigned as a teacher's aide in the classroom of H.L., petitioner's son. H.L. is in the same grade as Ms. Altomare's daughter, though not in the same classroom. Ms. Altomare testified under oath that during the 1985-86 academic year, her daughter came home from school and, probably at the dinner table, commented to the gathered family that H.L., petitioner's son, was suspended from school. It is this suspension to which Ms. Altomare made reference in her public utterance on April 13, 1987.

The Board's written policies (R-1) regarding pupil records parallels N.J.S.A. 18A:36-19 and N.J.A.C. 6:3-2.1 et seq. Regarding pupil suspensions, the superintendent testified as follows:

> The policy is to keep the documentation in the hearing process [leading to a pupil suspension] confidential and the paperwork. The suspension itself becomes public knowledge when the youngster is out of the schoolhouse. I have no reason or no way of controlling the public record or the public portion of what transpires outside of the confines of the schoolhouse, not only with the students, but within the individuals who are out there observing the suspension.

The principal of the school in which H.L. is enrolled testified that to his knowledge Ms. Altomare was never given access nor had ever obtained access to review H.L.'s pupil records. The principal testified that at the beginning of each year he meets

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with all teachers to discuss the Board's policy regarding pupil records. In this regard, he testified that teachers are directed only to review the records of pupils in their class.

FINDINGS OF FACT

I FIND the following facts to be established by a preponderance of credible evidence in this record.

1. Following the Board's reorganization meeting held April 13, 1987 a conversation occurred in the corridor among Ms. Altomare and other persons.

2. Petitioner joined the conversation and among other things commented that 'the board of education stinks'.

3. Ms. Altomare, whose husband was just seated on the Board, took exception and, in response to petitioner's citing of statistics regarding pupil suspensions, made the utterance to petitioner regarding his son.

4. Ms. Altomare at no time was given access nor had she ever obtained access to H.L.'s pupil records.

5. The information regarding petitioner's son's suspension uttered by Ms. Altomare on April 13, 1987 to petitioner was obtained from Ms. Altomare's daughter. The principal of the school in which petitioner's son is enrolled meets with his teachers at the beginning of each year to explain the necessity for honoring the Board's policy regarding pupil records.

LAW

The Family Educational Rights and Privacy Act of 1974, P.L. 90-247, as amended, P.L. 93-380, section 513, codified at 20 U.S.C.A. 1232g et seq. provides at (b)(1) as follows:

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> No [federal] funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information * * *) of students without the written consent of their parents to any individual, agency, or organization, other than to the following - * * *

N.J.S.A. 18A:36-19 provides in part as follows:

> The State Board of Education shall provide by regulation for the creation, maintenance and retention of pupil records and for the security thereof and access thereto to provide general protection * * * for the right of both pupil and parent or guardian to reasonable privacy as against other persons * * *
>
> No liability shall attach to any member, officer or employee of any board of education for the furnishing of any pupil records consistent with this act and the regulations adopted hereunder.

The State Board of Education pursuant to its statutory obligation promulgated rules and regulations for the proper and appropriate compliation and use of pupil records. These rules and regulations are set forth at N.J.A.C. 6:3-2.1 and include areas such as mandated and permitted pupil records, N.J.A.C. 6:3-2.3, maintenance and security of pupil records, N.J.A.C. 6:3-2.4, access to pupil records, N.J.A.C. 6:3-2.5, and conditions for access to pupil records, N.J.A.C. 6:3-26. Access to pupil records is limited to authorized organizations, agencies and specifically identified persons.

The federal law seeks basically to protect students from infringement of personal privacy by unprivileged disclosures. State law and the administrative rules and regulations closely parallel the federal requirements.

In this case the evidence fails to demonstrate that Ms. Altomare acquired information regarding the suspension of petitioner's son from the pupil's records maintained by the Board. Rather, the evidence demonstrates that Ms. Altomare secured the information she publicly uttered April 13, 1987 from her daughter at some time during the 1985-86 academic year. Accordingly, the public utterance by Ms. Altomare on April 13, 1987 does not constitute, I **CONCLUDE**, disclosure of confidential information secured by her from H.L.'s pupil records. The information acquired by Ms. Altomare was from a source, her daughter, other than H.L.'s protected pupil records and, as such, the

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complained of utterance does not rise to the level of being a violation of state or federal law, or State Board rules and regulations, or of the Board's own policy regarding student records. There is no evidence to show the Board or any of its employees took any action to publicly disclose confidential information which may be contained or may have been contained in H.L.'s pupil records.

Accordingly, I **CONCLUDE** that petitioner has failed in his burden of proof to establish by a preponderance of credible evidence that the public utterance of Ms. Altomare on April 13, 1987 is in any way a violation of his son's right to privacy under school law. The petition of appeal is **DISMISSED.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

December 16, 1987
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

DEC 16 1987
DATE

Receipt Acknowledged:
Seymour Weiss
DEPARTMENT OF EDUCATION

DEC 21 1987
DATE

Mailed To Parties:
Ronald L. Parks /K.S
OFFICE OF ADMINISTRATIVE LAW

sc

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B.L., on behalf of his son, H.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BARNEGAT, OCEAN COUNTY AND LOUISE ALTOMARE,	:	DECISION
RESPONDENTS.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon review of the record including the transcript of the proceedings, the Commissioner concurs with and adopts as his own the conclusion of the ALJ that the evidence in this matter fails to demonstrate that Ms. Altomare acquired information regarding the suspension of petitioner's son from the pupil records maintained by the Board. Rather, the evidence supports that the source of Ms. Altomare's knowledge regarding said suspension was her daughter who was a fellow 8th grade student of H.L. when the suspension occurred two years previously in a school separate from that in which Ms. Altomare has been employed by the Board.

As such, the Commissioner agrees with the ALJ that petitioner has failed to demonstrate that any violation of federal or state law or regulations or the Board's own policy occurred regarding disclosure of, or inappropriate access to, confidential student records. The Commissioner wishes to point out, however, that such determination neither excuses nor condones the thoughtlessness of Ms. Altomare's utterance; rather, it affirms that no illegality occurred.

Accordingly, the initial decision is adopted as the final decision in this matter for the reasons expressed therein. The Petition of Appeal is, therefore, dismissed with prejudice.

COMMISSIONER OF EDUCATION

January 26, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4221-87
AGENCY DKT. NO. 178-6/87

THADEUS PAWLAK,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF HOPATCONG,
Respondent.

Sheldon H. Pincus, Esq., for petitioner
(Bucceri and Pincus, attorneys)

Ellen S. Bass, Esq., for respondent
(Rand, Algeier, Tosti, Woodruff & Frieze, attorneys)

Record Closed: November 4, 1987 Decided: December 15, 1987

BEFORE **WARD R. YOUNG, ALJ:**

Petitioner, a former tenured teaching staff member who had been employed by the Hopatcong Board of Education (Board), seeks indemnification benefits of reimbursement fees and other defense costs pursuant to N.J.S.A. 18A:16-6 and N.J.S.A. 18A:16-6.1, as well as back pay and other contractual benefits, as the result of the dismissal of criminal charges following the completion of his participation in the Pretrial Intervention Program (PTI).

The Board denies entitlement of any benefits and seeks dismissal of the Petition due to petitioner's alleged violation of N.J.A.C. 6:24-1.2.

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The matter was transmitted to the Office of Administrative Law on June 17, 1987 as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on August 21, 1987 at which, inter alia, the parties agreed to submit the matter for summary decision. Following a period provided for discovery and the filing of a Stipulation of Facts, the parties filed briefs and the record closed with the final submission November 4, 1987.

I.

The following relevant stipulated facts are adopted herein as **FINDINGS OF FACT:**

1. Petitioner was a tenured teaching staff member first employed by the Board in September 1975.

2. The Superintendent of Schools and petitioner met on March 7, 1985 to discuss alleged incidents of corporal contact with students and alleged conduct unbecoming a teacher pursuant to N.J.S.A. 18A:25-7, and suspension with pay pursuant to N.J.S.A. 18A:25-6 occurred on that day.

3. The Board affirmed the action of the Superintendent on March 14, 1985 and continued the suspension of petitioner until further notice.

4. Petitioner was indicted on June 27, 1985 by the Sussex County Grand Jury on three counts of the second degree crime of sexual assault and three counts of the third degree crime of endangering the welfare of children pursuant to N.J.S.A. 2C:14-26 and N.J.S.A. 2C:24-4.

5. Petitioner entered a plea of not guilty to all counts at arraignment.

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6. Petitioner's defense counsel noticed the Board on July 10, 1985 of his client's claim for indemnification pursuant to N.J.S.A. 18A:16-6.1.

7. The Board suspended petitioner without pay on July 15, 1985 by reason of the indictment and pursuant to N.J.S.A. 18A:6-8.3.

8. The Board did not certify tenure charges pursuant to N.J.S.A. 18A:6-10 at any time.

9. Petitioner's application for entry into the Sussex County PTI program was approved subject to the following five conditions:

   a) report to PTI counselor as directed;

   b) comply with all recommendations of Dr. Carlos E. Burlingham [Psychiatrist];

   c) petitioner resign from his teaching position with respondent;

   d) petitioner's notice to the Commissioner in writing that he would not seek or accept employment as a teacher in New Jersey in any private or public preschool, elementary, junior high or high school at any time in the future. [Letter written April 21, 1986.]

   e) enrollment in PTI would be for a period of one-year.

10. The imposition of conditions c) and d) above was requested by the Board in a letter dated October 2, 1985.

11. Petitioner submitted his resignation to the Board on April 21, 1986.

12. The Board resolved to accept petitioner's resignation on April 28, 1986, effective April 21, 1986.

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13. Petitioner formally entered PTI on May 5, 1986.

14. Petitioner was not paid any salary by the Board during the period from July 15, 1985 through April 21, 1986 while the indictment was pending, pursuant to N.J.S.A. 18A:6-8.3.

15. Petitioner held a ten-month teaching position at all times material to this action.

16. The Board did not act to withhold the employment or adjustment increments of petitioner for the 1985-86 school year.

17. Petitioner successfully completed the one-year PTI probationary period on May 6, 1987.

18. An Order was entered on May 6, 1987 by the Sussex County Superior Court, Law Division-Criminal, to dismiss the three counts of Sexual Assault and three counts of Endangering Welfare of Children pursuant to Rule 3:28(c)(1) and upon the recommendation of the Director of the Sussex County PTI program and with the consent of the prosecutor and defendant.

19. Petitioner incurred the following expenses in his defense against the criminal charges:

a) counsel fees - $5000
b) investigator fees - 2640
c) psychiatric evaluation - 855

20. Petitioner had mitigation earnings of $300 from July 15, 1985 through April 21, 1986.

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21. Petitioner had accumulated 107 sick days as of June 30, 1985.

22. The Board retained petitioner's insurance coverages to April 21, 1986.

23. Seventeen documents were stipulated as evidentiary. [marked as joint exhibits and listed in addendum]

24. The instant Petition was filed with the Commissioner of Education on June 4, 1987.

Counsel for the Board would not stipulate the admisison of a July 12, 1985 letter from an agent of the Board to its insurance agency into evidence. Counsel for petitioner filed a Certification in support of his request that the document be admitted on the basis of relevance "to show the respondent's receipt of petitioner's notice of potential, but unaccrued, claim for indemnification transmitted by . . ." [defense counsel]; "Said letter contains admissions of liability for indemnification under N.J.S.A. 18A:16-6.1," and "It is relevant to the defense of untimeliness, asserted by respondent." Recognizing that the threshhold of relevance for the admission of a document into evidence is low, and further recognizing that the import of an evidentiary document is the weight attached by the finder of fact and that the document will speak for itself, I hereby admit the July 12, 1985 letter into evidence.

II.

The Board's contention that this matter be dismissed due to petitioner's untimely filing in violation of N.J.A.C. 6:24-1.2 shall be addressed first.

N.J.A.C. 6:24-1.2(b) clearly states that a petition transmitted to the Commissioner of Education must be filed "no later than the 90th day from the date of receipt of the notice of a final order, ruling, or other action by the district board of education which is the subject of the requested contested case hearing."

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The Board contends the cause of action occurred on May 5, 1986, the date petitioner entered the PTI program. This contention is based on the belief that petitioner then "knew that, barring any extraordinary events beyond his personal control, the criminal charges would be dismissed," and "It is on this date that effective disposition of the criminal charges occurred because from then on Pawlak held the future in his own hands — his compliance with the PTI program requirements." Rb at 3.

Petitioner submits, inter alia, that the cause of action did not occur until the indictment against him was dismissed on May 6, 1987 following successful completion of the PTI program.

The indemnification statute concerning any criminal action, N.J.S.A. 18A:16-6.1 clearly refers to the proceeding if "dismissed or result in a final disposition." The Board's contention of inevitable dismissal must be rejected as conjecture. It cannnot be disputed that dismissal of the indictment did not occur until May 6, 1987, nor that the instant petition was filed on June 4, 1987.

I **FIND** the cause of action for indemnification occurred on May 6, 1987 and that the Petition was timely filed. I **CONCLUDE**, therefore that summary decision for dismissal due to untimely filing is **DENIED**.

III.

The substantive indemnification issue is whether it is appropriate to reimburse the costs of defense against criminal charges pursuant to N.J.S.A. 18A:16-6.1 when disposition of the charges is totally dependent upon successful completion of a PTI program pursuant to N.J.S.A. 2C:43-12 et seq.

The relevant facts are undisputed. Petitioner was a tenured teacher when he was indicted by the Grand Jury on charges of sexual assault and endangering the welfare of children. He entered a plea of not guilty. He was then admitted into PTI to qualify for dismissal of the charges in Superior Court upon successful completion of the program.

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There was no hearing on the merits of the charges in the indictment. Admission to PTI occurred only after petitioner resigned his teaching position and advised the Commissioner of Education of the self-imposed permanent bar to teach in the private or public schools in New Jersey.

Petitioner contends that the dismissal of the indictment qualifies him for reimbursement of defense costs pursuant to N.J.S.A. 18A:16-6.1.

The Board contends that petitioner is not an appropriate candidate for indemnification and is not entitled to reimbursement.

What is the scope of protection from the cost of criminal litigation available to public school employees and the impact of PTI upon that protection? A need to explore the statutory schemes for indemnification of public school employees and the PTI program is basic to this discussion.

N.J.S.A. 18A:16-6 sets standards for indemnification against civil actions and states:

> Whenever any civil action has been or shall be brought against any person holding any office, position or employment under the jurisdiction of any board of education, including any student teacher, for any act or omission arising out of and in the course of the performance of the duties as such office, position, employment or student teaching, the board shall defray all costs of defending such action, including reasonable counsel fees and expenses, together with costs of appeal, if any, and shall save harmless and protect such person from any financial loss resulting therefrom; and said board may arrange for and maintain appropriate insurance to cover all such damages, losses and expenses.

N.J.S.A. 18A:16-6.1 applies to criminal actions and states:

> Should any criminal action be instituted against any such person for any such act or omission and should such proceeding be dismissed or result in a final disposition in favor of such person, the board of education shall reimburse him for the cost of defending such proceeding, including reasonable counsel fees and expenses of the original hearing or trial and all appeals.

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It is patently clear that the statutory standard in criminal actions is more restrictive as dismissal or a favorable final disposition is required, whereas in civil actions applicability of the statute is not dependent on the outcome.

There is no recorded legislative history accompanying these statutes, which were adopted in 1965 and amended in 1967. The sole indication of legislative intent appears in the introductory statement to Senate Bill 284 (L. 1965, C.205) that the bill was an extension of a long-standing policy to provide protection to school employees, and emphasizes that this protection is available "for an act or omission arising out of the performance of duties." The statement further says:

> This bill broadens the protection now granted for damage suits to cover any civil action arising out of the performance of duty . . .
>
> This bill also proposes legal help under limited circumstances in the event of a criminal action against an employee . . . provided the action is dismissed or results in a final disposition in favor of such employee.
>
> (Senate Bill 284, Introductory Statement, L. 1965, C.205 — emphasis added)

A reading of N.J.S.A. 18A:16-6 and N.J.S.A. 18A:16-6.1 indicates the need to pursue a bifurcated analysis in determining eligibility for indemnification from criminal defense costs. The first leg of the inquiry must determine whether the "act or omission" qualifies. Only after this determination is made may one pursue the second part of the inquiry. Thus, the analysis of the impact of the dismissal through PTI does not come into play until after the initial question is resolved and only if the act is found to qualify.

There is sparse case law interpreting the interplay of indemnification and PTI provisions. The one analysis directly on point, McCorkle v. Pittsgrove Township Bd. of Ed., (App. Div. A-5580-81T2, June 2, 1983, per curiam, aff'g oral trial court decision)

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(unreported), involved facts of striking similarity to the instant matter. A teacher was indicted for sexual assault upon a student, accepted into PTI, completed a six-month program, and disposition was noted with "complaint dismissed — matter adjusted."

The McCorkle panel held (slip opinion at 2) that the "act asserted is not of quality or character" to be classified as "arising out of and in the course of the performance of the duties" pursuant to statutory standard. Emphasizing that the primary and overriding burden was on the petitioner to prove applicability of the act, the McCorkle panel relied upon Powers v. Union City Bd. of Ed., 124 N.J. Super. 590 (Law Div. 1973), aff'd o.b., 127 N.J. Super. 294 (App. Div. 1974), cert. den., 65 N.J. 575 (1974).

Powers was a matter of first impression construing similar language in N.J.S.A. 18A:12-20 as it affected indemnification after dismissal of criminal charges. It involved a school board member acquitted of extortion charges. The fact of the jury acquittal was never addressed as Judge Larner determined that the nature of the act itself presented the insurmountable obstacle. He declared that criminal charges required a strict analysis to ensure reimbursement only "when the circumstances . . . fit clearly within the legislative limitations." 124 N.J. Super. at 598.

Examples of "circumstances" deserving such treatment were given as voting to discriminately exclude ethnic groups from school, instituting religious tests for employment, and negligently or willfully refusing to perform duties. Judge Larner emphasized the contrast between the restrictive standards applied in criminal cases and the more liberal tone in the civil context. He stressed the liberal approach in civil cases to allow school board members to perform their duties without the inhibiting fear of litigation. Id., at 597.

The Commissioner of Education approved indemnification pursuant to N.J.S.A. 18A:16-6.1 in a case of simple assault as the conduct arose out of and in the course of the performance of duties. See, Cilento v. Hillside Twp. Bd. of Ed., 1985 S.L.D. ____ (decided October 7, 1985).

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The language in N.J.S.A. 40A:14-155 was similar to that of N.J.S.A. 18A:16-6 when the Supreme Court decided Valerius v. Newark, 84 N.J. 591 (1980), a matter in which a police officer had been acquitted of misconduct in office. The officer claimed that the chief witness against him had testified to avenge previous accusations by the officer against the son of the witness. The Court determined this was just the type of situation the indemnification statute was intended to address, and held that the answer to the "question whether the action or proceeding arose out of the officer's performance of his duties or was incidental thereto" may depend on whether there is a determination of guilt or innocence. (at 596)

It is noted that the "incidental" language in N.J.S.A. 40A:14-155 was recently deleted and replaced with "and directly related to the lawful exercise of police powers in the furtherance of his official duties," L. 1985, C.457 §1 (January 15, 1986). The statement accompanying this amendment expresses the Legislature's intention to stop a trend to expand the reach of that statute to "charges arising solely from the person's status as a police officer" outside the scope of police duties.

The second part of this inquiry concerns the statutory requirement of dismissal or a final disposition in favor of an individual seeking the protection of N.J.S.A. 18A:16-6.1. Does petitioner's participation in and completion of the PTI program fulfill this requirement?

This part of the bifurcated process must include an examination of the PTI program as set forth in N.J.S.A. 2C:43-12, adopted in 1978 and amended in 1979. There is no record of public hearings on the matter, nor is there any accompanying expression of legislative intent. See, L. 1978, C.95, L. 1979, C. 178, §88 (September 1, 1979), and Assembly Bill 642 (1976). However, the concept codified in the statute has a short and well-documented history which provides insight. PTI was not an officially recognized option prior to a 1967 report by the President's Commission on Law Enforcement and Administration of Justice. Several experimental programs were then instituted in other states.

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The first New Jersey pretrial intervention program was a vocational project based in Newark and known as the Defendants' Diversionary Program. Official guidelines for this experimental project were provided by the New Jersey Supreme Court in Court Rule 3:28 (October 1970). The emphasis was and continues to be on diversion of first-time offenders from traditional criminal prosecution into more effective rehabilitative programs. In 1974, the rule was retitled as Pretrial Intervention Programs. See, Pressler, Current N.J. Court Rules, Comment R. 3:28 at 599-600.

Although State v. Leonardis, 71 N.J. 85 (1976) was concerned with eligibility standards, the Court stated at 89:

> The pretrial intervention program is an alternative procedure to the traditional process of prosecuting criminal defendants. It is intended to augment the criminal justice register where prosecution would be counterproductive, ineffective or unwarranted.

The Court emphasized the rehabilitative function of the program and the concommitant avoidance of the stigma of conviction since the person avoids adjudication of his guilt.

When the 1979 Code of Criminal Justice was enacted and R. 3:28 was codified at N.J.S.A. 2C:43-12, the Legislature incorporated an explicit statement of public policy within the statute, which included the following:

> The purpose . . . is to effectuate a statewide program of pretrial intervention. It is the policy of the State of New Jersey that supervisory treatment should ordinarily be limited to persons who have not previously been convicted of any criminal offense . . . when treatment would:
>
> (1) Provide applicants, on an equal basis, with opportunities to avoid ordinary prosecution by receiving early rehabilitative services or supervision . . . to deter future criminal behavior . . .; or
>
> (2) Provide an alternative to prosecution . . . to serve as sufficient sanction to deter criminal conduct; or
>
> . . .

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> (5) Provide deterrence of future criminal or disorderly behavior by an applicant in a program of supervisory treatment. (emphasis added)

An understanding of the time frames of adoption is basic to an analysis of the goals of the Legislature expressed in the relevant statutory schemes. The State's first PTI-type experiment started in 1970 and the Legislature's first proposal of what is now the PTI program did not occur until 1976. Thus, one must infer that there was no consideration by the Legislature of such a scheme during the enactment of the indemnification provisions of N.J.S.A. 18A:16-6 and N.J.S.A. 18A:16-6.1 in 1965 and 1967.

As previously indicated, the interplay of the indemnification and PTI statutes was alluded to in McCorkle. There was no further analysis of the issue since the petitioner was found ineligible on the basis of the act involved and the second step of the inquiry was never reached.

The impact of PTI disposition of criminal charges was addressed in Thomas v. N.J. Inst. of Technology, 178 N.J. Super. 60 (Law Div. 1981), wherein the issue was whether the PTI participation was proof of a favorable termination necessary to show malicious prosecution. Judge Baime found that PTI was too indecisive a determination to qualify in noting that it "cannot be regarded as the equivalent of a judgment of acquittal or an otherwise favorable termination," but instead "provides criminal defendants with an opportunity to avoid ordinary prosecution. (at 62)

The Thomas rationale was expanded upon in Lindes v. Sutter, et al., 621 F. Supp. 1197 (1985), wherein Judge Rodriquez cited R. 3:28 in a footnote to indicate that the factors stressed "imply 'guilt with amenability to rehabilitation', not innocence." (at 1201, Fn.5). In finding that completion of PTI does not constitute the element of favorable termination, Judge Rodriquez further stated:

> To hold otherwise would be to allow a criminal defendant to sidestep criminal prosecution, to forego litigation of his guilt or innocence, to benefit from a rehabilitative program, and then to turn around and use this process which was designed

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> to help him as a sword against the state in civil action. This cannot be the result intended by the Legislature in creating PTI. (at 1201-2)

In Kerwick v. Trenton, 184 N.J. Super. 235 (Law Div. 1982), wherein reimbursement of defense costs was sought pursuant to N.J.S.A. 40A:14-155 [almost identical to N.J.S.A. 18A:16-16.1], Judge Levy found the petitioner not eligible and stated: "By taking advantage of . . . diversionary treatment plaintiff cannot use a legal fiction to support a conclusion that there was a final determination in his favor." (at 240)

Petitioner's reliance on Raymond Della Serra v. Borough of Mountainside, (N.J. App. Div. A-5585-84T, July 18, 1986) (unreported) is misplaced as the question therein was whether Della Serra was entitled to back pay during a period of reinstatement after completion of PTI. The Della Serra court reviewed the goals of the back pay and PTI statutes and noted they were enacted at "different times . . . and for different purposes." (at 6)

IV.

As initially stated, determination of eligibility for indemnification under N.J.S.A.18A:16-6 and N.J.S.A. 18A:16-6.1 is dependent on a bifurcated analysis. The initial inquiry must be whether the act or mission fits the statutory standard as one "arising out of and in the course of the performance of the duties." It is essential to focus on the nature of the act in relation to the duties of the position held. Once eligibility requirements are determined, the next question would be whether PTI diversion fits the statutory standard of dismissal or a final disposition in favor of a person.

The petitioner's position in the instant matter must fall on the first leg of the inquiry. I **FIND** no possible nexus between the charges of three counts of the second degree crime of sexual assault and three counts of the third degree crime of endangering the welfare of children with the performance of the duties of a teaching staff member, regardless of what those duties may be.

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I **CONCLUDE**, therefore, that summary decision is **GRANTED** to the respondent Hopatcong Board of Education, and that the instant Petition seeking indemnification pursuant to N.J.S.A. 18A:16-6 and N.J.S.A. 18A:16-6.1 is hereby **DISMISSED**.

V.

Petitioner also seeks back pay for the period from his suspension without pay by the Board on July 15, 1985 to the effective date of his resignation on April 21, 1986, as well as compensation for 107 accumulated sick days as of June 30, 1985.

A brief chronology of events is in order. Petitioner was suspended with pay by the Superintendent by reason of filed charges on March 7, 1985, which was affirmed by the Board on April 14, 1985. The Board suspended petitioner without pay on July 15, 1985 until resolution of the criminal charges against him by reason of the indictment by the Sussex County Grand Jury on June 27, 1985. The Board accepted petitioner's resignation from his tenured position on April 28, 1986, effective April 21, 1986. Dismissal of the Indictment/Complaints was entered by the Superior Court on May 6, 1987 after satisfactory completion of petitioner's participation in the PTI program. The instant petition was filed on June 4, 1987.

The claim for back pay during the period of suspension without pay until resolution of the criminal charges from July 15, 1985 to April 21, 1986 must obviously be premised on the dismissal of the charges as being favorable to the petitioner. Such claim is **DENIED** for all the reasons previously stated above as the rationale for dismissal of the indemnification claim.

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Concerning petitioner's claim of compensation for 107 accumulated sick days as of June 30, 1985, I **FIND** the cause of action for such a claim occurred with the acceptance of petitioner's resignation from his tenured position on April 28, 1986, effective April 21, 1986. I **FIND** the nexus of this claim to be with his termination of services with the district by reason of his resignation, and not with the dismissal of the indictment by the court. This claim was incorporated in the instant petition filed on June 4, 1987, which is 11 months and 2 weeks after the cause of action. I **FIND** that petitioner has slept on his perceived rights with no compelling reason to determine the substantive merits of his claim. N.J.A.C. 6:24-1.2. Laches. Petitioner's claim for accumulated sick day compensation upon his resignation is therefore **DENIED**.

In summary, I **CONCLUDE** the Petition of Appeal in its entirety to be **DISMISSED**.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

15 December 1987
DATE

WARD R. YOUNG, ALJ

Receipt Acknowledged:

DEC 17 1987
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

DEC 18 1987
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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THADEUS PAWLAK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HOPATCONG, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions were timely filed pursuant to N.J.A.C. 1:1-18.4. The Board's reply exceptions were timely as well.

Petitioner's exceptions are a nearly verbatim iteration of his post-hearing reply brief. Both parties' post-hearing submissions are incorporated herein by reference. The essence of petitioner's exceptions is that the ALJ erred in granting summary judgment to the Board, thereby denying indemnification to him for counsel fees and costs of defense pursuant to N.J.S.A. 18A:16-6.1. He claims that as a matter of fact and of law, the incident which gave rise to the charges against him arose out of and in the course of his duties. Moreover, he claims the dismissal of the charges against him following completion of the Pretrial Intervention (PTI) program was a dismissal which entitles him to indemnification. Finally, petitioner claims the ALJ's analysis of the matter was in error.

The only new argument included in petitioner's exceptions pertains to the ALJ's recitation of the holdings in Powers v. Union City Bd. of Ed., 124 N.J. Super. 590 (Law Div. 1973), aff'd o.b. 127 N.J. Super. 294 (App. Div. 1974), cert. den. 65 N.J. 575 (1974) and McCorkle v. Pittsgrove Township Bd. of Ed., Docket No. A-5550-81T2, N.J. Superior Court, Appellate Division, June 2, 1983 (aff'd trial court decision) "for the premise that petitioner's alleged acts are not of the 'quality or character' to be classified as 'arising out of and in the course of the performance of duties' 'pursuant to statutory standard.'" (Exceptions, at p. 2, citing Powers, supra, and McCorkle, supra, page references omitted in exceptions)

Petitioner contends that in the instant matter, the ALJ in the initial decision, ante, cited the judge in Powers, supra, for examples of conduct that would arise out of the duties of a board member that would thereby entitle that board member to indemnification.

> Those "circumstances" only pertain to Board members, however, and not teaching staff members. Other than to cite the Commissioner's

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> decision in Cilento v. Hillside Twp. Bd. of Ed., 1985 S.L.D. _____ (decided October 7, 1985) (simple assault allegation is conduct arising out of and in the course of the performance of duties), not one other type of conduct is described which would satisfy the Powers test if applied to teaching staff members. Petitioner submits, however, that such a construction is improper since it results in part of a statute rendered inoperative, superfluous or meaningless, and is a rule to be avoided. (citations omitted) (emphasis in text) (Exceptions, at pp. 3-4)

Petitioner claims that Cilento, supra, failed to address Powers, supra. He avers that "it is simply bewildering how the ALJ can square the two holdings." (Exceptions, at p. 4) Petitioner feels the ALJ left unanswered what criminal teaching staff member conduct can meet the requirements of N.J.S.A. 18A:16-6.1 for indemnification. He submits the ALJ erred in concluding that "petitioner's alleged conduct did not 'arise out of and in the course of his employment' to trigger the application of N.J.S.A. 18A:16-6.1." (Exceptions, at p. 5)

Additionally, in a footnote, petitioner claims the ALJ erred in not admitting into evidence or, alternatively, to set forth the basis for excluding from evidence a document submitted by petitioner dated April 24, 1985 purporting to be a letter from DYFS advising of its investigation concerning "'allegations of abuse at the Hudson-Maxim School, Hopatcong, New Jersey'.***" (Exceptions, at p. 2, quoting letter of April 24, 1985) Petitioner claims that this letter has bearing on the issue of whether the incidents with which he was charged arose out of or in the course of his duties.

Moreover, relying on Raymond Della Serra v. Borough of Mountainside et al. (DKT. NO. A-5585-84T, N.J. Superior Ct., App. Div., July 18, 1986), petitioner contends the ALJ erred in concluding that his participation in PTI did not constitute a "dismissal" of the proceeding as further required by the statute in question. He avers that said case "directly answers the question in petitioner's favor and explicitly rejects the very cases which Judge Young relied on to defeat petitioner's assertion." (Exceptions, at p. 5) Rather, petitioner claims "it is the ALJ who misplaced reliance, and who quotes the decision's language out of context in an attempt to ignore the clear import of the decision." (Id.) Petitioner claims again that summary decision should not have been issued in the Board's favor.

Thereafter, petitioner reasserts his claim for back pay, the arguments for which are embodied in his post-hearing submission.

The Board's reply exceptions aver petitioner errs in respect to each of his exceptions and that his points are the same ones raised in his initial brief and reply brief, which were rejected by the ALJ. It counters each exception point for point. Said arguments are summarized in pertinent part below.

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Relying on N.J.S.A. 18A:16-6.1, the Board suggests "it is inconceivable to believe that the legislators intended to indemnify a teacher for such acts as Pawlak's since these acts are a perversion of the duties of a certified tenured teacher." (Reply Exceptions, at p. 2) Suggesting that there is a difference between "during the course of" employment and "arose out of and in the course of" employment, the Board claims that the trial level decision in McCorkle, supra, decided against McCorkle, and that the judge therein "made a distinction between acts that arose out of the duties expected of a teacher and acts that arose while a teacher is teaching but are not expected of him." (Reply Exceptions, at p. 2) The Board claims the ALJ below, who relied on the Appellate Division affirmance of McCorkle, was correct in "showing that the act of sexual abuse of a student is not one that is of the 'quality or character' to be classified as arising out of and in the course of the performance of the professional duties of a public school teacher." (Reply Exceptions, at p. 2, page references omitted) The Board contends the ALJ's "distinctions in language get at the intention of the statute, as passed by the legislature." (Id.)

Moreover, the Board claims its reliance on Valerius et al. v. Newark, 84 N.J. 591 (1980) is relevant. The Board claims that in the instant matter, as in Valerius, acts are averred that require a jury determination. While the jury acquitted Valerius and, thus, the City of Newark could not claim that Valerius' actions constituted a perversion of a police officer's duties, in Pawlak's case, there has been no such determination because petitioner entered PTI, choosing not to contest the criminal charges. Since "the question of whether Pawlak's conduct arose out of and in the course of his duties as a teacher cannot and will never be answered favorably to Pawlak *** Pawlak cannot support his claim that his acts arose out of his professional duties." (Reply Exceptions, at p. 3)

Moreover, relying on Kerwick v. Trenton, 184 N.J. Super. 235, 240 (Law Div. 1982), the Board claims petitioner fails to recognize that "emerging case law clearly sets dismissals acquired from diversionary procedures apart from favorable dispositions.***" (Reply Exceptions, at p. 3) It suggests that the ALJ was correct in concluding "that 'plaintiff cannot use a legal fiction to support a conclusion that there was a final determination in his favor.'" (Id., quoting Kerwick at 240)

The Board agrees with the ALJ, also, that Della Serra, supra, is distinguishable from the instant matter not only for the reason suggested by the ALJ, that is, that the PTI program was enacted at a different time and with a different purpose from the statutes regarding indemnification and back pay, but also because the statute in question in Della Serra, N.J.S.A. 40A:14-149.2, specifically relates to police officers, not teachers. "Also, Police Officer Della Serra subsequently was reinstated to his position after a review of the disciplinary proceedings against him." (Reply Exceptions, at p. 4)

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Finally, the Board counters petitioner's argument that the ALJ analyzed the chronology of events incorrectly by suggesting that the Board asked, not demanded, as petitioner contends, that as a condition for agreeing to petitioner's availing himself of PTI, he resign. It cites Document 25M in support of its position in this regard. The Board avers the prosecutor, not the Board, set the requirements for petitioner's participation in PTI, and petitioner voluntarily accepted them as a condition for entry into that diversionary program. The Board cites State v. DeMarco, 107 N.J. 562 (1987) for having recognized the propriety of conditioning entry into PTI on a public employee's resignation. It contends that petitioner's alternative analysis of the instant matter relies on the dissenting opinion in DeMarco, which is not the law of the State of New Jersey.

The Board submits that the opinion of ALJ Young must stand as correct and should be upheld.

Upon his careful and independent review of the record, the Commissioner adopts the findings and determination of the Office of Administrative Law for the reasons expressed in the initial decision as amplified below.

The Commissioner, like the ALJ, founds his determination in this matter upon the Appellate Division decision in McCorkle, supra. The McCorkle facts were markedly similar to the instant situation: both men were teachers, both were charged with sexual assault of students, both opted to participate in and completed a PTI program, and, in both cases, the charges were dismissed upon completion of said program. Moreover, the legal arguments the Court was asked to consider concerned language from the same statutes, that is, N.J.S.A. 18A:16-6 and N.J.S.A. 18A:16-6.1, in deciding first, whether the act or omission (with which McCorkle was charged) qualified for indemnification because it "arose out of the performance of duties" and second, whether his participation in a PTI program constituted grounds for indemnification because "the action is dismissed or results in a final disposition in favor of such employee." (N.J.S.A. 18A:16-6, 16-6.1)

In addressing the first of the two-step inquiry for indemnification, the Appellate Court panel decision in McCorkle was unequivocal in stating that the act "here asserted is not of that quality or character" to be classified as "arising out of and in the course of the performance of the duties" of a teaching staff member. (Slip Opinion, at p. 2) (See also Initial Decision, ante.) The Court stated:

> N.J.S.A. 18A:16-6.1 is specifically tied in legislative context to N.J.S.A. 18A:16-6. In both subsections the "act or omission" thus must be one "arising out of and in the course of the performance of the duties" of plaintiff's employment as a teacher. A criminal charge of the nature here asserted is not of that quality or character. Cf. Powers v. Union City Bd. of

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> Educ., 124 N.J. Super. 590, 595-598 (Law Div. 1973), aff'd o.b., 127 N.J. Super. 294 (App. Div. 1974), certif. den. 65 N.J. 575 (1974). (Interpretation of similar language in N.J.S.A. 18A:12-20. Board of Education held not liable to pay counsel fees and expenses for board member acquitted of extortion.) (Slip Opinion, at p. 2)

The Court distinguished between an action that might "arise out of" a teaching staff member's duties and one that is "in the course of" one's teaching duties by relying on the Appellate Court decision in Powers, supra, which was affirmed, o.b. by the New Jersey Supreme Court. The McCorkle appellate panel stated:

> By reason of the foregoing and our total concurrence with the reasoning Judge Larner applied in Powers we need not address the question of whether the "dismissal" in this case, which resulted from a diversion of plaintiff from the ordinary criminal process and amounts to no finding of guilt, innocence or lack of proof, constitutes the sort of dismissal the Legislature contemplated as ground for reimbursement of counsel fees and expenses.
>
> Affirmed. (Slip Opinion, at p. 2)

The distinction, while perhaps subtle, is a real one, made clear by the panel in Powers. The ALJ's interpretation of Powers and the difference between actions "arising out of" as compared to "in the course of" is consistent with the Commissioner's. The issue posed was the same, as in McCorkle, the analysis by the judge the same, notwithstanding the fact, that under the Powers facts, plaintiff was acquitted by a jury. Therein, Judge Larner stated:

> The basic issue to be determined is whether the criminal charge of which defendant was acquitted was "for any act or omission arising out of and in the course of the performance of his duties as a member of the board of education," within the intendment of the Legislature in making such provision for indemnification.
> (Powers, 124 N.J. Super. at 593)

Citing the Workers' Compensation Act as embodying similar language, Judge Larner defined the terms in question as follows:

> ***arising out of employment signifies that "it results from a risk 'reasonably incidental' thereto," and arising in the course of employment connotes that "it occurs within its period at a place where the employee may properly be and while he is fulfilling the duties of his employment 'or doing something incidental to it.'" [citations omitted] (emphasis in text)
> (Id., at 595-6)

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In Powers, as in McCorkle, the Appellate Division determined that the facts did not qualify plaintiff for reimbursement under N.J.S.A. 18A:16-6 and 6.1. The panel in Powers further noted that in connection with criminal conduct the facts should be analyzed strictly, rather than liberally, in deciding when the circumstances are such as to fit clearly within the legislative intent.

The Commissioner construes this language to mean that while contact with students is certainly a condition that exists in the course of one's teaching duties, in no conceivable way could charges of three counts of the second degree crime of sexual assault and three counts of the third degree crime of endangering the welfare of children, the charges as averred herein, arise out of the performance of the duties of a teaching staff member. (See also Initial Decision, ante.) Thus, he finds, as did the ALJ below, that petitioner shall not be indemnified. He deems irrelevant, therefore, petitioner's exception contending that the ALJ erred in not admitting into the record the letter from DYFS dated April 24, 1985 because the Commissioner's determination to deny indemnification is predicated on a legal conclusion, not a factual one.

The Commissioner finds petitioner's attempts to distinguish the facts in this case from those posited in Powers, supra, and McCorkle, supra, to be without merit. That Mr. Powers was a board member performing the questionable acts outside of the course or scope of his duties as a board member is a distinction without a difference. As noted above, the conduct with which petitioner herein was charged could not, under any circumstance, have arisen out of the scope of his duties as a teaching staff member.

Similarly, the Commissioner finds no factual or legal error in the Appellate Court's interpretation of the lower court's conclusion in McCorkle, supra. Petitioner cites Tr. 8, lines 2 and 15 and Tr. 9, line 14 from McCorkle for the proposition that Judge Farrell held that McCorkle's alleged acts arose out of the course of his duties as a teacher. Contrary to petitioner's position, Tr. 8, lines 2 and 15 citations from the transcript of the Superior Court level hearing merely represent Judge Farrell's recitation of McCorkle's position in regard to his Motion for Summary Judgment, not a legal conclusion of the judge. Tr. 9, line 14, while a part of the judge's conclusions, is not inconsistent with the Appellate Court's affirmance. The conclusion of the Appellate Court was that McCorkle's alleged criminal behavior could not have arisen out of his duties as a teacher. The language of line 9 of the law division decision speaks to "during the course of his duties." As explained in Powers, the two conditions are not the same. Such argument raised by petitioner herein appears to be petitioner's "shell game," (Exceptions, at p. 4) and is accordingly dismissed as being without merit.

Moreover, Cilento, the one case wherein the Commissioner did indemnify a petitioner for costs and fees following a charge of simple assault, is distinguishable from the instant matter. The Commissioner agrees with the finding of the Appellate Division in

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McCorkle that, once having established that the first leg of the test for indemnification under N.J.S.A. 18A:16-6 and 6.1 has not been met, the second leg, whether the matter was "dismissed" as that term pertains to PTI diversionary measures need not be reached. However, the Commissioners notes for the record, that in Cilento, the entire matter was dismissed before it even reached the point of suggesting PTI. Thus, the Commissioner found that under those very limited facts, indemnification was appropriate. PTI participation is in no way analogous to early dismissal of charges for want of proof or failure to follow through on the charges, for example.

Finally, regarding Della Serra, supra, the Commissioner agrees with the ALJ's citing the language of that decision suggesting that the statutes regarding indemnification, back pay and PTI programs were enacted at different times with different purposes in mind. Moreover, as noted by the Board in its exceptions, "[t]he Della Serra decision is not on point because the statute analyzed there, N.J.S.A. 49A:14-149.2, specifically relates to police officers and not to teachers." (Reply Exceptions, at pp. 3-4) Once again, the Commissioner finds that McCorkle is dispositive of the instant matter not only because the statutes in question were the same, but the fact pattern therein was nearly identical to the instant matter. Therefore, there is no need to consider other case law developed under other indemnification statutes.

Accordingly, the Commissioner adopts as his own the findings and determination embodied in the initial decision, including the ALJ's decision on motion dated October 5, 1987 and his determination regarding back pay and compensation for 107 sick days, for the reasons stated therein, as augmented herein. Further, concerning petitioner's claim for sick day compensation the Commissioner finds that even were his claim for such compensation timely, based on petitioner's own admission that such benefit is contractual, the matter does not lie within the Commissioner of Education's jurisdiction, but rather with PERC. Accordingly, the instant petition is dismissed with prejudice.

COMMISSIONER OF EDUCATION

January 27, 1988

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THADEUS PAWLAK,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HOPATCONG, SUSSEX COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, January 27, 1988

For the Petitioner-Appellant, Bucceri and Pincus, (Sheldon H. Pincus, Esq., of Counsel)

For the Respondent-Respondent, Rand, Algeier, Tosti, Woodruff & Frieze (Ellen S. Bass, Esq., of Counsel)

This case involves a claim by a former teaching staff member for indemnification pursuant to N.J.S.A. 18A:16-6.1 and for back pay and contractual benefits based on dismissal of criminal charges after he had completed his participation in the Pretrial Intervention Program (PTI). Petitioner, who had been a tenured elementary teacher, was indicted on June 27, 1985, on three counts of sexual assault and three counts of endangering the welfare of children. On July 10, 1985, Petitioner noticed the Board of his claim for indemnification. On July 15, the Board suspended Petitioner without pay pursuant to N.J.S.A. 18A:6-8.3 for reason of indictment.

Petitioner applied for and was granted approval for entry into the Pretrial Intervention Program (PTI) subject to conditions imposed by the prosecutor, thereby avoiding prosecution for the criminal charges. Among those conditions were the specific condition that Petitioner resign from his teaching position with the Board, as well as the condition that he relinguish any right to teach in New Jersey.[1] In accord with those conditions, Respondent submitted his resignation to the Board on April 21, 1986, and, on April 28, the Board acted to accept his resignation.

Petitioner formally entered PTI on May 5, 1986, and completed his one year PTI probationary period on May 6, 1987, following which an order was entered by the Superior Court

[1] See In the Matter of the Revocation of the Teaching Certificate of Thadeus Pawlak by the State Board of Examiners, decided by the State Board, February 3, 1988, appeal pending, Appellate Division.

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dismissing the criminal charges. On June 4, 1987, Petitioner filed his petition with the Commissioner, seeking the relief specified above.

The Administrative Law Judge (ALJ) rejected Petitioner's claims. He concluded that Petitioner was not eligible for indemnification, finding no possible nexis between the charges of sexual assault and endangering the welfare of children and the performance of the duties of a teaching staff member, regardless of what those duties may be. He further concluded that Petitioner's claim for back pay must be premised on a dismissal of the charges as favorable to Petitioner and, therefore, also denied that claim. He found that Petitioner's claim for compensation for accumulated sick leave was time-barred in that the cause of action with regard to that claim arose with Petitioner's resignation, which was effective of April 21, 1986, more than 11 months before he filed his petition.

The Commissioner adopted the ALJ's determination, finding that the conduct with which Petitioner was charged could not, under any circumstances, have arisen out of the scope of Petitioner's duties as a teaching staff member. The Commissioner likewise adopted the ALJ's determinations of Petitioner's claims for back pay and for compensation for accumulated sick leave, specifically finding that jurisdiction over any claim for the contractual benefit of payment for sick leave lay not with the Commissioner, but with the Public Employees Relations Commission (PERC).

We, like the ALJ and Commissioner, find no merit to Petitioner's claim for indemnification. N.J.S.A. 18A:16-6.1 provides that a district board shall indemnify any board employee

> [s]hould any criminal action be instituted against any such person for any act or ommission and should such proceeding be dismissed or result in a final disposition in favor of such person...

As with the indemnity against civil action afforded by N.J.S.A. 18A:6-6, a teacher is entitled to indemnity against criminal action only if the action involves an act or ommission arising out of the performance of the teacher's duties and in the course of performing those duties. Powers v. Union City Bd. of Ed., 124 N.J. Super. 590 (Law Div. 1973). In connection with criminal conduct, the facts must be analyzed strictly rather than liberally, so that reimbursement of legal fees and expenses should only ensue when the circumstances are such as to fit clearly within the legislative limitations. Id. at 598. See Senate Bill 284, Introductory Statement, L. 1965 c. 205.

Although the Board does not dispute that the conduct that gave rise to the criminal charge here arose while Petitioner was a teacher, there is absolutely no indication in the record that the conduct occurred while he was in the course of carrying out his duties as a teacher. Powers v. Union City Bd. of Ed., supra. Although we would hesitate to hold as a matter of law that N.J.S.A. 18A:16-6.1 would never be applicable in any case involving charges

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such as those here, given the quality and character of those charges and the total absence of any indication of any nexis between the conduct forming the basis of the charges and Petitioner's performance of his duties as a teacher, we conclude that Petitioner has failed to establish any responsibility in the Board under the statute. Powers v. Union City Bd. of Ed., supra; McCorkle v. Pittsgrove Township Bd. of Ed., Docket #A-5580-81T2 (App. Div. June 2, 1983).

We also conclude that the order of the Superior Court dismissing the charges following Petitioner's participation in PTI does not constitute a "dismissal" of the charges within the meaning of N.J.S.A. 18A:16-6.1. As set forth in the ALJ's Initial Decision, N.J.S.A. 18A:16-6.1 was enacted in 1967, while the first PTI type experiment was not undertaken until 1970 and the first legislative proposal for what is now PTI was not made until 1976. In contrast to the purpose of N.J.S.A. 18A:16-6.1 to provide legal help under limited circumstances, Senate Bill 284, Introductory Statement, L. 1965 c. 205, and the explicit conditioning of eligibility for indemnity to those cases where criminal charges have been dismissed or resulted in final disposition in favor of the defendent, the purpose of PTI is to provide applicants with the opportunity to avoid prosecution, to provide an alternative to prosecution and to provide deterence of future criminal behavior by applicants. N.J.S.A. 2C:43-12. To hold that an order of dismissal following participation in PTI constitutes "dismissal" within the meaning of N.J.S.A. 18A:16-6.1 would allow a teacher charged with criminal conduct to sidestep criminal prosecution, thereby foregoing litigation of his guilt or innocence, to benefit from the rehabilitative program and then turn around and use the process as a sword in an action for indemnification. See Lindes v. Sutter, et al., 621 F. Supp. 1197, 1201-2 (1985).[2] Such consequences are inconsistent with the intent of N.J.S.A. 18A:16-6.1.

We likewise find Petitioner's claim for back pay for the period of his suspension pursuant to N.J.S.A. 18A:6-8.3 to be without merit. That statute makes no provision for back pay regardless of the disposition of a criminal indictment, and we find no basis under the education laws upon which he would be entitled to back pay in these circumstances.

Finally, we concur with the Commissioner's determination that Petitioner's claim for compensation for accumulated sick leave is time-barred. However, while we agree with the Commissioner that insofar as the claim is contractually based this would not be the

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[2] In this regard, we emphasize that regardless of Petitioner's arguments to the contrary, dismissal of charges as a result of participation in to PTI does not imply innocence, but generaly implies guilt with amenability to rehabilitation. Id. at 1202 n.5.

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proper forum for resolving it, we make no judgment as to whether PERC's jurisdiction under N.J.S.A. 34:13A-1 et seq. is such that jurisdiction over such claim would lie with that agency.

June 1, 1988

Pending N.J. Superior Court

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 5166-87
AGENCY DKT. NO. 219-7/87

JOHN A. GRINGERI,
Petitioner,
v.
BOARD OF EDUCATION OF THE RAMAPO-INDIAN HILLS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,
Respondent.

John A. Gringeri, pro se

Allan P. Dzwilewski, Esq., for respondent (Green and Dzwilewski, P.A., attornevs)

Record Closed: December 8, 1987 Decided: December 18, 1987

BEFORE STEPHEN G. WEISS, ALJ:

A petition of appeal in this matter was filed with the Commissioner of Education on July 16, 1987, by John A. Gringeri, pro se, alleging that although he had attempted to file charges of misconduct with the respondent Board against its tenured superintendent of schools, respondent had failed and refused to act on those charges. Accordingly, petitioner asserted that since the Board failed voluntarily to carry out its responsibility to pursue charges duly filed with it, the Commissioner should order the Board to do so. The Board thereafter filed its answer with various separate defenses, including the assertion that Gringeri's petition was time-barred under N.J.A.C. 6:24-1.2.

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Following transmittal of the case to the Office of Administrative Law pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq., a prehearing conference was conducted by the undersigned administrative law judge, and I issued a prehearing order on September 28, 1987. One of the specific issues framed in the order was whether the petition was time barred, and a schedule for the filing of a prehearing motion and supporting and opposing briefs with respect to that separate defense was established. See, Prehearing Order, para. 13. In addition, counsel for the Board was directed to advise the superintendent of the pendency of the proceedings so he then could determine and inform the undersigned as to whether he wished to intervene, or otherwise participate in the matter. See, N.J.A.C. 1:1-16.1 et seq. Thereafter, I received a letter from the private attorney for the superintendent setting forth that although his client did wish to intervene, he would delay filing his application to do so pending my disposition of the Board's anticipated motion to dismiss. Thereafter, in accordance with the established time schedule, the Board filed its motion and supporting brief, petitioner filed a response, and the Board then filed its reply. Thus, pursuant to N.J.A.C. 1:1-12.5, the matter is now ripe for summary determination.

FINDINGS OF FACT

The petition of appeal filed by Gringeri in July 1987 contained six paragraphs setting forth his allegations. The Board admitted the first five, which are as follows:

1. John A. Gringeri is a citizen of the Township of Wyckoff, a municipality which is served by the respondent, Ramapo Indian Hills Regional High School District Board of Education.

2. In accordance with N.J.S.A. 18A:6-11, petitioner filed tenure charges of misconduct against Superintendent Syd Salt with respondent on February 27, 1987.

3. The attorney for the respondent informed petitioner by a letter dated March 10, 1987, that the respondent will not act on the charges.

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4. Petitioner sent a letter dated April 21, 1987, requesting that the respondent confirm whether they will certify tenure charges against Superintendent Salt pursuant to N.J.S.A. 18A:6-11.

5. The attorney for the respondent sent a letter dated May 6, 1987, to petitioner confirming that no action would be taken on the misconduct charges.

6. Four exhibits (A through D) were attached to the petition and referenced in the first five paragraphs. They include the following: (A) letter dated February 9, 1987, from petitioner to the Board setting forth certain allegations involving the conduct of the superintendent and concluding with a request that the Board, "take action to certify a tenure charge of misconduct [against the superintendent] for a reduction in salary or dismissal." Attached to that letter was an itemization of the specific areas of alleged misconduct; (B) letter dated March 10, 1987, to petitioner from counsel for the Board which advised that the Board had reviewed the submission made by Gringeri and, "has determined, despite your attempts to re-classify and re-order the charges in evidence, that the substance is the same as those considered and rejected by the Board at its August 7, 1985 meeting. Therefore the Board will not ask [the superintendent] to respond to these charges, nor will it take action on them." (C) a response, dated April 21, 1987, in which petitioner advised the Board that his prior complaint against the superintendent, "has been adjudicated, and it is a closed matter unless I choose to pursue it further. My misconduct complaint against [the superintendent] is a new and separate action requiring compliance with N.J.A.C. 18A:6-11, which is to result in a decision from you as to whether you will or will not certify tenure charges. . . ." Gringeri went on to ask that confirmation of the Board's willingness to comply with the statutory reference was expected no later than April 30, 1987; (D) a letter dated May 6, 1987, in which counsel for the Board advised petitioner in response to his letter of April 21, 1987 (Exhibit C), that Gringeri "already [has] the Board's position and response as set forth in my letter of March 10, 1987."

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7. On May 22, 1987, at 3:30 p.m., the Division of Controversies and Disputes received and time-stamped a document captioned "John A. Gringeri, petitioner, v. Ramapo Indian Hills Regional High School District Board of Education, respondents," and entitled as a "Petition."[1] The document alleged that Gringeri was a citizen of Wyckoff, which municipality was a constituent member of the regional high school district. It went on to allege that although probable cause existed for the dismissal or a reduction in salary of the superintendent for various allegations of misconduct, the Board had arbitrarily and capriciously refused to abide by its obligations pertaining thereto. After detailing the various actions and/or inactions of the superintendent, which he maintained were in violation of statute or regulation, petitioner concluded with a request that the Commissioner "investigate the facts of this case" and order the Board to certify charges of misconduct against the superintendent.

8. In a letter dated June 4, 1987, from Commissioner Cooperman to Gringeri, petitioner was advised that the document which he filed on May 22, 1987, contained certain allegations which had already been litigated[2] and that it sought investigation of some actions which dated back seven or more years. The Commissioner advised Gringeri that it was not the function of his office to conduct an investigation of that sort, and if Gringeri believed the superintendent had conducted himself in a manner which would justify his dismissal or a reduction in salary, he was obliged first to file those charges with the Board. Gringeri further was informed that if the Board thereafter should fail to act upon the charges, or find them insufficient, then Gringeri could file a petition of appeal with the Commissioner requesting the Board to certify the same. In that same letter, the Commissioner also noted that the previous petition which had been filed by Gringeri, "related to the same situation and circumstances" and was dismissed on November 14, 1986, as untimely. Petitioner was informed that should he seek to pursue the matter further, "you must do so in a manner that conforms with statute."[3]

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1 This document will be marked "Court Exhibit 1."
2 See, para. 12, infra.
3 This letter will be marked "Court Exhibit 2."

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9. In a reply letter dated June 6, 1987, Gringeri advised the Commissioner that a "complaint" previously had been filed with the Board in March, and the Board responded that it did not intend to act upon it. He also made reference to his letter of April 21, 1987 (see paragraph 4, supra), as well as the reply letter from the Board attorney of May 6, 1987 (see paragraph 5, supra). Thus, Gringeri took the position that since the Board had, in fact, failed to entertain the complaint he had filed with it, he now was seeking review by the Commissioner.[4]

10. In a reply dated June 10, 1987, the Director of the Bureau of Controversies and Disputes, Division of Executive Services, advised petitioner that with respect to his letter of June 6, 1987, he must again be informed that it, "does not respond to the requirements for perfecting a petition of appeal, a guideline for which we provided in our last correspondence to you dated June 4, 1987." The Director also went on to observe that the letter of March 10, 1987, referred to by Gringeri had not been included among the materials received from him, that the Commissioner would not hear a matter involving charges against a tenured employee unless they were certified by the Board, and that it was the obligation of petitioner if he wished to pursue such charges to file a petition of appeal which stated that the Board had failed to do so. Gringeri was cautioned that the Commissioner could not simply "investigate" the matter, and a sample petition of appeal in a matter which had been filed with the Commissioner by an individual against another school board was provided for Gringeri's "information and possible guidance in drafting a procedurally and substantively correct petition of appeal regarding this matter."[5]

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4 Gringeri's letter of June 6, 1987, will be marked "Court Exhibit 3."
5 This letter will be marked "Court Exhibit 4."

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11. By letter dated June 22, 1987, the Commissioner further informed Gringeri that two letters had previously been sent (under date of June 4, 1987, and June 10, 1987), which described the proper procedure which one had to follow with respect to filing of a petition of appeal and Gringeri specifically was told that "unless you perfect your Petition in a manner which permits the Board to effectively respond to the issues you raise in the matter . . . we will dismiss the matter."[6]

12. Gringeri and the Board previously had been litigants in a case entitled John A. Gringeri v. Board of Education of the Ramapo-Indian Hills Regional High School District, OAL DKT. EDU 3377-86 (Oct. 10, 1986), Commissioner's Decision (Nov. 14, 1986). In her initial decision, Administrative Law Judge Edith Klinger determined that Gringeri's petition, which alleged the Board had failed to give serious consideration to charges he had leveled against the superintendent for incompetence, was out of time pursuant to N.J.A.C. 6:24-1.2(b). In particular, Judge Klinger held that this regulation was required to be read strictly and was applied almost without exception. See, e.g., Rielv v. Board of Education of Hunterton Central High School, 173 N.J. Super. 109 (App. Div. 1980). Judge Klinger further determined that there was no adequate foundation to relax the requirements of the 90-day rule and she concluded that since the petition of appeal was time-barred it should be dismissed, with prejudice.

13. In his November 14, 1986 decision affirming the summary decision by Judge Klinger, the Commissioner specifically considered and rejected all of the exceptions raised by petitioner.

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6 This letter will be marked "Court Exhibit 5."

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DISCUSSION

The brief filed in support of the Board's instant motion to dismiss the petition contains three separate points.

The first argument is that the instant petition was not filed until July 16, 1987, which was 128 days after petitioner was notified of the Board's disposition of the complaint Gringeri filed with it. Thus, it is asserted that Gringeri's delay until July 16, 1987, in filing a "proper" petition with the Commissioner was 38 days beyond the 90-day time period and gives rise to a sound basis to dismiss. The Board goes on to note that Gringeri, of all people, "need hardly be notified or reminded of this standard, " since the very same sort of result was reached in the prior case. In addition, the Board observed there is no basis in the record to find any reason to relax the rule pursuant to N.J.A.C. 6:24-1.17 since no extraordinary reasons exist justifying such action.

Point two of the Board's brief asserts that petitioner, in any event, lacks "standing" to prosecute the matter since his children no longer attend respondent's public schools and, therefore, he has no "stake in the outcome" of the proceedings. See, e.g., Kenwood v. Bd. of Ed. of Montclair, OAL DKT. EDU 8858-81 (April 23, 1982), aff'd, Commissioner of Education (June 14, 1982).

Finally, the Board maintained that a review of the petition of appeal filed in July 1987 by Gringeri, except for one paragraph contained in his "statement of evidence," involves matters that had already been decided, settled or which do not involve the superintendent at all. The Board also pointed out that petitioner was not even a party to many of the matters mentioned and in any case was not affected by them.

Petitioner's responsive brief argues, contrary to the assertions made by the Board, that his petition of appeal was, in fact, filed in a timely fashion, that he does have standing to prosecute the matter as a citizen and taxpayer of Wycoff and that the instant charges have not previously been heard or settled. In its reply brief, the Board reiterated the timeliness and standing arguments and urged a dismissal of the petition.

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The first issue to be addressed is whether petitioner has the requisite "standing" to pursue the instant case. The Board's argument is predicated upon the fact that Gringeri is not an "interested person" as required by N.J.A.C. 6:24-1.1 since he does not have a sufficient "stake" in the outcome of the proceedings. According to the Board, unless a petitioner, even a citizen and taxpayer, is entitled to pursue a matter before the Commissioner, there must be a "specific harm," actual or threatened, demonstrated by such a person. In this case, according to the Board, Gringeri has failed to meet this standard. See, Kenwood, supra.

Last year I had occasion to address a similar issue. See, Huettemann v. Board of Education of East Rutherford, OAL DKT. EDU 4100-86 (July 25, 1986), aff'd, Commissioner of Education (Sept. 3, 1986). In that decision, I determined that a taxpayer and resident of a school district does not have standing, on that basis alone, to challenge the legality of a decision made by a board to transfer personnel. See also, Riccardelli v. Board of Ed. of Newark, OAL DKT. EDU 1894-79 (Sept. 26, 1979), aff'd, Commissioner of Education (Nov. 16, 1979). In reaching that conclusion, I noted that a petitioner must demonstrate that if the requested relief is not granted, he or she will suffer a "substantial likelihood of harm." See also, Homebuilders League of South Jersey, Inc. v. Berlin Township, 81 N.J. 127 (1979).

My analysis of the particular circumstances in this case indicate that it is not like the situations involved in Kenwood, Riccardelli or in Huettemann. Although petitioner in the present matter is challenging the Board's failure to take action which by statute is vested in it (similar to a transfer of personnel), the contexts are not the same. In Huettemann, for example, I pointed out that the petitioner was essentially acting as a surrogate complainant in attempting to pursue challenges which more properly should have been brought, if at all, by the persons actually involved. That situation does not exist here. While I agree that a strong argument can be made that the particular status of Gringeri may not necessarily give rise to a conclusion that he will be "substantially, specifically and directly affected by the outcome of a controversy"; nevertheless, I do not believe it inappropriate to take a liberal approach to the standing issue and give him the benefit of the doubt in this regard. See, e.g., Crescent Park Tenants Assoc. v. Realty of

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N.Y., 58 N.J. 98 (1971). Accordingly, I will reject the Board's argument that as a matter of law, for summary decision purposes, Gringeri lacks standing to pursue the matter.

On the other hand, the Board's second major point, that the petition is out of time under N.J.A.C. 6:24-1.2(b), is correct and, for that reason, summary decision will be entered and the petition will be dismissed. Although Gringeri argues that the petition of appeal which was received by the Commissioner on July 16, 1987, was simply a "perfected" pleading which relates back to his earlier submissions, he is in error. As the Commissioner's letter of June 4, 1987, to Gringeri pertinently observed, the document he filed in May 1987 was simply inadequate to be acted upon. As the Commissioner noted specifically, ". . . you are or should be aware of the appropriate manner for filing of tenure charges against an employee of a local school district" and that should "you seek to pursue this matter further, you must do so in a manner that conforms with statute." In his letter of June 10, 1987, to Gringeri, the Director of the Bureau of Controversies and Disputes, Dr. Seymour Weiss, reiterated that the petition of appeal which previously had been filed by Gringeri remained inadequate. While a liberal approach with respect to amendments to petitions is a principle which often is followed, it cannot and should not be used to overcome deficiencies which are patent on their face. Cf., F. Bogart v. Board of Education of East Orange, OAL DKT. EDU 6245-82 (Jan. 26, 1983), aff'd, Commissioner of Education (March 14, 1983). In this case, the petitioner's appeal was not properly filed until July 16, 1987, approximately 128 days following his being informed of the Board's refusal to pursue the charges he brought against the superintendent and his request to examine his other allegations. There is an abundance of authority to support the Board's position that petitioner, having failed to file his complaint in a timely manner within the requirements of N.J.A.C. 6:24-1.2(b), the petition must be dismissed. See, e.g., Nealy v. Roselle Board of Education, OAL DKT. EDU 7796-85 (June 4, 1987), aff'd., Commisioner of Education (July 16, 1987), and cases cited therein.

With respect to the possibility of relaxing the application of the 90-day rule in this case pursuant to N.J.A.C. 6:24-1.17, I find no basis to do so. As noted, petitioner, although acting pro se, is a litigant who should have particularly been aware of the 90-day rule having suffered a dismissal in 1986 of a previous case for that very same reason. Absent

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from the instant circumstances are any facts which in other circumstances supported the proposition that strict adherence to the rule would work an injustice. See, e.g., Polaha v. Buena Regional School District, 212 N.J. Super. 628 (App. Div. 1986); Stockton v. Board of Ed. of City of Trenton, 210 N.J. Super. 150 (App. Div. 1986). In short, the 90-day rule clearly applies to bar the petition in this case, and there is no sound basis to relax it the rule.

Accordingly, in view of my determination to dismiss the petition under N.J.A.C. 6:24-1.2(b), there is no need to address the third point raised by the Board.

CONCLUSION

Accordingly, for the reasons set forth above and pursuant to N.J.A.C. 1:1-12.5(b), summary decision in favor of the respondent dismissing the petition of appeal, with prejudice, will be granted as there exists no genuine issue of material fact sufficient to require a plenary hearing and the Board is entitled to summary decision as a matter of law.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** this Initial Decision with **SAUL COOPERMAN** for consideration.

December 18, 1987
DATE

STEPHEN G. WEISS, ALJ

DEC 22 1987
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

DEC 23 1987
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

amn/ms/e

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JOHN A. GRINGERI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RAMAPO INDIAN HILLS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions were not timely filed pursuant to N.J.A.C. 1:1-18.4. The Board's exceptions were timely filed however. Because petitioner's exceptions were untimely, the Commissioner will not address the Board's reply exceptions thereto. Petitioner's reply exceptions were timely filed in response to the Board's exceptions.

While recognizing that the initial decision grants the Board's Motion for Summary Judgment on the basis of the 90-day rule, N.J.A.C. 6:24-1.2, the Board avers the ALJ erred in concluding, as a matter of law, that petitioner has standing. Relying on the arguments submitted in its post-hearing letter brief and the case relied upon by the ALJ in the initial decision, Huettemann v. Board of Education of East Rutherford, decided by the Commissioner September 3, 1986, the Board asserts that "petitioner is 'essentially acting as a surrogate complainant in attempting to pursue challenges which more properly should have been brought, if at all, by the persons actually involved.' (Initial Decision, p. 8)." (Exceptions, at p. 1)

The Board further avers that a review of the statement of evidence attached to the July 16, 1987 Petition of Appeal clearly supports the Board's position that petitioner has no standing.

> Paragraphs 1., 2., 3., 4., 5., 6., 7., 8., 9. and 13. complain about allegations of other parent(s). Only in paragraphs 10. and 11. does petitioner make any claims involving himself as an individual or parent (and these are clearly time barred). (Id., at p. 2)

The Board contends that "if nothing else," the Commissioner should grant a partial summary judgment that petitioner lacks standing based on the general allegation of other parent(s) contained in the above paragraphs. (Id.)

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In reply to this exception, petitioner avers that the ALJ's determination granting him standing to pursue the instant Petition of Appeal is correct and should be adopted by the Commissioner. He claims that it is a fact that the Board spent in excess of $200,000 for legal fees to defend the Superintendent's "inefficient management of the schools." (Reply Exceptions, at p. 1) He contends, "Petitioner, and every taxpayer in the district, has a direct and equal stake and substantial interest in the efficient and sound fiscal management of the schools in accordance with state laws and codes." (Id.) He urges the Commissioner to support the decision of the ALJ in this regard for the reasons stated in the initial decision.

Having conducted a careful and independent review of the instant matter, the Commissioner adopts in part and rejects in part the initial decision for the reasons stated below.

The Commissioner concurs with the ALJ's conclusion that the petition herein is out of time pursuant to N.J.A.C. 6:24-1.2(b) and, thus, that summary decision shall be granted to the Board and the petition shall be dismissed. The Commissioner agrees with the ALJ's legal and factual recitation in this regard and adopts it, in toto, as his own.

Because the matter is dismissed pursuant to N.J.A.C. 6:24-1.2, the Commissioner will not reach the issue of standing posed by petitioner. In this regard, he does not adopt as part of this decision the ALJ's analysis of the standing issue embodied in the initial decision.

Accordingly, the initial decision is adopted, only insofar as the issue of timeliness is concerned. Consequently, summary decision is granted the Board. The instant Petition of Appeal is dismissed with prejudice.

COMMISSIONER OF EDUCATION

January 29, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4532-87
AGENCY DKT. NO. 185-6/87

HOWARD WALKER,
Petitioner,

v.

BOARD OF EDUCATION OF THE
CITY OF RAHWAY, UNION COUNTY,
Respondent.

Howard Walker, petitioner pro se

Leo Kahn, Esq., for respondent

Record Closed: December 11, 1987 Decided: December 21, 1987

BEFORE JAMES A. OSPENSON, ALJ:

Howard Walker, a teacher of mathematics employed by the Board of Education of the City of Rahway, Union County, since the 1981-82 school year, was employed as supervisor of mathematics in the 1985-86 and 1986-87 school years. On April 9, 1987, he was informed that he would not be renewed in the supervisory position for 1987-88 school

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year and was presented with a negative evaluation. Pursuant to N.J.A.C. 6:3-1.20, he requested and was granted an informal appearance before the Board on May 28, 1987 and was given reasons after hearing for non-renewal. In a petition of appeal filed before the Commissioner of the Department of Education on June 16, 1987, petitioner sought judgment that he be renewed as supervisor, alleging that contrary to his rights under N.J.S.A. 18A:27-3.1 et seq., he had not been given three observations and evaluations during the course of the 1986-87 school year before he was given notice of non-renewal as supervisor. Though tenured in the position of teacher of mathematics under N.J.S.A. 18A:28-5, petitioner did not attain transfer or promotional tenure as supervisor of mathematics under N.J.S.A. 18A:28-6, since he did not serve in that position for more than the equivalent of two academic years.

In answer to the petition, the Board admitted petitioner was not renewed for cause and contended it had provided the requisite hearing pursuant to N.J.A.C. 6:3-1.20. The Board contended further that subsequent to filing the petition of appeal, petitioner resigned his teaching position in the district on July 14, 1987 and is now employed elsewhere as principal of a parochial high school in Middlesex County, a circumstance which the Board contends renders issues in the matter moot. Petitioner has conceded he no longer seeks the relief of reinstatement, but has demanded a Board apology for what he maintains was an unfair and inadequate evaluation.

The Commissioner transmitted the matter to the Office of Administrative Law on June 29, 1987, for hearing and determination as a contested case in accordance with N.J.S.A. 52:14F-1 et seq.

On notice to the parties, the matter came on for prehearing conference in the Office of Administrative Law on October 5, 1987 and an order was entered establishing, inter alia, a hearing on December 11, 1987. The parties were directed to confer for the purpose of fashioning stipulations of relevant and material propositions of fact in chronological and sequential order, together with documentation as appropriate, which should thereafter be filed in the cause no later than ten days before hearing. Thereafter, the matters at issue were to be addressed and resolved as if on cross-motions for summary

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decision in accordance with N.J.A.C. 1:1-12.5, on pleadings, admissions, stipulations, documentation and memoranda of law.

It was provided in the prehearing order that in view of events subsequent to filing of the petition of appeal, there remained at issue in the matter only whether, since petitioner no longer seeks reinstatement, the petition should not now be dismissed for mootness; and/or whether action of the Board in observation, evaluation and the giving of notice of non-renewal as supervisor remains actionable.

All submissions having been completed by December 11, 1987, the record closed then.

ADMISSIONS, STIPULATIONS AND FINDINGS OF FACT

The parties having so admitted and/or stipulated, I make the following **FINDINGS of FACT:**

1. Howard Walker was hired by the Rahway Public School District as a teacher of mathematics in 1981. He started work in this capacity on September 1, 1981.

2. Walker presently holds a teaching certificate in the area of secondary mathematics in the State of New Jersey. He also holds a principal/supervisor's certificate.

3. Walker became tenured in his position of teacher in September of 1984.

4. Walker was hired as area supervisor of the mathematics, business and computer departments for grades 7-12 in the district of Rahway in August of 1985, two months after he acquired his supervisor's certificate.

5. On April 28, 1986, Walker received a year-end evaluation for his first year as supervisor.

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6. On February 24, 1987, Adele Magnolia, curriculum director, expressed some concern with Walker's performance. When asked, Magnolia stated that she had not yet made the decision on whether or not she would recommend renewal of Walker's contract for the 1987-88 school year.

7. On February 26, 1987, Walker submitted a lengthy written response to the concern voiced two days earlier. A conference was held on February 26, 1987 between Walker and Magnolia.

8. On April 9, 1987, Walker received his first written evaluation of the year. Walker learned at that time that Magnolia would not be recommending him for renewal of his contract.

9. A hearing was held on May 28, 1987. The Board vote to uphold the decision to dismiss Walker was 6-2 in favor, with one board member absent. [See N.J.A.C. 6:3-1.20].

10. A petition to overturn the decision was filed with the [Department of Education] in June by Walker.

11. As a result of the Board's action, Walker's position as area supervisor was terminated June 30, 1987.

12. Subsequent thereto, Walker submitted a letter of resignation on July 14, 1987 as teaching staff member of the Rahway school district, having been appointed as principal at a parochial high school in Middlesex County.

DISCUSSION

The petition as originally filed in this matter sought reinstatement as supervisor as a principal form of relief. Since petitioner has resigned all positions in the district, including his tenure position, that form of relief, even assuming he were entitled to it, is academic. Petitioner appears to press a grievance because as supervisor of mathematics in the 1986-87 school year he was given only one performance evaluation instead of the three required under N.J.S.A. 18A:7-3.1. He feels that only a single

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evaluation was improper, that the process by which he was non-renewed was tainted and that his reputation thus has suffered. But it remains clear that the single evaluation of petitioner developed sufficient negative information to predicate the Board's ultimate decision not to renew his supervisorship for 1987-88. The Board's determination, ultimately, came after petitioner was given both a statement of reasons as required under N.J.S.A. 18A:27-3.2, and an informal appearance before the Board in protest, as required under N.J.A.C. 6:3-1.20(a). The decision of the Board is entitled to a presumption of correctness that petitioner has not overcome. Lack of strict compliance with requirements of N.J.S.A. 18A:27-3.1 for three evaluations, not one, while not to be condoned here, is insufficient to render actionable petitioner's claim for reinstatement, financial reward or alteration of records in his personnel folder. Petitioner was, during his two-year supervisorship, only a probationer for promotional tenure. The Board's managerial power not to grant it overrides any "right" to three evaluations each year. See Dore v. Bedminister Twsp. Bd. of Ed., 185 N.J. Super. 447, 455-6 (App. Div. 1982):

> . . . Absent constitutional constraints or legislation affecting the tenure rights of teachers, local boards of education have an almost complete right to terminate the services of a teacher who has no tenure and is regarded as undesirable by the local board. The statues quoted above [N.J.S.A. 18A:27-3.1 et seq. and N.J.A.C. 6:3-1.19, 20] neither add to nor detract from the tenure rights of teachers in this State. The first section sets forth a procedure to be followed for evaluating teachers but does not provide any penalty in the event a local boards fails to follow the prescribed procedures. The second statute clearly adopts the final line of Donaldson and "urges" local boards of education to give reasons to employees who are being terminated — ostensibly for the reasons set forth in Donaldson [Donaldson v. North Wildwood Bd. of Ed., 65 N.J. 236 (1974)]. . . Since there is no power to impose a penalty for non-compliance with the two statutes in question, power to reinstate or penalize cannot be arrogated by the Commissioner to himself.

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CONCLUSION

For the foregoing reasons, I **CONCLUDE** that petitioner has failed to state a claim upon which relief can be granted, that the Board hereinbelow in non-renewal of petitioner's supervisorship for 1987-88 has not been shown to be either arbitrary or actionably contrary to law, and that Board procedure, therefore, should be, and is hereby, **AFFIRMED.** The petition of appeal is **DISMISSED**, but the Board is **ADMONISHED** hereafter to ensure observance of N.J.S.A. 18A:27-3.1 for its supervisory staff.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **SAUL COOPERMAN** for consideration.

December 21, 1987
DATE

JAMES A. OSPENSON, ALJ

DEC 24 1987
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

DEC 24 1987
DATE

Mailed To Parties:
OFFICE OF ADMINISTRATIVE LAW

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HOWARD WALKER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF RAHWAY, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner filed timely exceptions pursuant to N.J.A.C. 1:1-18.4.

Petitioner contends in exceptions that while he is "sure that the decision is based on a solid legal foundation", he is uneasy with the implication of the decision. (Exceptions, at p. 1) He reiterates his employment history at Rahway High School, as well as his argument that he was evaluated only once by his supervisor during the 1986-87 school year, instead of the three times prescribed by N.J.S.A. 18A:27-3.1. He avers that the action taken against him, failing to renew him to his position of area supervisor, was arbitrary and capricious. He submits that an admonition of the Board is not sufficient.

Upon a careful and independent review of the record, the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law that petitioner has failed to state a claim upon which relief can be granted and that the action of the Board in failing to renew petitioner to the position of area supervisor in mathematics for the 1987-88 school year has not been demonstrated to have been arbitrary, capricious or unreasonable. The Commissioner so finds for the reasons stated in the initial decision. He agrees with the ALJ that the issue of reinstatement is made moot by petitioner's having resigned from all employment with the Rahway Board and also because, while not sanctioned, failure on the part of the Board to provide the requisite three evaluations of a supervisor, in and of itself, "is insufficient to render actionable petitioner's claim for reinstatement, financial reward or alteration of records in his personnel folder.*** See Dore v. Bedminister (sic) Twp. Bd. of Ed., 185 N.J. Super. 447, 455-6 (App. Div. 1982)***." (Initial Decision, ante)

Notwithstanding the above, the Rahway Board is hereby cautioned to strictly and assiduously comply with the dictates of N.J.S.A. 18A:27-3.1 in evaluating its nontenured staff.

Accordingly, the instant Petition of Appeal is dismissed with prejudice.

COMMISSIONER OF EDUCATION

January 29, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION -
DECISION ON MOTION
OAL DKT. NO. EDU 2777-87
AGENCY DKT. NO. 53-3/87

MICHAEL P. DREHER,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,
Respondent.

Michael P. Dreher, petitioner, pro se

James J. Seaman, Esq., for respondent
(William A. Massa, attorney)

Record Closed: December 11, 1987 Decided: December 18, 1987

BEFORE **JAMES A. OSPENSON**, ALJ:

Michael P. Dreher, a tenured teaching staff member employed by the Board of Education of the City of Jersey City, Hudson County, presently employed as assistant principal in an elementary school, holds the BA degree (1961), the MA degree (1969) and juris doctor degree from Seton Hall University School of Law (August 1983). He holds certifications as elementary and secondary principal, general supervisor and school

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administrator. Board regulation 703-01, in effect since 1966, provides that all degrees or academic credits for advanced standing (an increased salary) must be in the field of education, except that degrees or credits earned in other fields will be accepted if they are closely related to the field in which the teacher is certified. Petitioner made application for advanced standing on the doctorate level before and just after award of his juris doctor degree in 1983. Having thereafter pursued grievance procedure when his application was denied, petitioner advised the Board on November 23, 1986, he would consider a negative final decision to have been issued by December 28, 1986, if he received no different response before then. In a petition of appeal filed in the Division of Controversies and Disputes of the Department of Education on March 30, 1987, more than 90 days after December 28, 1986, he alleged Board action in failing to apply its written policy in his favor was erroneous, that other individuals had been granted advanced standing in other non-education fields such as divinity and hospital administration, and that Board denial was unfair, discriminatory, arbitrary and unlawful. He sought such advanced standing and retroactive increased salary on a doctorate level retroactive to September 1, 1983 and retroactive adjustment of other emoluments of position. The Board admitted petitioner's employment, certifications and education attainments generally, but denied petitioner's other allegations and asserted petitioner's study of law was peripheral to duties of an elementary school assistant principal, petitioner's position, and that the Board has regularly refused to recognize a juris doctor degree heretofore for advanced salary standing. See, Smith v. Bd. of Ed., Jersey City, 1977 S.L.D. 1186, 1188-90.[1]

The Commissioner of the Department of Education transmitted the matter to the Office of Administrative Law on April 27, 1987 for hearing and determination as a contested case in accordance with N.J.S.A. 52:14F-1 et seq.

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[1]See, infra, footnote 2, at 6.

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On notice to the parties, the matter came on for prehearing conference in the Office of Administrative law on June 1, 1987 and an order was entered establishing, inter alia, a hearing date on August 13, 1987. At request and/or with consent of the parties, the matter was adjourned until November 12, 1987. Previously, as appeared from the prehearing conference order, on application of the Board, and for good cause shown, the administrative law judge **ORDERED**, pursuant to N.J.A.C. 1:1-6.2, that the Board's answer be amended to include the defense of the bar of the 90-day limiting period of N.J.A.C. 6:24-1.2. The parties were ordered to confer for the purpose of fashioning stipulations of facts relevant and material thereto, with documentation, which thereafter were to be filed in the cause no later than ten days before hearing. Issues thereupon raised were to be addressed and resolved as if on cross motions for summary decision in accordance with N.J.A.C. 1:1-12.5 et seq. Later, the parties by direction of the administrative law judge on October 29, 1987 were directed to confer and prepare before hearing, for submission at hearing on November 12, 1987, a stipulation of facts and documentation relative to the Board's defense of the limiting period of N.J.A.C. 6:24-1.2. The parties were advised at hearing on November 12, 1987 by the administrative law judge, acting pursuant to N.J.A.C. 1:1-14.6, that the order and priority of proofs would first be directed to that issue alone before other issues on the merits or substantive allegations of the petition were addressed. The parties stipulated procedural facts; documentation in evidence thereof was admitted as Exhibits J-1 through J-69. In addition, as noted in the prehearing conference order, paragraphs 1, 3, 5, 6, 7 and parts of paragraphs 9 and 10 of the petition of appeal were admitted by the Board. It was admitted that the relevant portion of Board regulation 703-01 provided:

> All degrees or academic credits must be in the field of education, except that degrees or credits earned in other fields will be accepted if they are closely related to the field in which the teacher is certified.

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The parties also stipulated the following:

1. Petitioner was granted a hearing before the Jersey City Board of Education on May 20, 1986 pursuant to his grievance for advanced standing credit on the doctorate level retroactive to September 1, 1983 (erroneously listed as March 20, 1986 in paragraph 9 of the petition);

2. The Jersey City Board of Education never thereafter rendered a decision concerning petitioner's grievance for advanced standing credit on the doctorate level retroactive to September 1, 1983; and

3. Petitioner did not thereafter submit the matter to arbitration.

The prehearing conference order noted petitioner is presently being paid on a salary step of MA plus 31 credits beyond MA degree. The order listed all matters at issue as the following:

1. Whether the petition of appeal was timely;

2. Whether petitioner was improperly denied advanced standing on salary scale for a juris doctor degree awarded August 1983;

3. Whether petitioner was unfairly denied such advanced standing while other teaching staff members had been allowed such standing for divinity and/or hospital administration credits;

4. Whether a degree in law is "closely related" to the field in which petitioner is certified and/or presently employed; and

5. If so, whether and to what extent petitioner shall be entitled to relief by way of differential back pay and/or pre- and/or post-judgment interest and other emoluments since August 1983.

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The evidential record of documentation concerning the board's defense of the bar of the limiting period of N.J.A.C. 6:24-1.2 having thus been established at hearing on November 12, 1987, the parties were given 30 days thereafter within which to file memoranda of law. Such memoranda having been filed, and the time therefor having elapsed, the record on motions closed.

EVIDENCE ON CROSS-MOTIONS AND FINDINGS

The parties having so admitted and/or stipulated, I make the following generalized findings of fact. Petitioner, a tenured teaching staff member employed by the Board of Education of the City of Jersey City, Hudson County, presently employed as assistant principal in an elementary school, earned a juris doctor degree from Seton Hall University School of Law in August 1983 (J-6). He is appropriately certified. Board regulation 703-01, in effect since 1966, provides that all degrees or academic credits for advanced standing (and increased salary) must be in the field of education, except that degrees or credits earned in other fields will be accepted if they are closely related to the fields in which the teacher is certified. Four months before petitioner graduated, he notified the superintendent of a request for advanced salary standing to the doctorate level because of his anticipated degree in law (J-2). He was rebuffed (J-1).

An agreement between the Board and the Administrators and Supervisors Association of the Jersey City school system, effective September 1, 1982 through August 31, 1985 (J-67), provided in Article V that a grievance may be considered to exist when an administrator believed that an administrative procedure or policy adversely affected his working conditions or his welfare or violated the terms of the agreement. Procedurally, four steps were outlined for the grievance procedure. In step one an administrator was required first to voice an oral grievance with his immediate supervisor. If unsatisfactorily resolved, the administrator at the second step was to make a written statement of details to the superintendent. A third step by the administrator, if still unsatisfied, was to request review by the Board in writing through the superintendent. The Board was

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required to review the case and to hold a hearing with the administrator if so requested and thereafter to render its decision in writing within 21 days of receipt of the grievance. A fourth step was that the still dissatisfied administrator "may" submit the matter to binding arbitration within ten days of the Board's decision. The agreement specifically provided in Article V that in the event no decision were forthcoming within prescribed time limits at any step, the aggrieved administrator might, upon notice, proceed to the next step. The grievance procedure was in no way to impair, diminish or preclude any rights of the parties as set forth in Title 18A, New Jersey statutes, or any other law (J-67 at 3-5).

Between a first request for consideration because of his juris doctor degree, in early April 1983 (J-2), and a final letter to the Board on May 23, 1986 (J-66), petitioner continually pressed in writing his request for advanced salary standing to the doctorate level retroactive to the date of his juris doctor degree. His requests covered all steps of the grievance procedure in Article V. He was rebuffed each time, consistently with the decision of the Commissioner in Smith v. Bd. of Ed., Jersey City, 1977 S.L.D. 1186, 1188-90.[2] He was rebuffed by a letter from the principal/personnel on August 30, 1984 (J-28), by assistant superintendents in writing on April 14, 1983 (J-1), October 22, 1985 (J-47, 50), June 7, 1984 (J-24, J-25), by the Board attorney on December 27, 1985 on behalf of the superintendent (J-54), and by the Board on January 24, 1986 and February 21, 1986 (J-58, 60).

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[2]It was held a teacher's study of law is peripheral to the subject of English, which Smith was assigned to teach. While a board of education may legally recognize a juris doctor degree or law course for advanced salary standing, a salary policy that does not recognize such studies is not without a rational basis. Id. at 1190.

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At petitioner's request, he appeared before the Board for a hearing in reference to his grievance on May 20, 1986 (J-66). The Board never rendered a formal written decision on his grievance; petitioner by his own admission never thereafter proceeded to the next grievance step of submission to binding arbitration, although his contractual rights permitted him to do so under Article V. Instead, on November 23, 1986 he informed the Board that unless he received a determination on December 28, 1986, he would consider the Board's final decision a negative one and would thereafter within, as he put it, 90 days following December 28, 1986, institute appropriate proceedings before the Commissioner. In his letter (J-66), he insisted he would "reserve my right to file an appeal." More than 90 days after December 28, 1986, on March 30, 1987, he filed the present appeal.

DISCUSSION

Eligibility for advanced salary standing on the doctorate level under Board regulation 703-01 is a term or condition of employment arbitrable under the binding arbitration clause of Article V of the negotiated agreement between the Board and the Administrators and Supervisors Association. It is to be distinguished, perhaps, from such nonarbitrable issues as disputes concerning withholding of salary increments for inefficiency or other good cause, such disputes being cognizable solely before the Commissioner under N.J.S.A. 18A:29-14. But whether arbitration procedures are binding or advisory, no aggrieved teaching staff member is relieved of prompt compliance with the 90-day requirement of N.J.A.C. 6:24-1.2 for filing a petition of appeal with the Commissioner. In Bernards Township Bd. of Ed. v. Bernards Tp. Ed. Assoc., 79 N.J. 311 (1979), the Court cautioned that while advisory arbitration was an appropriate intermediate procedural step for handling a dispute over withholding of a teacher's salary increment, a matter otherwise within the managerial discretion of the Board of Education, a teacher who proceeds through grievance and arbitration is not thereby relieved from compliance with N.J.A.C. 6:24-1.2. Id. at 326-327, n. 4. In North Plainfield Educ. Assoc. v. Bd. of Ed., Boro of North Plainfield, 96 N.J. 587 (1984), a case in which

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two teachers sought credit on the salary scale for time spent on sabbattical but had not filed timely petitions of appeal, preferring instead to exhaust grievance and arbitration procedures as allowed in the negotiated agreement, the Supreme Court held (1) statutory annual increments in teachers' salary were subject to annual evaluation of teacher performance and thus were not statutory entitlements; (2) since awards of annual increments were not matters of statutory right but subject to denial for inefficiency or other good cause, they were subject to the 90-day time bar of N.J.A.C. 6:24-1.2; (3) petitions of teachers who were aware they had not been advanced on the salary scale when they received their first paychecks for the subsequent school year but did not file petitions until more than a year later and more than nine months after expiration of the 90-day period of limitation were time-barred; (4) the time bar applied to future years; and (5) withholding of the increments did not constitute a continuing violation. Id. at 593-5.

In a case involving binding arbitration, an untenured teacher whose contract was not renewed for the 1976-77 school year by her board of education availed herself of grievance machinery in the negotiated agreement and demanded binding arbitration on the issue of the procedural propriety of her nonrenewal. An arbitrator found against her. More than a year later she filed a petition of appeal with the Commissioner, who ultimately dismissed it as untimely under N.J.A.C. 6:24-1.2. On appeal, the Appellate Division held the facts supported dismissal of the petition as untimely because the teacher chose to proceed to binding arbitration on her grievance and the issue was properly within the scope of mandatory arbitration under grievance machinery of the negotiated agreement. The teacher contended the matter could not have been submitted for arbitration since it was exclusively within the managerial discretion of the board, but the court held that clearly there was no reason to hold her appeal to the Commissioner during pendency of her arbitration proceedings. Since she had ample time to file a petition, it was evident to the Court she had gambled on a favorable arbitration award and, having lost, only then decided to seek further relief before the Commissioner when her petition was out of time. Riely v. Hunterdon Central High Bd. of Ed., 173 N.J. Super. 109, 112-14 (App. Div. 1980).

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I have considered petitioner's brief. I think his arguments miss the mark. Grievance procedure rights under a negotiated agreement between a board and a supervisor's association simply can not and do not modify or extend the time within which aggrieved parties may invoke the Commissioner's dispute resolution jurisdiction under N.J.S.A. 18A:6-9.

CONCLUSION

Based on the foregoing, I **CONCLUDE** that eligibility for advanced standing on the doctorate level under Board regulation 703-01 is not a statutory entitlement; that challenge to its denial before the Commissioner under N.J.S.A. 18A:6-9 is subject to the bar of the 90-day limiting period of N.J.A.C. 6:24-1.2; that petitioner here was well aware of the Board's denial of application for such standing based on his juris doctor degree even before he achieved it in August 1983; that he thereafter continued steadily through the grievance procedures of Article V of the negotiated agreement; that he never submitted the matter to arbitration although he could have done so; and that his petition of appeal, belatedly filed in 1987 after unsuccessful if incomplete recourse to grievance procedures, should be, and is hereby, **DISMISSED**, there being no occasion under N.J.A.C. 6:24-1.17 for dispensing with application of N.J.A.C. 6:24-1.2. See Stockton v. Bd. of Ed., Trenton, 210 N.J. Super. 150, 157 (App. Div. 1986); and cf. Caldwell-West Caldwell Ed. Assn. v. Bd. of Ed. Caldwell-West Caldwell, OAL DKT. NO. EDU 2826-87 (July 1, 1987), Comm'r of Ed. (Sept. 10, 1987) at 10-14.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN** , who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

December 18, 1987
DATE

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

Dec. 23, 1987
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

DEC 23 1987
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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MICHAEL P. DREHER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions were untimely filed pursuant to N.J.A.C. 1:1-18.4.

Upon a careful review of the record before him, the Commissioner agrees with the findings and conclusion of the Office of Administrative Law that the Petition of Appeal in this matter is untimely filed.

Initially, the Commissioner notes that he has no jurisdiction to adjudicate matters arising under the terms of a negotiated agreement. Such determinations lie solely within the purview of the Public Employment Relations Commission. Therefore, any arguments raised by petitioner or refuted by the Board, predicated on the grievance procedure in effect during the years in question herein, are not made part of the Commissioner's evaluation of the instant matter.

Moreover, pertaining to the argument raised in Petitioner's "Brief in Defence (sic) of Timeliness Issue" (Point 14 at p. 5) and the ALJ's finding (Initial Decision, ante), the Commissioner notes that while it is true that the Petition of Appeal in this matter was filed in the Bureau of Controversies and Disputes on March 30, 1986, the Commissioner will accept the date of March 28, 1986 as the date when it was filed. He does so based on petitioner's submission to the record of a Domestic Return Receipt, PS Form 3811, bearing the signature of a postal official of the State of New Jersey dated March 28, 1986 as the date on which the petition was received by the State.

Notwithstanding this finding, however, petitioner's argument that the matter was timely filed is found to be without merit for the reasons expressed by the ALJ on pages 7-9 of the initial decision. The Commissioner would add only that petitioner knew, or should have known, as early as April 1983 of the Board policy in question and also knew of the pertinent case law that evolved out of his own school district. Yet, he took no steps whatsoever until March 1987 to preserve his right of appeal before

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the Commissioner of Education. See Riely v. Hunterdon Central High School Board of Education, 173 N.J. Super. 109 (App. Div. 1980). Therein, the Appellate Division held, in considering the petition of a teacher who chose to proceed through the grievance mechanism in her district following her nonrenewal:

> If, as it appears, respondent now contends that her appeal to the Commissioner involves matters that were not, or could not, have been submitted for arbitration, in that such matters were exclusively within the managerial discretion of the local board, then clearly there was no reason to withhold the appeal to the Commissioner during the pendency of her arbitration proceedings. Respondent had ample time to file the petition***. It is evident to us that she gambled on a favorable arbitration award and, having lost, then decided to seek further relief at the hands of the Commissioner. By then, her petition was out of time. (at 113-114)

The Commissioner finds in the instant matter, as did the Court in Riely, supra, that having failed to follow through on his grievance before the Board while resting on his rights before the Commissioner, petitioner shall not have "two bites at the apple." Like the ALJ, the Commissioner finds and determines petitioner's belated filing before the Commissioner presents no basis for relaxation of the 90-day rule pursuant to N.J.A.C. 6:24-1.17. See Stockton v. Board of Education of Trenton, 210 N.J. Super. 150, 157 (App. Div. 1986).

Accordingly, the instant Petition of Appeal is dismissed with prejudice.

COMMISSIONER OF EDUCATION

February 2, 1988

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MICHAEL P. DREHER,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissoner of Education, February 2, 1988

For the Petitioner-Appellant, Micheal P. Dreher, pro se

For the Respondent-Respondent, James J. Seaman, Esq.

This is an appeal from a Commissioner's decision dismissing as untimely the petition of an assistant principal that challenged the district Board's denial of salary credit, which Petitioner had sought on the basis of his juris doctor degree. Petitioner's arguments in support of his appeal pertain entirely to the Commissioner's determination that his exceptions were untimely filed, and they do not address the merits of the case. We find that the Commissioner was under no obligation to consider Petitioner's exceptions, which he sent by regular mail nine days after receipt of the Initial Decision and which were, as a consequence, not timely filed. Therefore, on the basis of the record, for the reasons expressed by the Commissioner, we affirm his decision.

July 6, 1988

Pending N.J. Superior Court

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7490-87
AGENCY DKT. NO. 305-9/87

SANFORD J. and CONSTANCE F. WILLIAMS,
Petitioner,
v.
BOARD OF EDUCATION OF THE
TOWNSHIP OF ROXBURY,
Respondent.

Sanford J. Williams, pro se

David B. Rand, Esq., for respondent
(Rand, Algeier, Tosti, Woodruff & Frieze, attorneys)

Record Closed: December 28, 1987 Decided: December 29, 1987

BEFORE WARD R. YOUNG, ALJ:

Petitioners, the parents of M.W. who was a senior in respondent's high school in 1986-87, alleged the Board of Education of the Township of Roxbury (Board), through its agents, engaged in unfair and discriminatory discipline against their son and seek a cease and desist order and an expungement of their son's record.

The Board denied the allegations and seeks summary dismissal of the petition because of untimeliness, the equitable doctrine of laches, mootness, and deficiency in the absence of a genuine controversy or dispute.

The matter was transmitted to the Office of Administrative Law as a contested

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case on November 12, 1987 pursuant N.J.S.A. 52:14F-1 et seq., and was set down for prehearing conference on November 12, 1987. The Board filed its motion for summary decision on December 16, 1987, with a Certificate of Service upon petitioners on December 14, 1987. Petitioners were noticed of the filing by the undersigned on December 16, 1987 and directed to file responsive papers pursuant to N.J.A.C. 1:1-12.2(c) no later than December 28, 1987. Due to the failure of petitioners to file responsive papers as directed, the record closed on December 28, 1987.

"M.W." was disqualified from the 400 meter race held at the Morris County Track and Field Championship on May 15, 1987 because of a false start and subsequent abusive language toward the starter, which resulted in "M.W.'s" meet disqualification for unsportsmanlike conduct. See, Exhibit "A," the Froede memo to Dr. Elovitz under date of May 28, 1987.

Petitioners pursued an appeal of subsequent disciplinary action taken by the school administration which culminated in a disciplinary determination by the Board on June 15, 1987 and communicated to Mr. Williams on that same date.

The following **FINDINGS OF FACT** are adopted herein as the result of a thorough review of the record:

1. The Petition of Appeal was filed with the Commissioner of Education on September 29, 1987.

2. The cause of action occurred on June 15, 1987.

3. "M.W." graduated from the Roxbury High School on June 22, 1987.

In accordance with the 1987 New Jersey Lawyers Diary and Manual, the 90 day period following June 15, 1987 expired on September 13, 1987.

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N.J.A.C. 6:24-1.2(b) states:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education which is the subject of the requested contested case hearing.

It is noted that petitioners have not asserted any reason for the delay in filing nor have they sought relaxation of the 90-day rule pursuant to N.J.A.C. 6:24-1.19.

I **FIND** the instant petition to have been untimely filed and **CONCLUDE**, therefore, that Summary Decision is **GRANTED** to the Board, and the Petition of Appeal shall be and is hereby **DISMISSED**. Sara Riely v. Hunterdon Central High School Board of Education, 173 N.J. Super. 109 (App. Div. 1980); Board of Education of Bernards Township v. Bernards Township Education Association, 79 N.J. 311 (1979).

I **FIND** no compelling need to address the Board's remaining affirmative defenses.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if **Saul Cooperman** does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

29 December 1987
DATE

Ward R. Young
WARD R. YOUNG, ALJ

Receipt Acknowledged:

DEC 31 1987
DATE

Seymour Wiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

January 4, 1988
DATE

Gerald I. Parks, Jr.
OFFICE OF ADMINISTRATIVE LAW

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SANFORD J. AND CONSTANCE F. WILLIAMS,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ROXBURY, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful review of the record of this matter, the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law that the instant petition was untimely filed, and that no reason has been advanced by petitioners for the delay in filing. The Commissioner, concluding that there is no basis present for relaxation asserted by petitioners pursuant to N.J.A.C. 6:24-1.17, grants Summary Decision to the Board.

Accordingly, the instant Petition of Appeal is hereby dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 9, 1988

DATE OF MAILING - FEBRUARY 9, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4439-87
AGENCY DKT. NO. 169-5/87

SUSAN DUNHAM,

Petitioner

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF LAFAYETTE,

Respondent

Robert A. Fagella, Esq., for petitioner
(Zazzali, Zazzali & Kroll, attorneys)

Craig U. Dana, Esq., for respondent
(Morris, Downing & Sherred, attorneys)

Record Closed: December 4, 1987 Decided: December 23, 1987

BEFORE **WARD R. YOUNG**, ALJ:

Susan Dunham, a tenured teaching staff member and President of the Lafayette Education Association, alleged the action of the Board of Education of the Township of Lafayette (Board) in withholding her employment and adjustment increments on a permanent basis was arbitrary, capricious, unreasonable, contrary to statute, and/or retaliatory against her for her exercise of protected union activities.

The Board denied the allegations and asserts it lawfully exercised discretionary authority.

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The matter was transmitted to the Office of Administrative Law on June 25, 1987 as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on September 10, 1987 at which, inter alia, the matter was set down for plenary hearing. The matter was heard on October 26, 27, November 30, and December 4, 1987. The record closed at the termination of hearing on December 4 after agreement by the parties and the undersigned that no post-hearing memoranda or briefs would be submitted.

Counsel for the respondent Board stipulated at the opening of the record that the action of the Board in permanently withholding the employment and adjustment increments of petitioner was unlawful. The parties agreed that the withholding action for the 1987-88 school year only was being contested. It is noted that the withholding resolution also incorporates a provision for the Board to consider an adjustment to its action if significant improvement is made by the petitioner "during the first five months of the 1987-88 school year, based on the recommendation of the Chief School Administrator." See, P-1.

The history of Dunham's employment in Lafayette is undisputed. She has been employed in Lafayette since September 1976 and has had varied assignments, most of which have been as a teacher of kindergarten. There have been five Chief School Administrators (C.S.A.) during her period of employment. The most recent and current C.S.A., J. Thomas Morton, came to the school district at the beginning of the 1985-86 school year. Dunham was appointed the Lafayette Education Association (LEA) Negotiation Chairperson in September 1979, LEA Grievance Committee Chairperson in May 1980, and was elected President of the LEA in April 1986. See, P-9.

Extensive testimonial evidence was adduced from 10 witnesses. There are 46 evidentiary documents in the record, many of which are multiple documents. The recitation of testimonial evidence and reference to documents will be limited to what is deemed to be relevant during the 1986-87 school year, although there may be an occasional reference to prior years if warranted.

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The reasons stated for the withholding action are as follows:

1. Failure to attain the goals of the Professional Improvement Plan for 1986-87. The goals (found in P-15(a)) are succinctly stated:

   a) display genuine enthusiasm;

   b) begin the Ginn reading program with pupil groups when deemed ready.

   c) improve flexibility in the kindergarten program if there is a need with respect to instructional techniques and types of lessons.

2. Display of unprofessional conduct in statements directed at the Chief School Administrator in reference to her 1986-87 teaching assignment.

3. Unsatisfactory performance in both her kindergarten and BSIP teaching assignment in the 1986-87 school year.

4. Failure to complete any ISIP(s) as of April 7, 1987.

Each of the above reasons will be addressed in the order indicated.

1. FAILURE TO ATTAIN THE GOALS OF THE PROFESSIONAL IMPROVEMENT PLAN FOR 1986-87.

a) DISPLAY GENUINE ENTHUSIASM

Dunham testified that Morton told her in June 1986 that there was a need for her to exude more enthusiasm as a teacher. She also stated that Morton told her that he saw her in the hall and she wasn't smiling, which indicated a lack of enthusiasm.

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Evelyn Hansen, a teacher aide to Dunham, testified that Dunham was interested in children; the children seemed to love Dunham and would kiss her goodbye, except when she disciplined a child.

Anne Batte, a basic skills teacher, stated that her observations of Dunham teaching since 1980 were a joy to observe; that Dunham was always positive and never made any derogatory remarks.

Morton testified he observed the teaching of Dunham on January 12, 1987 and found her enthusiasm to be positive. His only other formal classroom observation was on April 4, 1987, which he stated was generally positive. He also stated that he chose to observe Dunham the minimum number of times, notwithstanding his right to observe her as often as he deemed it necessary. See, P-7 and P-33.

Francis Boyd, a Board member and previous volunteer teacher aide in Dunham's kindergarten class for four years, stated that she found Dunham's enthusiasm to be inconsistent, from excellent to poor. She said she became concerned that Dunham appeared to give more attention to general school operations than to her own teaching.

The relevant evidentiary documents are the Morton observation reports of observations on January 12, 1987 (P-7) and March 4, 1987 (P-33), and the attachments to a Morton memo of November 4, 1986 (R-1). P-7 appears to be a positive evaluation of Dunham's enthusiasm. P-33 appears to be an excellent evaluation with no negative comments concerning enthusiasm. The R-1 attachments are incorporated herein by reference. Two (12/8/86 and 12/11/86) are positive, and two (12/11/86 and 1/7/86) are negative.

b) BEGIN THE GINN READING PROGRAM WITH PUPIL GROUPS WHEN DEEMED READY

The only testimony adduced from Morton was that there was no reading groups in Dunham's kindergarten by March 1987.

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Dunham testified that she utilized GINN materials in reading groups during all her years of kindergarten teaching, and in fact did have reading groups formed after the Spring vacation in 1987.

A review of Dunham's PIP for 1986-87 indicates at 2 that "By the end of the kindergarten year, some students should be formed into reading groups to begin the Ginn reading program," and at 2b "When a group is ready, form the group and begin instruction in Ginn Level 1." See, P-15(Z).

c) IMPROVE FLEXIBILITY IN THE KINDERGARTEN PROGRAM IF THERE IS A NEED WITH RESPECT TO INSTRUCTIONAL TECHNIQUES AND TYPES OF LESSONS

Dunham does not dispute the fact that Morton incorporated flexibility in her 1986-87 PIP, which states at 3 in P-15(Z): "The amount of flexibility in the kindergarten program should be examined to determine if there is a need to develop alternative approaches with respect to instructional techniques and types of lessons." Nor does she dispute that Morton expressed a concern for provisions for brighter children, which had also been expressed by previous CSAs.

Morton indicates in his report of his January 12, 1987 observation that Dunham must consider ways to differentiate the curriculum for her students. See, P-7. Morton also indicated in his report of his March 4, 1987 observation that "There were provisions made for different levels of student activities." See, P-33.

2. DISPLAY OF UNPROFESSIONAL CONDUCT IN STATEMENTS DIRECTED AT THE CHIEF SCHOOL ADMINISTRATOR IN REFERENCE TO HER 1986-87 TEACHING ASSIGNMENT

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Dunham did not deny that she was emotionally upset upon receipt of her 1986-87 schedule, which assigned her 25 kindergarten children in the a.m. and a like number of BSI children in the p.m., and confronted Morton outside his office on the matter. Her voice was raised, she said, but she did not yell. She stated that she expressed fear that she could not achieve satisfactorily because of the heavy pupil load. She indicated that she visioned the schedule as punitive.

Morton stated his suggestion that they discuss the matter in his office was unheeded. He responded with a memo. See, P-3.

Board secretary Robinson did not dispute the testimony of either Dunham or Morton. She stated the confrontation made her uncomfortable, and she removed herself from the area.

On cross-examination, Morton stated the incident was not considered to be a reason for withholding recommendation or action until the April 20, 1987 meeting.

3. UNSATSIFACTORY PERFORMANCE IN BOTH HER KINDERGARTEN AND BSIP TEACHING ASSIGNMENTS IN THE 1986-87 SCHOOL YEAR

Reference is made to Dunham's 1986-87 annual evaluation by Morton under date of June 19, 1987, nothwithstanding that the Board acted to withhold on April 20, 1987. See, P-35. Morton agreed therein that Dunham's professional judgment is to be exercised in determining pupil reading readiness. He also indicated that the curriculum item of her PIP was fully met, and that all ISIPs were completed on BSI students by the end of the year with indications of appropriate amounts of progress by each student.

Morton also incorporated enthusiasm as a major concern, as well as Dunham's failure to meet with him to discuss parental concerns in a timely fashion, and also reiterated her confrontational conduct in early September as examples of unacceptable

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performance. Reference was also made that Dunham "had not made any entries in your ISIP folders for the entire year when I examined them on April 7, 1987."

Reference must also be made to P-7 and P-33 previously discussed.

4. FAILURE TO COMPLETE ANY ISIPs AS OF APRIL 7, 1987

This reason for the withholding action fully states that Dunham's failure was in violation of state statutes and district procedures.

Dunham testified she was not aware that the ISIPs were a problem until Morton sent memos to the BSI teachers on April 7 (P-26 to all with P-27, 28, 29 and 30 to each individual attached). She stated there was no review of ISIPs until April 1987; she completed the ISIPs with all initial information in a timely fashion by September 19, 1986; and that only Bruce Wilson had fully completed his ISIPs in a timely fashion. She further stated that the ISIP issue was concerned with part IIIc, which Wilson advised required an on-going update. Dunham also indicated that all ISIPs were completed between April 7 and the end of the school year, as verified in Morton's annual review of her performance. See, P-35.

Bruce Wilson, a teacher at Lafayette for 27 years, testified that the total ISIP form (P-2) was not and could not be completed until June because of part IIIc, but he was not advised of any impropriety by Morton. He further stated data for part IIIc were to be kept on an on-going basis, but need not be transmitted to the ISIP form until the end of the year.

BSI teacher Pini testified that she understood the ISIP was to be completed by September 19, 1986 excepting for part IIIc, but did not learn of the necessity of on-going IIIc entries until she received the Morton April 7, 1987 memos (P-26 and P-29), and further that she was not reprimanded by Morton.

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BSI teacher Batte testified that as of April 7, 1987, she had no part IIIc entries on her ISIPs other than pre-test scores entered in September 1987, but that she kept pupil records in separate folders. She stated she received no part IIIc instructions in September 1986 or thereafter, and relied on the assistance of Bruce Wilson concerning record-keeping.

Morton testified that he met with Dunham and Batte on September 16, 1986 to discuss ISIP entries and on-going updating during the year, which is contrary to the testimony of both Dunham and Batte. He further stated that he reviewed all ISIPs on April 7, 1986 which triggered the memos P-26 through P-30, and that he found none complete. He stated on cross-examination that he advised the Board of Dunham's failure to complete her ISIPs but could not recall if he also advised the Board of similar failures by the other BSI teachers.

Reference is made to the Morton memo of September 2, 1986 to all BSI teachers concerning ISIPs and schedules. See, P-24. It incorporates the development of an ISIP and a folder for each pupil, and indicates that the folder "will be on-going throughout the year, but please complete the ISIP by Friday, September 19."

A review of the ISIP form itself and IIIc in particular clearly appears to give credence to the testimony of the BSI teachers that part IIIc could not be completed in September and the timeliness of entries prior to the end of the school year was a cloudy issue.

The Morton memo to all BSI teachers on April 7, 1987 (P-26) appears also to amend his September 2, 1986 memo (P-24) from an on-going record in the pupil folder to part IIIc of the ISIP.

A review of the tone of individual memos to BSI teachers Batte, Dunham and Pini (P-27, 28 and 29) also appears to support the Dunham allegation of Morton animus toward her with no significant distinction in their ISIPs as reviewed by Morton.

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DISCUSSION

It would be difficult to dispute that the personal relationship between Dunham and Morton has been somewhat strained since the arrival of the chief school administrator at Lafayette in 1985-86, notwithstanding that Morton's evaluations of Dunham's performance are indeed positive, excepting the 1986-87 annual evaluation after the withholding action. This is evidenced by the tone and contents of Morton's memos. See, P-31 and the attached policy 320. Compare P-28 with P-27 and P-29.

It would indeed be conjecture to determine that the Dunham role as association president and the Morton role as administrator is responsible, but in light of good evaluations, the inference cannot be disregarded.

Four days of testimony makes one wonder if the critical reasons for Morton's withholding recommendations were omitted from the Board's resolution. The memo of December 17, 1986 (P-5) of alleged parental concerns and selected excerpts of evaluations from previous administrators (P-6) appears to have widened the relationship gap. Although Morton agreed that the teacher must be the judge as to when kindergarten children are ready for formal reading group instruction, he appears to have placed greater weight on his own judgment with but two classroom visitations. Morton expressed concern that Dunham's response to his December 17, 1986 request to discuss the contents of P-5 was not sufficiently expeditious and triggered P-6, which referred to his P-5 request as a direction.

Morton testified that he recommended the transfer of Dunham from half-time kindergarten and half-time BSI in 1986-87 to full-time BSI in 1987-88 at the Board's March meeting. There was no meeting of the whole Board between March and April 20 when the withholding action was taken, but Morton testified that he met with five Board members individually during that interim, discussed the Dunham matter with each and shared memos with them. Although Morton stated the September schedule confrontation was not considered as a withholding reason until the April 20 meeting, it is reasonable to believe

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that the Board solidified its determination to withhold as a result of the individual meetings. Morton also stated the confrontation incident alone was insufficient reason to withhold.

Concerning the parental concern memo (P-5), Morton testified it was not placed in her file and did not form a basis for withholding, but her failure to respond in a timely fashion was a great concern. He, nevertheless, read P-5 to the Board at the March meeting and showed it to individual Board members prior to the April 20 meeting. He also stated that he considered his January 19, 1987 memo (P-6) (excerpts of previous administrative evaluations) as a reason for withholding because of her failure to respond, but it was not stated as a reason in P-1.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

It is well established law that a prerequisite to the granting of salary increases to teachers are favorable reports by those charged with supervisory responsibility and approval by the Board of Education. It also cannot be disputed that the Commissioner of Education must determine whether the underlying facts are as those who made the evaluation claimed and whether it was unreasonable for the Board to conclude as they did upon those facts. Kopera v. West Orange Bd. of Education, 60 N.J. Super. 288 (App. Div. 1960).

We must also be mindful that the determination of the Board is afforded a presumption of correctness sans an affirmative showing that it acted arbitrarily, capriciously or unreasonably, and further that we are not to substitute our judgment for that of the Board. Quinlan v. Bd. of Ed. of North Bergen, 73 N.J. Super. 40 (App. Div. 1962); Thomas v. Morris Twp. Bd. of Ed, 89 N.J. Super. 327 (App. Div. 1965), aff'd 46 N.J. 581 (1966).

I **FIND** the recommendation to withhold Dunham's salary increments for 1987-88 by the Chief School Administrator to have been precipitous, and the action of the Board in approving the recommendation to have been arbitrary, capricious, and unreasonable for the reasons that follow.

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The primary reason given was Dunham's failure to attain the goals of her Professional Improvement Plan for 1986-87. Those goals were for Dunham to display genuine enthusiasm at appropriate times with the children; to form some students into reading groups by the end of the year; and to examine the amount of flexibility in the kindergarten program to determine if there is a need to develop alternate approaches with respect to instructional techniques and types of lessons.

Morton stated in his first observation report that "You showed a genuine effort in displaying enthusiasm to your class" (P-7) and in his second observation report there was no negative comment incorporated therein. Morton commended Dunham for her enthusiasm in memos of observations of assembly activities on December 8, 1986 and December 11, 1986; and also chastised her for a scowl on her face at dismissal on December 11, 1986, and a troubled and anguished look when she boarded a field trip bus on January 7, 1986. (R-1). It is difficult to believe the Morton's contention to be factual based on the above as well as the credible testimony of aide Hansen.

Concerning reading groups, notwithstanding Morton's argeement that teacher judgment was to determine reading readiness, Dunham's testimony that reading groups were formed after the Spring vacation was undisputed.

Concerning flexibility, Morton clearly indicated in his January observation that Dunham was "to consider ways to differentiate the curriculum for your students," and in his March observation cited several examples of flexibility observed in an excellent evaluation. P-33.

The second reason given relates to Dunham's conduct at the schedule confrontation in September 1986. Although Dunham should be reprimanded for her emotional outburst on this occasion, Morton testified it alone was insufficient for a withholding action and that it was not a consideration until the April 20 meeting.

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The third reason for the withholding action was the unsatisfactory performance of Dunham in both her kindergarten and BSI assignments. As previously stated, only the annual evaluation by Morton after the fact of Board action was negative. His two observations prior to Board action were indeed generally positive, and there is no evidence in the record of any observations of her BSI teaching.

The final reason was Dunham's failure to complete any ISIPs as of April 7, 1987. The record clearly establishes confusion among the BSI teachers concerning section IIIc, and does not indicate any required completion before the end of the year. There was no Board policy submitted relative to the timeliness of this responsibility. N.J.S.A. 18A:7A-11 and N.J.A.C. 6:8-6.2 indeed makes reference to district responsbilities and a July 1 reporting date. The tone of Morton's memos to Dunham, Batte, and Pini are vastly different for seemingly similar failures.

The Board's conduct in approving the withholding action must be examined as it flowed from the administrator's recommendation, which I **FIND** to have been precipitous, arbitrary, capricious, and unreasonable.

Board President Leibowitz testified that her opinion was influenced by Morton and some parental comments made to her. It cannot be disputed as a matter of law that the residuum rule does not permit consideration of the latter. N.J.A.C. 1:1-15.5. Weston v. State of New Jersey, 60 N.J. 36 (1972). Colavita v. Hillsborough Twp. Bd. of Ed., N.J. Super. (App. Div. 1985) A-4342-83T6 decided March 28, 1985. She further testified she did not review the Dunham file.

Board member Boyd testified that as a volunteer aide with Dunham for four years, she detected inconsistency with her enthusiasm during the fourth year.

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Board member Cleary testified that he relied on the oral presentation of Morton in support of his withholding recommendation, did read the Dunham PIP, and was satisfied with Morton's concerns and documentation, but did not review the Dunham file. He also stated that he was unaware that Dunham had completed her ISIPs before other BSI teachers.

I **FIND** that the Lafayette Board demonstrated good faith in supporting the recommendation of its chief school administrator, and was unquestionably influenced by his representations to individual Board members between the March and April meetings and to the whole Board on April 20, 1987.

Having found the recommendation of the Chief School Administrator to have been arbitrary, capricious, and unreasonable, I must therefore **CONCLUDE** the action of the Board to have been arbitrary.

The Lafayette Board of Education is hereby **ORDERED** to reinstate the employment and adjustment increments withheld from Susan Dunham for the 1987-88 school year, and to compensate her for the difference in salary received since September 1, 1987 and the salary she would have received if the Board had not acted to withhold.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

23 December 1987
DATE

WARD R. YOUNG, ALJ

DEC 2 [illegible]
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

Mailed To Parties:
DEC 29 1987
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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SUSAN DUNHAM,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LAFAYETTE, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Board's exceptions were untimely filed pursuant to N.J.A.C. 1:1-18.4. However, the Commissioner has considered said exceptions and petitioner's replies thereto based on the following procedural history.

Initially, the Commissioner notes the absence of a transcript of the proceedings below in the record before him. By letter dated January 5, 1988 the Board's counsel requested an extension of time within which to file exceptions to the initial decision in order that the transcript of the hearing below could be obtained. After telephonic conversation with the Director of the Bureau of Controversies and Disputes, counsel for the Board was advised by letter from the Commissioner's representative dated January 13, 1988 that the request for the extension was denied. On January 14, 1988, the request for an extension was renewed in writing and on January 25, 1988 was again denied by the Director of the Bureau of Controversies and Disputes. In his letter dated January 13, 1988 the Director stated:

> ***Any request for an extension to file exceptions because of the necessity to review the transcripts will not be honored unless the transcripts were ordered either at the conclusion of the hearing or, at the latest, upon the close of the record. ***[Y]our request for transcripts was made upon receipt of the initial decision, [and thus] a request for extension will not be honored.

The Board's exceptions were submitted, notwithstanding its receipt of the above-stated correspondence, well past the ten-day period permitted by N.J.A.C. 1:1-18.4. However, in the interest of developing a complete record, a summary of the exceptions and petitioner's replies thereto follows in pertinent part.

The reasons set forth by the Board as to why petitioner's 1987-88 increments were being withheld were as follows:

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1. Failure to attain the goals of the Professional Improvement Plan for 1986-87. The goals (found in P-15(a)) are succinctly stated:

   a) display genuine enthusiasm;

   b) begin the Ginn reading program with pupil groups when deemed ready;

   c) improve flexibility in the kindergarten program if there is a need with respect to instructional techniques and types of lessons.

2. Display of unprofessional conduct in statements directed at the Chief School Administrator in reference to her 1986-87 teaching assignment.

3. Unsatisfactory performance in both her kindergarten and BSIP teaching assignment in the 1986-87 school year.

4. Failure to complete any ISIP(s) as of April 7, 1987. (Initial Decision, at p. 3)

The Board raises four exceptions based on the above-stated reasons in response to the ALJ's conclusion that the withholding was precipitous, unreasonable and arbitrary.

POINT I

THE EVIDENCE DOES NOT SUSTAIN THE ADMINISTRATIVE LAW JUDGE'S CONCLUSION THAT THE DECISION OF THE CHIEF SCHOOL ADMINISTRATOR AND, THUS, THE BOARD WAS BASED ON UNION ANIMUS.

In regard to this exception, the Board relies on the testimony of the three Association members called by petitioner as supporting the Board's position that there was no evidence of any union animosity at the Lafayette Township School. The Board further argues that "the testimony of the Board's witnesses established that the action was taken to withhold the Petitioner's increment in spite of the fact that she was the Union President and not because of the fact that she was the Union President." (emphasis in text) (Exceptions, at p. 2) The Board summarizes in exceptions the testimony of the Board president, vice president, the chief school administrator and the Board secretary. The Board avers that a review of the testimony and the transcript will not support the ALJ's "conclusions of animus which pervade the entire decision of the Administrative Law Judgment." (Exceptions, at p. 4) Relying on In re Silberman, 169 N.J. Super. 243 (App. Div. 1979), aff'd 84 N.J. 303 (1980), the Board claims the ALJ's determination in this regard cannot be fairly supported by the record and must be reversed.

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POINT II

THE CONVERSATION OF THE ADMINISTRATIVE LAW JUDGE WITH THE BOARD PRESIDENT WAS IMPROPER.

The Board avers that a conversation between the ALJ and the Board president which took place during a recess in the hearing below was improper and "when considered in para materia with the Administrative Law Judge's erroneous findings of fact require reversal." (Exceptions, at p. 4) The discussion allegedly concerned the ramification a hearing such as the one sub judice would have on a small district such as the Board's.

The Board claims that thereafter the ALJ recommended a specific settlement, namely that petitioner's increments be restored February 1, 1988. The Board alleges that it would appear that in formulating a decision which would restore the increments, the ALJ was attempting thereby to substitute his judgment for that of the Board in contravention of the law as set forth in Quinlan v. Board of Education of North Bergen, 73 N.J. Super. 40 (App. Div. 1962).

POINT III

PETITIONER FAILED TO MEET HER BURDEN OF AFFIRMATIVELY ESTABLISHING THAT THE DECISION OF THE BOARD WAS "...ARBITRARY, CAPRICIOUS AND UNREASONABLE."

The Board argues that the reasons for withholding petitioner's increments were carefully set forth in the Board's resolution of April 20, 1987, noting the above-stated four reasons for it. Summarizing the testimony of Mr. Morton, the chief school administrator, the Board contends the decision was not precipitous, as the ALJ concluded, since three reasons were concerns set forth in petitioner's PIP from 1986-87. The Board also cites the memoranda written by and evaluations conducted by and discussed between Mr. Morton and petitioner in support of its position that Mr. Morton's recommendations were not arbitrary. The Board avers that "the Board members felt that the action was necessary and appropriate because of deficiencies in the Petitioner's teaching performance." (Exceptions, at p. 3) The Board claims that the shortcomings and failures of petitioner during 1985-86 and continuing through 1986-87 as shown by her failure to meet the goals set forth in her PIP and the other reasons set forth in the Board's resolution and Mr. Morton's recommendations are supported by a well-established record of deficiencies.

POINT IV

THE BOARD'S CONSIDERATION OF THEIR OWN INDIVIDUAL EXPERIENCES AS PARENTS AND AIDES AND THE CONSIDERATION OF PARENTAL CONCERNS WAS PROPER.

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Relying on Bebe Sellers v. Board of Education of the City of East Orange, decided by the Commissioner January 26, 1983 and Shafran v. Board of Education of the Township of Middletown, 1984 S.L.D. ____ (May 31, 1984) for the proposition that the Board may consider other factors outside of satisfactory teaching performance, the Board claims that petitioner's failure to respond to parental complaints "is as important as the fact that the Board members and Chief School Administrator heard them." (Exceptions, at p. 10) The Board claims a good teacher would do something about the complaints and respond to a supervisor before two months of time elapsed. Moreover, the Board claims that the ALJ's reliance on Weston v. State, 16 N.J. 36 (1972) was erroneous. It claims that the input of the Board members as former parents and, in particular, in the case of Mrs. Boyd, who had been a four-year volunteer in petitioner's kindergarten class, was credible. Further, the Board avers that the parents' concerns articulated to the Board members and to Mr. Morton could have been properly used by the Board to corroborate or support the opinion of Mr. Morton, and their own experiences.

In summary, the Board avers the initial decision runs contrary to case law and the facts. It avers the ALJ substituted his judgment and concerns for that of the Board. The decision must therefore be reversed and the action of the Board upheld, the Board submits.

Petitioner's reply exceptions rebut, point for point, the Board's exceptions. At the outset, petitioner recites her version of the background facts in the matter, including that "[h]er performance record was unblemished and had never been the subject of any concern until a new school administrator, Thomas Morton, arrived on the scene two years ago." (Reply Exceptions, at p. 2)

Petitioner avers the reasons proffered by the Board for withholding her increments for 1987-88 were vague, and that requests for more specific reasons were never forthcoming. Petitioner further claims she successfully rebutted all such reasons at hearing, as found by the ALJ. More specifically, she posits that the "lack of enthusiasm" reason proffered by the Board as a reason for withholding her increments is "an extremely subjective criteria" (Id., at p. 3), but through testimonial and documentary evidence, she did convince the ALJ that her level of enthusiasm was acceptable. She cites the testimony of Ms. Hansen, her aide for many years, the two occasions when Mr. Morton acknowledged in memos that he saw such enthusiasm, and several letters from parents "documenting her rapport and enthusiasm with the students in the school (P 17 to P 23)" (Id.) as evidence of her showing enthusiasm at appropriate times toward her pupils. Thus, petitioner contends, there is no reason to overturn the ALJ's determination below in this regard.

Similarly, petitioner claims in reply exceptions that there was "no basis for any of the other allegations against [her] concerning derelictions in her teaching performance." (Id., at p. 4) Again relying on the testimony proffered by other teachers, petitioner contends:

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> The process of completion, or lack of completion, of the ISIPs was identical by all of the employees involved. *** But what is critical to note, however, is that no disciplinary action whatsoever was taken against any of the other employees for performing the identical acts which formed one of the basis (sic) for the increment withholding of Ms. Dunham (P 27, P 28, P 29). (Id.)

Petitioner claims it was "incredible" that Mr. Morton advised the Board to make the ISIPs a basis for the increment withholding and that the ALJ was correct in finding in her behalf in this regard. (Id.)

As to forming reading groups, petitioner again suggests that her PIP called for formation of reading groups by the end of the school year which, she avers, was accomplished. That the Board and the chief school administrator took "an extremely serious disciplinary action in April against petitioner for allegedly failing to perform an act, when the chief administrator himself had given Dunham until June, 1987 to complete the process" was arbitrary. (Id., at pp. 4-5)

As to the incident of September 9, 1986, petitioner contends in reply exceptions that she was not rude, disrespectful or threatening. Moreover, petitioner contends the Board was aware of the incident when it happened and never advised her of any problem in this regard. "In fact, at no time prior to April 1987 was the incident ever mentioned again. It was simply used at a later date to 'bootstrap' the reasons for the withholding." (Id., at p. 5)

Petitioner then goes on in her reply exceptions to rebut the Board's denial of union animus as a motivating factor in the withholding, claiming that the ALJ acted properly in concluding that an inference could be drawn that her union activity was one basis for the arbitrary action. Moreover, in reply to the Board's allegation made in its exceptions that the ALJ's impromptu discussion with the Board president during the hearing was improper, petitioner suggests the matter was not raised below and was a "[n]on-issue until a desperate Board of Education belatedly raised it in the apparent hope that some claim might result in reversal." (emphasis in text) (Id., at p. 7)

As to the alleged failure of petitioner to meet her burden, petitioner suggests, inter alia, that this argument is a mere repetition of the Board's properly rejected claim that her performance was deficient during the 1986-87 school year, which she successfully rebutted at hearing.

Concerning the Board members reliance on their own experiences in deciding to withhold her increment, petitioner claims the Board, in its exceptions, misses the point of the ALJ's reasoning in this regard. Petitioner claims in reply exceptions that she was never told that the purported concerns of the unnamed

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parents were a reason for the increment withholding. "Thus, Dunham not only did not know who made such claims, she was never told what was said, and certainly was never advised that the unsubstantiated, unknown statements by anonymous persons would have any weight in the increment withholding." (emphasis in text) (Id., at p. 9) She claims this constitutes an arbitrary, unfair decision on the part of the Board if based upon such reasons.

In conclusion, petitioner submits that a transcript was not necessary to review the ALJ's decision. The critical facts, as developed in the initial decision, amply justify the conclusion that the withholding was arbitrary, she suggests. Petitioner claims the Commissioner should accept the ALJ's decision and restore her increment.

Upon a careful and independent review of the record before him, the Commissioner affirms the initial decision for the reasons stated therein as clarified below. He does so without benefit of the transcript of the hearing below which, even as this decision is written, has not been received.

The Commissioner must reiterate first the standard of review appropriate in his review of a withholding of increment case. Kopera v. West Orange Bd. of Education, 60 N.J. Super. 288 (App. Div. 1960) establishes the Commissioner's review is to determine

> 1) whether the underlying facts were as those who made the evaluation claimed, and
>
> 2) whether it was unreasonable for them to conclude as they did upon those facts, bearing in mind that they were experts, admittedly without bias or prejudice, and closely familiar with the mise en scene; and that the burden of proving unreasonableness is upon the appellant. (at 296-297)

The Commissioner notes, as did the ALJ, that in making the determinations above, he is not to substitute his judgment for that of the Board and, further, that the Board's determination is afforded a presumption of correctness absent a showing that it acted in an arbitrary, capricious or unreasonable manner. Quinlan, supra, Thomas v. Morris Twp. Bd. of Ed., 89 N.J. Super. 327 (App. Div. 1965), aff'd 46 N.J. 581 (1966) Based on the record before him, including the exceptions and replies thereto, the Commissioner must conclude, as did the ALJ, that at the time the Board voted to withhold petitioner's increment, it did not have a reasonable basis for so doing.

The Commissioner so concludes notwithstanding the ALJ's having incorporated into the Prehearing Order a matter not cognizable before the Commissioner of Education, that is, whether the action of the Board in withholding her increment was "retaliatory against petitioner for her exercise of protected union

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activities as President of the Lafayette Education Association [for] the 1986-87 school year." (Prehearing Order, dated September 10, 1987) Union animus is an issue that lies solely within the purview of the Public Employment Relations Commission. The Commissioner notes that the record reflects that on October 23, 1987 counsel for the Board apprised the ALJ below in writing that it consented to the withdrawal of its motion for a predominant interest determination made in consideration of petitioner's withdrawing all PERC charges stemming from the petition she filed before PERC on June 26, 1987. Moreover, the Commissioner notes that petitioner did not incorporate into her Petition of Appeal before the Commissioner information apprising him pursuant to N.J.A.C. 6:24-1.3(b) that a matter based on the same facts was pending before another tribunal.

The Commissioner finds that any inferences, suggestions or conclusions drawn by the ALJ in this matter pertaining to allegations of union animus are entirely inappropriate and are not made a part of the Commissioner's affirmance of the initial decision. Moreover, as to the Board's belatedly raised concern made in its exceptions as to an alleged settlement discussion between the ALJ and the Board president, no proof is brought to the record of such conversation, nor any evidence to suggest the subject matter of any such alleged conversation tainted the proceedings. Hence, both such arguments raised by the Board in exceptions are dismissed as being without merit. Notwithstanding this conclusion, the Commissioner is able to consider and, in fact, does review the instant matter framed as follows:

> Without consideration of any allegation of taint on the ALJ's part or that union animus was a motivating factor in the Board's action, is there otherwise present in the record credible evidence to establish whether the action of the Board in withholding petitioner's employment and adjustment increments was arbitrary, capricious, unreasonable or contrary to statute for the year in question?

Having established the basis upon which he reviews the instant matter, the Commissioner will consider, seriatim, the bases upon which the Board withheld petitioner's increments for the 1987-88 school year.

The first basis for the withholding action was:

> 1. Failure to attain the goals of the PIP for 1986-87. Those goals included:
>
> (a) display genuine enthusiasm.

The Commissioner's concern in regard to this PIP requirement and the withholding determination of the Board that flowed from it involves the residuum rule expounded upon in Michael S. Colavita v. Board of Education of the Hillsborough Township School District, N.J. Superior Court, Appellate Division A-4342-83T6 decided March 28,

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1985. In that case the Appellate Court determined that while hearsay evidence, in general, is admissible in an administrative hearing, the hearsay evidence used to sustain the underlying facts in support of that increment withholding must be supported by a residuum of "'legally competent evidence' presented to support the 'ultimate finding of fact to an extent sufficient to provide assurances of reliability to and to avoid the fact or appearance of arbitrariness.'" (Slip Opinion, at pp. 5-6, quoting N.J.A.C. 1:1-15.8 [now 1:1-15.5]) In Colavita, the superintendent received the complaint and directed the school principal to conduct an investigation. No firsthand testimony on the matter was ever brought before the Board. Neither did the superintendent in recommending the increment withholding have any firsthand knowledge of the facts. The Court held that it was not Colavita's duty to subpoena witnesses in the administrative hearing that followed the withholding, even though petitioner in such an appeal bears the ultimate burden of proof in establishing arbitrariness of the board action. Thus, Colavita's increments were restored.

In the instant matter, the Board had the following "evidence" before it when it considered whether petitioner failed to display genuine enthusiasm at appropriate times with the children.

1. Personal recollections of Board Member Boyd, who had been an aide to petitioner for four years. The Commissioner recognizes that a Board member may call upon her own firsthand knowledge of the issue in question when deciding how to vote. However, the weight to be accorded such firsthand knowledge is affected by her current role as a Board member. The Commissioner deems such firsthand knowledge based on her former service as a classroom aide, while perhaps corroborative, is of little probative value in deciding whether the recollections were based in fact since there may be a bias resulting from Ms. Boyd's role as a Board member.

2. Memos penned to petitioner by Chief School Administrator Morton, based on his observations of December 8 and 11, 1986 (positive) and those of December 11, 1986 and January 7, 1987 (negative). These documents were based on the superintendent's own personal observations and, thus, do not constitute hearsay. Since two were negative and two were positive, however, the weight to be accorded them is negligible in determining their factual accuracy.

3. Evaluation reports penned by Chief School Administrator Morton. Since these observations (P-33, P-7) were conducted by the superintendent himself, no question arises as to hearsay testimony on these two documents. The Commissioner finds, though, as did the ALJ, that these observation reports were largely positive (see Initial Decision, ante) and thus inure against the reasonableness of the Board's action to withhold.

4. Statements of Chief School Administrator Morton and Mrs. Liebowitz that parents had complained to them of petitioner's attitude. It is here that the Commissioner disagrees with the ALJ's conclusion that Colavita, supra, precludes all consideration of the

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parents' comments in the voting to withhold petitioner's increments. First, the Commissioner notes that it is well established in law that a board may rely on information gathered from sources other than that contained in evaluations, including parental comments made to board members. See, for example, Andrew Guerriero v. Board of Education of the Borough of Glen Rock, decided by the Commissioner March 4, 1985, aff'd State Board February 5, 1986, aff'd Superior Court, Appellate Division December 17, 1986 (Board determination made despite favorable evaluation that it did not want to retain nontenured teacher because of negative comments made from a small group of parents upheld). See also Bebe Sellers v. Board of Education of the City of East Orange, decided by the Commissioner January 26, 1983 (Board members have the responsibility, and the duty, to consider not only the evaluations from its professional staff, but also to consider other factors outside of satisfactory teaching performance in deciding whether to withhold increment). However, the inquiry as to the reliability of the parents' comment does not end here. The residuum rule must also be considered. Under the Colavita standard, had the parents in the instant matter themselves observed some behavior in petitioner with which they were dissatisfied and thereafter addressed their concerns to Board President Liebowitz or the chief school administrator, the Board's action could be relied upon by the Board in reaching its conclusion as to whether there was a reasonable basis for withholding. Had said parents, however, conveyed their concerns of having heard complaints from their children's observations of petitioner's behavior, the residuum rule as cited in Colavita would have applied. When the Board reached its determination based solely on said hearing, it lacked a proper basis for its conclusion.

In the instant matter, the record does not make clear whether the reports from parents were the result of their own direct observation or reports from their children. Any decision to withhold made by the Board based upon hearsay without a residuum of reliability is thus found to be arbitrary and unreasonable. The Commissioner so finds.

Moreover, the superintendent's memo, dated December 17, 1986, lists comments made to him by parents, yet nowhere is it made known in the record from what source the parents' comments stemmed. Without testimony or documentation establishing the basis for such alleged commentary, the Commissioner is unable to conclude that such comments were based on a residuum of competent evidence. Accordingly, he finds the Kopera standard has not been met, that is, whether the underlying facts are as those who made the decision claimed, particularly where the matter of petitioner's enthusiasm toward the children is concerned. Moreover, since said memo (P-5) concerning the parental concerns was not placed in petitioner's file and Mr. Morton testified it was not a basis for withholding, the Commissioner finds, as did the ALJ, that the Board acted precipitously in withholding her increments relying on the superintendent's having read P-5 to the Board members at the March meeting and having showed it to individual Board members at the April 20 meeting. (See Initial Decision, ante)

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Additionally, the Commissioner finds the requirement that petitioner should demonstrate "genuine enthusiasm at appropriate times with the children" to be so subjective and vague as to be arbitrary. (Id., at p. 11)

> b) begin the Ginn reading program with pupil groups when deemed ready.

As to the contention by the Board and superintendent that petitioner failed to meet Goal 2 of her 1986-87 PIP which spoke to forming some students into reading groups by the end of the year, the Commissioner finds, as did the ALJ, no conclusive evidence establishing whether, in fact, such groups were formed by the end of the school year in question. Moreover, this PIP goal, too, is vaguely drafted and lacking in consistency with N.J.A.C. 6:3-1.21(h)(3) which requires:

> Individual professional improvement plan is a written statement of actions developed by the supervisor and the teaching staff member to correct deficiencies or to continue professional growth, timelines for their implementation, and the responsibilities of the individual teaching staff member and the district for implementing the plan***. (emphasis supplied)

> c) improve flexibility in the kindergarten program if there is a need with respect to instructional techniques and types of lessons.

The Commissioner further notes a third PIP requirement that petitioner incorporate flexibility into her lessons. However, petitioner was later commended in her March 4, 1987 Observation Report (P-33). "Various learning modes were used during the session." "During the lesson, there were provisions made for different levels of student activities." "It is obvious that you have used your knowledge and background experience to implement the recommendations that you and I have discussed previously. This lesson has shown me that you are capable of doing an excellent job in the classroom." Thus, it is not clear, in the Commissioner's opinion, in what way petitioner's performance in teaching reading was deficient if, in fact, it was.

2. Display of unprofessional conduct in September 1986.

In this regard, the Commissioner adopts the finding and conclusion of the ALJ on pages 6 and 11 of the initial decision wherein he states this matter was not considered by the Board until April 20, 1986 and, while not condoned, was not sufficient basis to withhold.

3. Unsatisfactory performance in both her kindergarten and BSIP teaching assignments in the 1986-87 school year.

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The Commissioner notes the above satisfactory evaluation (P-33) as indication of the superintendent's praise for petitioner's teaching ability. Moreover, the Commissioner is in accord with the ALJ that petitioner's year-end evaluation states that "the curriculum item of your PIP you have fully met." (P-35) Once again, the Commissioner is perplexed by the seemingly mixed signals conveyed to petitioner concerning her performance during the 1986-87 school year.

4. Failure to complete any ISIPs (Individual Student Improvement Plan) as of April 7, 1987.

In this regard, the Commissioner adopts as his own the findings of the ALJ as found in the initial decision, ante..

A review of the record before him convinces the Commissioner that regarding the information upon which the Board herein relied in determining to withhold petitioner's increments has not been demonstrated as being factually sound.

The Commissioner is fully cognizant that the ultimate burden in proving unreasonableness lies with petitioner, and he is convinced that she has demonstrated satisfactorily that the Board's action herein as the ALJ found, was "precipitous *** arbitrary, capricious, and unreasonable***." (Initial Decision, ante)

Accordingly, the initial decision is affirmed for the reasons stated therein, as clarified herein. The Board is hereby directed to reinstate the employment and adjustment increments withheld from Susan Dunham for the 1987-88 school year and to compensate her for the difference in salary since September 1, 1987 and the salary she would have received if the Board had not acted to withhold.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

February 10, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NOS. EDU 290-87,
2045-87 and 2776-87
(CONSOLIDATED)
AGENCY DKT. NOS. 419-12/86,
37-3/87 and 43-3/87

IN THE MATTER OF THE TENURE HEARING OF DR. FRANK J. NAPOLI, SUPERINTENDENT OF SCHOOLS, SCHOOL DISTRICT OF THE CITY OF SALEM, SALEM COUNTY,

AND

DR. FRANK J. NAPOLI,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF SALEM, SALEM COUNTY,

Respondent.

John T. Barbour, Esq., for the complainant-respondent (Barbour & Costa, attorneys)

Jeffrey A. Bartges, Esq., for respondent-petitioner

Record Closed: Oct. 15, 1987 Decided: December 16, 1987

BEFORE LILLARD E. LAW, ALJ:

STATEMENT OF THE CASE

On December 12, 1986, the Board of Education of the City of Salem (Board) certified six charges of unbecoming conduct and incompetency before the Commissioner

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of Education (Commissioner) pursuant to N.J.S.A. 18A:6-10 et seq., against Dr. Frank J. Napoli, its tenured Superintendent of Schools (Superintendent or respondent). Subsequently, on February 23, 1987, the Board certified before the Commissioner an additional eight charges against its Superintendent.

Respondent denies the allegations of the Board's charges and petitions the Commissioner for a declaratory judgment to construe the provisions of N.J.S.A. 18A:17-16 and declare that the Board's appointment of an assistant superintendent without the "nomination of the superintendent" is void ab initio.

PROCEDURAL ASPECTS

On January 15, 1987, the Commissioner transmitted the Board's six certified charges dated December 12, 1986, to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. Thereafter, on February 13, 1987, a prehearing conference was held at the Atlantic City OAL at which, among other things, the issues to be determined by this administrative tribunal were set forth.

Subsequently, the Board certified an additional eight charges on February 23, 1987, to the Commissioner who, in turn, transmitted the matter to the OAL on March 25, 1987, with directions to consolidate the matters. On May 13, 1987, the undersigned issued an order of consolidation of the two matters.

On March 16, 1987, the Superintendent filed his petition for declaratory judgment. After receipt of the Board's Answer, the Commissioner, on April 27, 1987, transmitted the matter to the OAL. On June 1, 1987, the undersigned issued an order to consolidate this petition with the two pending tenure matters.

Fourteen days of hearing were held in Salem County commencing on June 22, 1987, and concluding on July 16, 1987. The parties requested and were granted leave to submit post-hearing memoranda. The last submission was received on October 15, 1987, which constituted the date of the closing of the record. An extension was requested and granted to the undersigned for the execution of the herein initial decision. The requested extension was due, in major part, to the undersigned's recuperation from eye surgery.

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THE CHARGES

As set forth above, the Board certified two sets of charges against respondent which are as follows:

December 12, 1986 charges of Unbecoming Conduct (First Set of Charges) (OAL Dkt. No. EDU 290-87)

1. Frank J. Napoli, as Superintendent of Schools has engaged in conduct which has been found to constitute violations of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. .....

2. Frank J. Napoli, as Superintendent of Schools has provided sworn testimony, in a legal proceeding in which the Salem City Board of Education was a party, which the trier of fact found to not be credible. .....

3. Frank J. Napoli, as Superintendent of Schools has engaged in conduct which caused a civil action to be filed against the Board of Education by Francis C. Ponti, previously a principal employed by the Salem City Board of Education, asserting that Mr. Ponti's civil and constitutional rights were violated by Frank J. Napoli's conduct. .....

4. Frank J. Napoli, Superintendent of Schools, failed to detect or failed to report to the Board of Education after having become aware of an alleged scheme to embezzle funds from the district's cafeteria program by one George Hart, and possible others. .....

5. Frank J. Napoli, as Superintendent of Schools, has engaged in conduct which led to needless litigation over whether or not the salaries of compensatory education teachers funded from state categorical aid should be calculated in the tuition to be charged a sending district pursuant to N.J.S.A. 18A:38-19 by failing or refusing to disclose that such salaries were not in fact so included or by falsely supplying factual data which indicated that such salaries were in fact so included. .....

6. Frank J. Napoli, as Superintendent of Schools has engaged in conduct which is designed to or which results in unwarranted friction, dissension, controversy and/or litigation between the Board of Educational District employees. .....

February 23, 1987 Charges of Unbecoming Conduct (Second Set of Charges) (OAL Dkt. No. EDU 2045-87)

1. Frank J. Napoli is charged with an alleged incident of shoplifting at the Salem Acme in January 1984. .....

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2. Frank J. Napoli is charged with causing and advising the district to accumulate a budget surplus of approximately four and one half million dollars with a district budget of approximately six and one half million dollars. .....

3. Frank J. Napoli is charged with strenuously opposing the Board's attempts to reduce the aforementioned budget surplus. .....

4. Frank J. Napoli is charged with failure to properly, adequately or accurately evaluate the district's administrative and supervisory staff. .....

5. Frank J. Napoli is charged with intentionally or negligently allowing the physical condition of the district's buildings and fixed assets to deteriorate in an unreasonable and unacceptable manner an extent due to lack of proper maintenance and repairs. .....

7. Frank J. Napoli is charged with establishing or allowing the continuation of a system for the sale and distribution of athletic event spectator tickets without adequate fiscal controls. .....

8. Frank J. Napoli is charged with the improper and unacceptable use of foul and offensive language when speaking to district teaching staff members in the presence of district students. .....

Charge No. 6, as sworn to by Ervin G. Ochs and as certified by the Board, was withdrawn prior to the opening of the record in these proceedings.

Incompetency as Charged in Both the First and Second Set for Charges

Frank J. Napoli is incompetent to fulfill the duties of the office of Superintendent of Schools of the Salem City School District. .....

BURDEN OF PROOF

The Board must affirmatively establish, by a preponderance of the credible evidence, proof that the tenure charges against respondent are true in fact, and that they support the sanctions requested.

Respondent must affirmatively demonstrate, by a preponderance of the credible evidence, that the Board violated N.J.S.A. 18A:17-16 and that he is entitled to a declaratory judgment in his favor on this issue.

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UNCONTESTED FACTS

A review of the record reveals certain uncontested facts, which are hereby adopted as **FINDINGS OF FACT** as set forth below, as follows:

1. The Petitioner Board had for many years been organized as a Type I School District under Title 18A and its predecessor Title 18 of the Statutes of the State of New Jersey.

2. As a Type I School District, Salem had a local board of education that was appointed by the Mayor of the City of Salem rather than by direct election by the voters of the City of Salem.

3. In January 1985, the voters of the City of Salem approved a referendum to change its form of organization from a Type I, appointed board of education to a Type II, elected board of education.

4. Since the approval of that referendum changing the organizational structure of the Board, there has been a progression as provided for by Title 18A from appointed board members to elected board members with the current division being (6) elected board members and three (3) appointed board members. As the terms of the remaining appointed board members are completed, those respective seats on the Salem Board of Education will be filled by the election process.

5. Since the approval of the referendum by the voters, one previously sitting appointed board member has been elected as a member of the Salem Board of Education.

6. Under the Type I organizational structure the budget for a local school district such as Salem was established by the Board of School Estimate and funded through the City governing body without direct involvement by the voters.

7. Under the Type II organizational structure approved in the referendum by the voters of the City of Salem, the amount of money to be raised locally to support the school budget is voted upon by the local voters at the annual school election. Since that referendum was approved the voters have rejected the amount proposed in current expense and/or capital outlay to be raised locally at all three of the ensuing annual school elections.

8. The respondent, Frank J. Napoli, was appointed by the prior Type I Board as Assistant Superintendent for Business and Board Secretary and served in that position from 1970 until 1977.

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9. Respondent was appointed by the prior Type I Board as Superintendent of Schools in 1977. Respondent attained tenure in that position under the prior Type I Board and has held that position until the present, notwithstanding the institution of the instant tenure charges by the elected Type II Board in December 1986, at which time respondent was suspended from his position.

THE FIRST SET OF CHARGES

CHARGES NOS. 1 and 2

(OAL DKT. NO. EDU 290-87)

The essence of Charges Nos. 1 and 2 of the December 12, 1986 certification is that respondent violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., and at the hearing thereon, before the Public Employment Relations Commission (PERC), respondent's sworn testimony was deemed to be incredible by the PERC hearing officer. Charge No. 1 grew out of a dispute which occurred in October 1981, between respondent Napoli and a school nurse who challenged the Superintendent's authority to unilaterally change the daily duty-free lunch schedule of three school nurses. Respondent altered an employment past-practice, which allowed school nurses to leave their assigned school buildings during their assigned duty-free lunch periods, to require that the school nurses take their duty-free lunch within the building to which they were assigned. Two school nurses, Doris Dague and Catherine J. Watford, alleged that respondent threatened to cause a reduction in force (RIF) of school nurses should a grievance be filed to challenge respondent's unilateral action. Respondent rejected a demand by the Salem Teachers Association (STA) to negotiate the duty-free lunch issue and, thereafter, the STA brought an action before PERC alleging an unfair labor practice by the Superintendent and the Board. The matter was litigated before a PERC hearing examiner, who found and concluded that the Board and respondent were in violation of N.J.S.A. 34:13A-5.4(a)(1), making coercive and threatening statements to nurses Dague and Watford regarding the filing and processing of a grievance, and that the Board violated N.J.S.A. 34:13a5.4(a)(5) when it refused to negotiate with the STA on the issue of additional compensation for interruptions to school nurses' duty-free lunch periods. In the Matter of the Salem City Board of Education, DKT. NO. CO-82-242-9, H.E. NO. 83-85, 9 N.J.P.E.R. 14081 (January 27, 1983).

Prior to PERC having taken action upon the hearing examiner's recommendations in the above-captioned matter, the STA amended its unfair practice charge with the

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addition of Counts IV and V with a request, granted, to reopen the record before the same hearing examiner. Count IV alleged that the Board violated N.J.S.A. 34:13A-5.4(a)(1), (3), (4) and (5) when it failed to renew the employment contract of school nurse Watford for the 1983-84 school year in retaliation for her having engaged in protected activities under the Act. Count V alleged that the Board violated the Act by engaging in a series of retaliatory acts against school nurse Dague for having engaged in protected activities on behalf of the STA and nurse Watford. The Hearing Examiner found and concluded that the Board was guilty of violating both amended Counts IV and V. In the Matter of the Salem City Board of Education, DKT. NO. CO-82-242-9, H.E. No. 84-59, 10 N.J.P.E.R. 15156 (May 25, 1984). PERC sustained and affirmed the hearing examiner in both matters except to the N.J.S.A. 34:12A-5.4(a)(1) and (5) violation—the Board's refusal to negotiate.

With regard to the Board's Charge No. 2, respondent Napoli testified in the former PERC matter, but not in the latter amended complaints proceeding. In his findings of fact, the PERC hearing examiner found, by way of footnote 2, that he did not credit Napoli's denials of certain testimony as set forth by nurses Dague, Watford and school principal Francis C. Ponti. The hearing examiner's assessment of respondent's credibility was based upon his observation and appraisal of the demeanor of the named four witnesses. 9 N.J.P.E.R. 14081 at 178.

Based upon the foregoing evidence, I **FIND** and **CONCLUDE** the Board has met its burden of proof with respect to Charges Nos. 1 and 2, as stated in the First Set of Charges.

CHARGE NO. 3

It is acknowledged and admitted by respondent that Francis C. Ponti filed a civil action against the Board and Napoli before the United States District Court for the District of New Jersey. Therein, Ponti alleged, among other things, that respondent Napoli and the Board violated certain of Ponti's rights under the First and Fourteenth Amendments to the Constitution of the United States. Ponti sought compensatory and punitive damages from the Board and respondent, together with attorney's fees and the cost of the suit. The matter was ultimately settled and dismissed and, therefore, it never proceeded to trial.

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The terms of the settlement included a payment of $51,000 to Ponti plus the payment of Ponti's attorney's fees. These payments were conditioned, as a part of the settlement agreement, upon Ponti's immediate submission of his resignation from the Board's employ for the reason that Ponti was to retire from the profession.

The above-stated paragraphs are neither in dispute nor contradicted in any manner. Therefore, I hereby adopt, by reference, the two preceding paragraphs as **FINDINGS OF FACT.**

The Board's charge against respondent here alleges that respondent engaged in conduct which caused the civil suit to be brought against the Board and Napoli by former principal Ponti. This administrative tribunal neither questions the terms and conditions of the settlement of the suit, nor does it conjecture or speculate as to the outcome of the suit had it gone to trial. Rather, this tribunal finds it necessary to disclose the conflicting evidence which formed the basis for Ponti's cause of action in Federal District Court and its ultimate disposition.

By way of background, it is observed that all of the tenure charges brought against respondent Napoli were presented to the Board by Ervin G. Ochs, a sitting member of the Board since April 15, 1984. Mr. Ochs, who is retired from the United States Army, served on both the Type I appointed Board and its successor Type II elected Board. The evidence reveals that at least as early as 1982, Ochs carried out a public newspaper advertising campaign adverse to respondent Napoli (Exhibit R-50). While Ochs testified that he was only opposed to the Superintendent's salary, and the newspaper advertisements so indicate, at least one newspaper advertisement paid for by Ochs expressed his opinion for "the elimination of the present Superintendent of schools" (Exhibit R-50).

Mr. Ochs is alleged to have intimidated Board employees at their workplace during Ochs' service as a Board member (TR XIV, pp. 24-26). There is no dispute that Ochs intimidated a witness to these proceedings prior to her testimony on behalf of respondent Napoli. Ochs' action in this regard occurred outside the view and without the knowledge of counsel for the Board and respondent. Ochs' action, however, did take place in full view of this administrative tribunal, but without its knowledge at the time of the event (TR XIV, pp. 23-24, 88-91).

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The evidence further demonstrates that Ochs was and is friendly with Ponti and with whom, Ochs admitted on the record, Ochs spends "at least 10-15 minutes a day, everyday, except weekends" (TR XI, p. 202). Ochs admitted on the record that he had been criticized and chastised by the Board for releasing confidential information (TR XI, p. 202).

In his complaint and testimony, Ponti contends that his difficulties with respondent commenced immediately following Ponti's appearance at the PERC proceedings (Charges Nos. 1 and 2), at which Ponti testified on behalf of the school nurses and against Napoli. From that point in time (December 1, 1982), Ponti contends that respondent issued a written reprimand accusing Ponti of not working within the management team; reprimanded Ponti for speaking with the president of the Teachers' Association at a Board meeting; issued unfavorable evaluations of Ponti's performance; excluded Ponti from a Board executive session to discuss the renewal or nonrenewal of school nurse Watford; excluded Ponti from a meeting of school principals where the Board's strategy to deal with a teacher job action was discussed and determined, and issued a written memo to Ponti excluding Ponti from the Board's administrative team with regard to meetings and other instances of interpersonal contact, among other allegations against respondent and the Board.

Respondent contends, among other things, that the difficulties with Ponti did, indeed, commence with the issue as to whether or not the school nurses were required to take their duty-free lunch in the building to which they were assigned, as directed by Napoli. It was this issue, together with the allegation that the Superintendent threatened a nurse if the lunch decision was grieved, that caused the Assocation to bring the PERC unfair labor practice complaint.

Napoli asserts that Ponti was involved with him and the Board's attorney in the preparation of their defenses to the unfair labor practice charges to be heard by PERC. Neither Napoli nor the Board's attorney knew or had been advised that Ponti had been subpoenaed by the Assocation until the day Ponti appeared at the PERC proceedings as a witness against Napoli and the Board. Ponti did not advise respondent or the Board's attorney of the subpoena nor that he was to testify on the Association's behalf and against respondent (Exhibit R-11). Respondent was further distressed that Ponti appeared at the PERC hearing, which was held outside of the school district, without advising the

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Superintendent of Ponti's absence from school prior to the hearing or without requesting a personal leave day to appear at the hearing.

Respondent testified that these events, coupled with other subsequent events, convinced the Superintendent that Ponti could not be trusted with confidential matters. Therefore, Ponti was excluded from certain administrative meetings and discussions by respondent.

Having considered the totality of the evidence presented, I **FIND** that Charge No. 3, as stated, is true.

CHARGE NO. 4

There is no dispute that George Hart, the Board's former cafeteria manager, embezzled a substantial amount of cash over a period of years from the Board's cafeteria account. This was a skim operation whereby Hart required the cafeteria office employees, who counted the daily cash receipts, to hand over to Hart cash in varying amounts between $180 and $230 per day. Hart covered the shortage in daily cash receipts by inflating the number of pupils who were served free and reduced price lunches on the reimbursement forms which are required to be filed with the state and federal governments. Subsequent to his indictment, Hart entered a plea of guilty to embezzlement in a court of competent jurisdiction and was incarcerated at the time of this hearing.

Dorothy Gage, a cafeteria worker who began to substitute in the Board's cafeteria office commencing in the 1980-81 school year, testified that when she did substitute, she was instructed to hand-deliver to Hart $180 per day from the daily cafeteria cash receipts. Gage was so instructed by Marian Bacon, Hart's secretary, for whom Gage substituted when Bacon was absent. Bacon informed Gage that the money was used for cash transactions for the cafeteria. Gage testified that she informed her husband of the practice to hand-deliver the cash to Hart. Her husband believed that Hart should give Gage a receipt for a record of the cash transaction. In or about February 1981, Richard Stoner, a family friend of Mr. and Mrs. Gage and a member of the Board, appeared at the Gage home to discuss another personnel-cafeteria related matter. While in the Gage home, Mrs. Gage brought to Stoner's attention the Hart cash transaction activity and the lack of receipts from Hart to account for the money. Mrs. Gage testified

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that she did not want Stoner to discuss this matter with Hart or Napoli because she was embarrassed that someone would believe she was checking on her boss. Gage asserted that Stoner acted surprised and shocked by her allegations and that he stated that he would check into the situation.

Mrs. Gage testified that later in the evening of the day Mr. Stoner was in her home, she received a telephone call from Stoner. Gage asserted that Stoner said:

> I am at Dr. Napoli's house. I know you asked me not to go to Dr. Napoli but it was too big and too important and I had to come and talk with Dr. Napoli.
>
> . . .
>
> Dr. Napoli wants you to continue to give the money to Mr. Hart and don't mention it to Marian [Bacon] or Mr. Hart. If there's anything wrong we'll get back to you, otherwise continue doing what you did when you substituted. (TR II, p. 10)

Mrs. Gage carried out Stoner's instructions and heard nothing further from Stoner or Napoli subsequent to Stoner's telephone call. Mrs. Gage disclosed these facts to the Salem City Police Department as a consequence of its investigation on October 25, 1985 (Exhibit P-5).

Mr. Stoner testified, among other things, that he did not recall ever having a discussion with Mrs. Gage about Mr. Hart (Exhibit P-5, TR XIII, p. 59).[1] Stoner asserted that Dorothy Gage has a reputation for telling the truth (TR XIII, p. 117, 124). Stoner further stated on this record that he did not testify that the incident to which Gage testified did not occur but, rather, that he did not recall the incident (TR XIII, p. 125).

Respondent Napoli asserted that the incident did not occur as testified to by Gage because he was on vacation and out of the country at that time. Napoli offered no proof of his assertion.

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[1]The original copy of the transcript of the proceedings held on July 15, 1987 (Volume XIII) incorrectly identifies Dorothy Gage as Dorothy Dague.

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Kathy L. Spicer, the Board's Assistant Food Service Director, testified at length with regard to her role in the Hart embezzlement scheme and its ultimate detection. In summary, Ms. Spicer testified she started working as a substitute for Marian Bacon in or about November 1981, replacing Dorothy Gage as the substitute in the Food Service office. Subsequently, when Bacon submitted her resignation in or about February 1984, Hart persisted in having Spicer fill the position on a part-time basis. Ms. Spicer agreed and has been so employed since.

In any event, from the time she substituted in 1981 until September 1985, Ms. Spicer completed daily worksheets (denomination sheets) to show a complete breakdown of all cash and check receipts from the cafeterias of the Board's three schools. Ms. Spicer would total the amount of the daily receipts and, in the beginning, she would write Hart's name on the worksheet next to the $230 deduction she was instructed to give to Hart daily. Ms. Spicer attached these worksheets (denomination sheets), which were not required, to the daily cash register tapes, which were required to be retained. Mr. Hart was unaware that Spicer retained these worksheets, which ultimately aided the auditor to uncover the embezzlement.

The discovery of the Hart skimming operation is attributed, indirectly, to a letter sent to Governor Thomas Kean by E.L. Valentine, President of Citizens for Beter Schools (CBS) (Exhibit R-3). Mr. Valentine, a friend of Ervin Ochs, requested the Governor to intervene in a 12-item agenda of concerns about the Salem City public schools. Dr. Saul Cooperman, Commissioner of Education, responded to Valentine, indicating that the organization's concerns were appropriate action for the Board. As a consequence of the Valentine letter and other issues, the Board retained Special Council to investigate the Valentine allegations.

On September 24, 1985, Special Counsel William C. Davis, Esq., submitted a confidential report to the Board wherein it was recommended, among other things, that the Director of Food Services [Hart] prepare a report covering the period July 1, 1980 to June 30, 1985, and that the food services records be sequestered for review by special counsel, the Board's investigator and/or the Board's auditor. It was further recommended that the Board's prior school auditors be interviewed to determine what steps they took to review and audit the Board's food service operations (Exhibit R-3).

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There was considerable testimony as to how and under what circumstances the embezzlement was discovered. Suffice it to say that Mr. Hart admitted his role in the embezzlement and left his position on September 25, 1985.

I **FIND** and **CONCLUDE** that the Board has not affirmatively demonstrated that respondent Napoli was aware of the scheme to embezzle its cafeteria funds at any time prior to its discovery or that he failed to report the embezzlement to the Board thereafter.

This finding and conclusion is grounded upon the following **FINDINGS OF FACT:**

1. It may fairly be presumed that the Board's school auditors had the occasion to audit the Board's food service accounts between 1981 and 1985, as required by N.J.S.A. 18A:23-1.

2. There is nothing in this record to demonstrate that the Board's school auditors detected the Hart embezzlement scheme between September 1981 and June 1985.

3. There is nothing in the record to demonstrate that the New Jersey Department of Education detected the Hart embezzlement scheme through Hart's monthly reports filed with it.

4. Dorothy Gage, a credible witness, could not demonstrate that Napoli had any knowledge of the Hart skimming operation. She could only infer, from the comments allegedly made to her by Mr. Richard Stoner, that Stoner was in Napoli's presence when Stoner telephoned Gage concerning the Hart skimming operation.

5. Neither Dorothy Gage nor Kathy Spicer reported Hart's conduct to respondent Napoli.

While it is acknowledged by respondent that he failed to detect the Hart embezzlement and such acknowledgement supports a finding that that portion of Charge No. 4 is true, the charge as a whole is hereby **DISMISSED** for lack of proof.

CHARGE NO. 5

This charge arises out of a complaint registered with the Salem County Superintendent of Schools by a sending school district in a sending-receiving relationship

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with the Salem City School District. As a consequence, the Salem County Superintendent of Schools advised the New Jersey Department of Education, Division of Finance and Regulatory Services (Division), that the Salem Board was charging excessive tuition rates for the sending school district pupils. Consequently, a spot audit of the Salem Board's pupil tuition rates was conducted by the Division, which determined, on the basis of data supplied to it by respondent Napoli and the Board's secretary, that the salaries for teachers of compensatory education were included in the tuition rate. The Division disallowed the compensatory education salaries. Thereafter, the Board brought an action before the Commissioner for declaratory judgment seeking relief from the Division's action to disallow the computation of the compensatory education teachers' salaries. The Commissioner found and determined that the Board improperly calculated the tuition rates to its sending districts for the 1979-80 and 1980-81 school years, insofar as these rates included the salaries of compensatory education teachers as a part of the regular instructional program. The Commissioner also determined that the Division was allowed to audit the Board's tuition rates for the 1978, 1979 and subsequent school years. Board of Education of the City of Salem, Salem County v. Vincent B. Calabrese, Assistant Commissioner of Education and the Division of Finance and Regulatory Services of the Department of Education, State of New Jersey, OAL DKT. NO. EDU 6442-82, decided by Commissioner (February 18, 1983).

As the result of the Commissioner's decision, a second spot audit was conducted by the Division where it was determined that the salaries for the compensatory education teachers had not been included in the calculation of the tuition rate and that respondent Napoli and the Board secretary had provided factually inaccurate data to the Division on its original spot audit.

Based upon the above, I **FIND** as **FACT** that respondent Frank J. Napoli did, in fact, provide inaccurate data to the Division upon its original spot audit which caused the Board to unnecessarily bring a cause of action against the Assistant Commissioner of Education and the Division.

CHARGE NO. 6

In this charge the Board alleges that respondent, serving as its Superintendent of Schools, engaged in conduct which is designed to or which results in unwarranted friction, dissention, controversy and/or litigation between the Board of Education and

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school district employees. The Board further asserts that the tenure charges of unbecoming conduct with respect to its first set under the numbers 1, 2 and 3, and in the second set of charges, 1 and 8, are incorporated by reference with respect to this Charge no. 6.

The Board asserts that in May 1984, its teaching staff members approved a vote of no confidence in Superintendent Napoli by an affirmative vote of 93 percent. The Board asserts that this vote of no confidence was as a result of Napoli's behavior and conduct with its teaching staff members.

The Board further asserts that respondent's testimony in these proceedings clearly demonstrates his lack of interpersonal skills with members of the teaching staff and others. The Board refers to respondent's testimony wherein Napoli contends that certain of the Board's staff members lied while testifying before this administrative tribunal and/or before PERC. Respondent testified in these proceedings that it was his belief that Esther Lee, principal of the John Fenwick Elementary School, testified incorrectly and/or untruthfully before this tribunal (TR IX, p. 210). Respondent testified that he believed that nurse Watford did not tell the truth at the PERC hearing and that he believed that Doris Dague did not tell the truth at the PERC hearing (TR IX, p. 210). Respondent Napoli also testified that he believed that Mr. Robert Tosti, the Board's attorney in the PERC matter, was also untruthful before this administrative tribunal. Mr. Tosti indicated that it was his opinion that respondent Napoli's administration was "a reign of terror."

By way of defense, respondent Napoli contends that a vote of no confidence of a superintendent of schools is a generally accepted labor tactic frequently used by teacher associations to divide the management team during the process of contract negotiations. He further asserts that the actions of the Superintendent, at the direction of or with the approval of the Board of Education, may cause some friction, dissention, controversy, and result in litigation. He contends that any time staff positions are reduced as a result of a reduction in force or when the Board takes a hard line in contract bargaining, it is the superintendent that takes the brunt of the reaction. Respondent contends that the Board has not demonstrated that he deliberately rushed into situations to stir up controversy. Therefore, no unbecoming conduct can be demonstrated with respect to this charge.

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There is no doubt that the PERC litigation, as set forth in Charges 1 and 2 in the first set, created friction, dissention and controversy between the Board of Education and the school district employees. It is further evident that the Ponti litigation before the United States District Court created friction and dissention among the administrative staff. As stated on the record in this proceeding, it is not the intention of this tribunal to relitigate the PERC or the Ponti matter. Rather, it must determine the extent to which respondent's conduct led to these controversies.

Based upon the findings of fact as set forth in the PERC matters, it was indeed respondent's conduct and behavior which lead to the friction, dissention and controversy between himself, the Board, nurse Watford and nurse Dague. It was the respondent's conduct and behavior which resulted in a finding that he and the Board had engaged in an unfair labor practice in violation of N.J.S.A. 34:13A-1 et seq. In the Ponti matter, which was settled out of court for a considerable sum of money, respondent was alleged to have taken steps in retaliation against Ponti because Ponti had testified against respondent and the Board in the PERC matter. These retaliatory actions by respondent are alleged to have excluded Ponti from principal meetings and administrative staff meetings and Ponti's exclusion from Board executive sessions where other school administrators were invited. Respondent defends his action of exclusion of Ponti on the grounds that Ponti was untrustworthy and could not be entrusted with confidential-personnel matters. The demonstrable fact remains that respondent was unable or unwilling to work with staff members in a reasonable fashion when respondent was confronted with a challenge to his authority. Rather than attempt to discuss, mediate or negotiate the issues in dispute in a mature and professional manner, respondent resorted to threats, as in the PERC matter, or impinged upon the professional responsibility of an administrator, as in the Ponti matter, by excluding the administrator from very sensitive and crucial administrative staff meetings as well as Board meetings.

Therefore, I **FIND** and **CONCLUDE** that Charge 6 as stated is true in fact and that respondent engaged in conduct which was designed and/or which resulted in unwarranted friction, dissention, controversy and litigation between the Board and its district employees.

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THE SECOND SET OF CHARGES
(OAL DKT. NO. EDU 2045-87)
CHARGE NO. 1

This charge concerns an alleged incident of shoplifting at the Salem Acme Supermarket in or about January 1984. The Board produced Walter R. Rubel, Esq., General Counsel for Acme Markets, who testified, among other things, concerning its procedures with respect to the handling of alleged shoplifters in or on its established premises. Attorney Rubel produced a packet of exhibits which, among other things, included a document which he characterized as an admission and release. This document, which respondent Napoli identified and admitted signing, provided in part as follows:

> This is to acknowledge that I, Frank J. Napoli . . . was stopped on 1/29/84 outside the sales area of the Acme Market at Salem Acme. At the request of the Acme Markets, Inc., employee, I consented to a search of my possession and as a result, the following was found in my possession.
>
> | | |
> |---|---|
> | Two Kodak 200 film | $ 4.19 |
> | | $ 4.19 |
> | One Energizer AA | 3.29 |
> | | $11.67 |
> | One Acme Assorted Jellies | $ 1.29 |
> | | $12.96 |
> | | Total Value |
>
> I hereby acknowledge that this merchandise was not paid for by me and was intentionally concealed in order that I would not have to pay for such.
>
> This acknowledge is freely given by me without any rewards or promises of rewards and is being made with my understanding that it may be used against me. . . . (Exhibit P-66)

Attorney Rubel testified that he, among other Acme employees, had been in receipt of a number of telephone inquiries from persons in the Salem area concerning the alleged shoplifting incident. Rubel testified that it was his policy to maintain all of the admissions and releases in the strictest confidence and are not to be released to anyone outside of the company. He stated further that it is his policy not to provide a copy of the admission and release to the individual who had signed it. Mr. Rubel testified that he had had some telephone conversations with respondent Napoli, who asserted that he did not know what he had signed and that he had done so to terminate the incident in order to leave the store premises quickly after the alleged event.

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The Board alleges that respondent Napoli's conduct with respect to this offense meets the definition of "shoplifting" as found in the New Jersey Criminal Code at N.J.S.A. 2C:20-11.

It is noted here that the Board produced no testimony by a witness who could demonstrate that he/she directly observed the event which forms the basis of this charge. Board counsel advised this tribunal that it had subpoenaed Leonard Purnell, a security guard; however, Mr. Purnell had advised the Board that he would not honor the subpoena. The Board did not seek to enforce its subpoena issued to Purnell in Superior Court.

Respondent testified that on the day in question, January 29, 1984, he was home watching a basketball game on television with his younger son. He had received a 35 millimeter camera from his wife as a Christmas present and, as he was reviewing the manual, he was attempting to get acquainted with the equipment. He testified that as the basketball game came to halftime, he left the house and proceeded to the Acme Market to purchase film and batteries for his new camera. While at the store, he also decided to pick up some food for lunch and for his supper. Upon entering the Acme market, he did not take a shopping cart, but proceeded to the film display. Respondent became confused because of the variety of 35 millimeter film exposures. He finally decided on a particular film and took two packages from the display case. Thereafter, he went to the battery case display where he took a package of batteries for his new camera. He then proceeded to various locations in the store where he picked up some meat for dinner and some pre-cut lunch meat for lunch, in addition to a carton of milk. From there he proceeded to the bread case and as he was leaning over to take a loaf of bread from the lower shelf, several items fell from his arms. He picked up the two packages of film and the AA batteries and placed them in his pocket. He retrieved the other items and then proceeded to the checkout cashier. However, before he arrived at the checkout counter, there was a tap on his shoulder. He turned around to discover that there were two gentlemen who asked him to follow them to a nearby partition. He was directed around this partition which had a desk and a chair in place. One of the gentlemen requested that he put down the items that he had in his hands on the desk. He testified that one of the gentlemen asked him, "Where is the candy? No, no, empty your pockets." Respondent emptied his pockets which contained the owner's manual for the 35 millimeter camera, the two film packages and the battery package. The one gentleman repeated, "Where is the candy?" Respondent then asked, "What candy? "I have no candy." The gentleman advised respondent that he could charge him with shoplifting. Respondent answered that he had dropped the

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packages no more than 10 feet from where the partition was located and denied that he had shoplifted. Respondent testified that he advised the gentleman that he expected to pay for everything that he had in his possession. He also advised the gentleman, "Send your partner out and get a package of candy, and fine, I'll pay for that, also."

The one gentleman left and the other began writing on a document and stated to respondent, "If you don't pay for this and sign this release, I'm going to call the police." Respondent stated that he advised the gentleman that he was the Superintendent of Schools and that if the gentleman brought a policeman onto the premises under these circumstances, the incident would be all over the newspapers that the Superintendent had been shoplifting. Respondent testified that he asked the gentleman whether or not he had any indication that respondent did shoplift, whereupon respondent testified that the gentleman stated, "No." The respondent testified that the gentleman stated to him that all he wanted respondent to do was to pay for the items and to sign a release. Napoli testified that he did, in fact, sign the release. He gave the money to the checkout counter and he left the premises immediately.

Having considered all of the evidence with respect to this charge, I **FIND** it to be true, as stated and set forth by the Board.

Although it is found that this charge is true as stated, further findings of fact must be made at this juncture. First, the security guard, the only person who has direct knowledge of the alleged shoplifting incident other than respondent, refused to honor the Board's subpoena and appear at these proceedings to testify as to his perception and description of the incident. Further, respondent was not placed under arrest nor was he charged with any criminal misconduct. Consequently, respondent was neither prosecuted nor convicted for the alleged offense.

It appears that information concerning this alleged incident was leaked to the community. This is evidenced, in part, by a telephone record maintained by Acme wherein on February 15, 1984, Mr. Ernest Valentine (CBS) telephoned the Acme market concerning the alleged shoplifting incident. Mr. Valentine apparently knew that it involved a prominent person; however, Mr. Valentine would not give the name of the person whom he asserted everyone wanted to see brought to justice. Mr. Valentine also asserted that he had telephoned the local newspaper inquiring about the incident and determined that Acme Markets had not notified the local police or anyone else.

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Mr. Valentine continued to state that he believed, among others, that Acme was not doing anything about the alleged incident because of the alleged shoplifter's position and prominence in the community. Mr. Valentine further stated that he had received at least 25 telephone calls from neighbors wanting to know if anything had been done about it, and if not, that these individuals intended to boycott and picket Acme Market. Mr. Valentine insisted that someone get in touch with him with more information or that he would take other unspecified action (Exhibit P-66).

In another memorandum executed by Robert Blackburn, an employee of the Acme Markets, indicated that Mr. Frank Sullivan, the Director of Public Safety in the City of Salem, telephoned Mr. Blackburn concerning the incident asserting that he, Sullivan, was being accused by various unnamed people in the community of "killing an arrest of Napoli for shoplifting." Sullivan stated that he had confronted Napoli about the incident but received no direct answers with respect thereto. Mr. Blackburn assured Sullivan that no arrest had been made, nor did Acme Markets contemplate that it would bring charges for a subsequent arrest (Exhibit P-66).

Considering the totality of the facts in this matter and that the Board did not rebut respondent Napoli's testimony with respect to his description of the events which led to his being stopped in the Acme Market, I cannot conclude that his behavior gives rise to a charge of conduct unbecoming a teaching staff member.

CHARGES NOS. 2 AND 3

Respondent Napoli is charged with causing and advising the school district to accumulate a budget surplus of approximately four and one-half million dollars with a school budget of approximately six and one-half million dollars, and with strenuously opposing the Board's attempts to reduce said budget surplus.

There is sufficient evidence on the record to demonstrate that respondent did advise the Board to maintain an excessive budget surplus. However, there is insufficient evidence to support the charge that Napoli "caused" such a surplus or that he opposed any attempt by the Board to reduce the surplus.

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There is little doubt that the authority to "cause" a budget surplus of the magnitude controverted herein lies with the Board. In this instance, and under the Type I organization, the Board was supported by the Board of School Estimate and further encouraged by the corporate governing body to generate the surplus. This Board cannot, and has failed to, demonstrate that respondent Napoli "caused" the surplus in its school budget. Although the Board here produced expert testimonial evidence by way of a school auditor, a fiscal expert from the Department of Education, and the Salem County Superintendent of Schools to show that the level of budget surplus accumulated and maintained by the Board was excessive and inappropriate, none of these experts could show that it was respondent, rather than the Board, which "caused" the condition.

The facts in this matter clearly demonstrate that the City of Salem was undergoing a fiscal crisis during the late 1970s to mid-1980s with the closing of the facility which was its leading employer. The City's tax base was effectively eroded by this and other factors. The Board, on the other hand, was in a position to invest surplus monies at a time of historically high interest rates. Consequently, the Board was encouraged by the City's Mayor to apply its unappropriated current expenses to its ensuing current expense budget in order to maintain a self-sustaining tax rate for the school community. The Board, under its Type I organizational structure, exceeded to the Mayor's request.

This issue is summarized, in part, by a report to the Board submitted by Board members Wright and Stoner, dated June 8, 1983, where it was said:

> A committee of the Board met with Council on Monday evening, June 6. . . .
>
> The committee of the Board reminded the Mayor and Council that approximately five years ago, the Mayor directed the Board of Education to provide a long term plan of fiscal restraint to assist the Council in holding down the school tax rate while the Council attempted to attract new industry and tax ratables into the community. The Mayor and Council petitioned the Board to maintain a surplus balance to offset any necessary requests from the City which would substantially increase the tax rate. The Board, in response to this directive, coupled with declining enrollments, eroding tax base, exiting middle class, and the sending districts petition to keep high school tuition costs as low as possible, have held the budget increases under five percent. . . .

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The testimony of former Board member Richard Stoner supports and corroborates the proposition that the Board's budget surplus was generated, in part, through the direction and approval of the City's Mayor and Council.

I **FIND**, therefore, that there is no basis in fact to attribute the "cause" of the Board's excessive surplus to respondent Napoli.

I further **FIND** and **CONCLUDE** that, under the circumstances, respondent's adivse to the Board with respect to its budget surplus does not constitute conduct unbecoming a teaching staff member.

CHARGE NO. 4

In this instance, Frank J. Napoli is charged with failure to properly, adequately or accurately evalute or cause to be evaluated the district's administrative and supervisory staff. The Board alleges that respondent did not conduct or prepare evaluations of the administrators under his direct supervision for the 1985-86 school year. Subsequently, however, it concedes that the evaluations were completed by respondent for the 1985-86 school year and for prior years. The Board complains, however, that Napoli's evaluation of its administrative staff was neither proper, adequate or accurate. It contends that respondent's evaluation of the administrators did not contain sufficient reference to the deplorable condition of the school district's purported curriculum; there was not sufficient reference to the deplorable results which the school district achieved on the MBS and HSPT Standards Tests; there was not sufficient reference to the deplorable conditions which exist with respect to the district's facilities and buildings; and there was no reference with respect to the administrators failing to comply with Board policy with respect to the frequency of evaluation of the teaching staff members. The Board further contends that the Superintedent's evalutions of his administrators and supervisors were totally void of individual professional improvement plans whereby Napoli provided leadership, advice and guidance to the administrators under his supervision.

Respondent contends that he did not fail to evaluate the administrative and supervisory staff. He asserts that the testimony related to this charge reveals a great deal about how the Board treated evaluations and set administrator's salaries, but does not demonstrate any unbecoming conduct on respondent's behalf. Respondent cites the testimony of Richard Stoner, Board member, which verifies that Napoli came to the

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relevant Board meeting with the evaluations of his administrators and supervisory staff members. However, the Board members chose not to review the evaluations (TR XIII, p. 33, 34 and 35). Respondent further asserts that at the hearing of these proceedings, Norman K. Wilson, Principal of the Salem City High School, produced his evaluation (See, Exhibit R-46). None of the administrators testified that they had not been evaluated and all confirmed that they had received appropriate evaluations throughout the tenure of Napoli in his position as Superintendent. Respondent asserts that the testimony reveals, however, that the Board refused to consider the evaluations when setting salary levels for its administrators. Respondent contends that the Board did not produce any evidence that the evaluations were inadequate or inaccurate.

In reviewing the evidence produced by the Board and by respondent, I **FIND** that Frank J. Napoli did, in fact, evaluate his administrative and supervisory staff (Exhibits P-70, P-71, P-72, P-73, P-74 and R-46). I further **FIND** that the form used by Napoli to evaluate the Board's administrative and supervisory personnel appears to be one that was adopted by the Board. In the event the Board chooses to change or modify its evaluative criteria and procedure for administrative and supervisory staff, it has the right to do so and to instruct its Superintendent to comply with its policy. Based upon the evidence before me, however, I **CONCLUDE** that there is not basis in fact to credit Charge No. 4 (See, Exhibit R-58) and, therefore, it is hereby **DISMISSED.**

CHARGE NO. 5

Respondent is charged with intentionally or negligently allowing the physical condition of the school district's buildings and fixed assets to deteriorate in an unreasonable and unacceptable manner and extent due to lack of proper maintenance and repairs. In support of this charge, the Board relies upon a letter issued by Basco Associates, Architects and Engineers. This is a one-page letter with a three-page attachment dated June 17, 1987, and addressed to Mr. Richard R. Rahu, Assistant Superintendent/Acting Superintendent, Salem Board of Education. The letter, which is supported by Mr. Rahu's testimony, asserts that the architect conducted a walk-through of the Board's three buildings and, thereafter, compiled a brief list of items the architect indicated needed repair or replacement. Attached to the architect's letter was a list and calculation of the cost of the itemized repairs and replacements for each building: i.e., Salem Middle School, $1,469,000; Fenwick School, $700,000; and Salem High School, $645,000.

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Respondent asserts that the Salem City School District has some old buildings and has had the same chronic flat roof leak problems shared by most school districts. Respondent contends that, in an effort to demonstrate that the condition of the buildings was unacceptable, the Board arranged a walk-through by an architectural firm named Basco Associates. Mr. Rahu testified that he had worked in the sales office at Basco before he worked with the New Jersey School Boards Association (TR X, p. 271) and before his appointment by the Board. It was revealed that Basco's services were obtained without interviewing any other architectural firm. It was further revealed that Basco did not review or inspect any prior studies done for the Board with respect to the condition of its buildings and a schedule of repairs. Respondent contends that the report relied upon heavily by the Board, (Exhibit P-75), was prepare in one walk-through without going onto the roofs of the building; and the architect was accompanied by Mr. Rahu, Mr. Ochs and other individuals who brought items in need of replacement or repair to the architect's attention (TR X, p. 274). The report mentions the presence of asbestos, although the substance observed was not tested by Basco (TR X, p. 277).

The Board's building administrators testified at the hearing that there was an ongoing maintenance program and that they did not have any work orders denied by the Superintendent. They also testified that extensive repairs of doors, windows and roofs had been undertaken. Mr. Call, the Board's Secretary, testified about the master plan for maintenance of the buildings which was carried out continually (TR XII, p. 7). Respondent asserts that in sum, the Board could not demonstrate that the maintenance plan was being ignored; that custodians were not performing their responsibilities; that the Monitoring Team found the building condition unacceptable, or that the buildings had deteriorated.

Having considered all the evidence before me with respect to this charge, I **FIND** and **CONCLUDE** that the Board has offered no proofs to support the charge. Therefore, the charge is hereby **DISMISSED.**

CHARGE NO. 7

Respondent Frank J. Napoli is charged with establishing or allowing the continuation of a system for the sale and distribution of athletic event spectator tickets without adequate fiscal controls.

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Walter B. McNichol, the Board's school auditor, testified that commencing with the 1984-85 School Audit Report, he observed that it was apparent there was no inventory of athletic event tickets which would indicate the number of tickets sold for each athletic event. He stated that although the records were kept, there was no indication that there was anything wrong; however, these records did not lend themselves to good control. He asserted that under the system then extant, tickets could be sold without an accounting for their revenues being turned back into the school.

The record reflects that respondent Napoli was aware of this recommendation as of October 29, 1985, by way of a preliminary audit recommendation (Exhibit P-88). The record further discloses, as a result of the preliminary audit recommendations, respondent requested that the high school principal set up a process of color coding tickets for different athletic events and to devise a system of separate tickets for other school activities. There is nothing in the record, however, to demonstrate whether or not the high school principal did in fact do anything to correct the problems identified by the school auditor until August 21, 1986, where respondent issued a memorandum indicating that the head ticket taker/seller was being replaced and that new procedures for the collection of monies, recordkeeping and deposits of such monies were to be initiated.

Based upon the evidence before me, I **FIND** and **CONCLUDE** that Charge No. 7 is true in fact.

CHARGE NO. 8

Frank J. Napoli is charged with improper and unacceptable use of foul and offensive language when speaking to district teaching staff members in the presence of district students.

I **FIND** and **CONCLUDE** that this charge is true in fact. This is based upon the unrebutted testimony of Janet Elk, a teacher in the Board's employ, who asserted that respondent used foul and inappropriate language while speaking with her about another staff member in the presence of students. Respondent does not deny Ms. Elk's assertions and allegations; however, he contends that he does not recall the incident. Respondent does not argue that he has never used foul and offensive language while in the schoolhouse. He did testify, however, that he is particularly careful about not using foul language in front of students. Ms. Elk's testimony was corroborated by Nicholas Dinunzio,

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a teacher, who was within earshot of respondent when he is alleged to have used the profanities. There was further corroboration that respondent used profanity in school buildings by the testimony of David Whitzell, a teacher, Sam Venuto, the athletic director, and high school principal Norman Wilson.

Having considered all the evidence with respect to Charge 8, I **FIND** and **DETERMINE** that the charge is true in fact and demonstrates conduct unbecoming a teaching staff member by respondent.

THE CHARGE OF INCOMPETENCY AS SET FORTH IN BOTH THE FIRST AND SECOND SET OF CHARGES

The Board charges Frank J. Napoli is incompetent to fulfill the duties of the Office of Superintendent of Schools of the Salem City School District.

The Board asserts that under Napoli's leadership, wholly inadequate curriculum was developed and maintained for the John Fenwick School in the areas of Language arts, computer skills, health, and mathematics. In support of this portion of the charge, the Board presented Esther Lee, the Principal of the John Fenwick School, who replaced Mr. Ponti. Ms. Lee reviewed documents in evidence identified as P-79, P-80, P-81 and P-82 which purport to be curriculum for the John Fenwick School. In her review of P-79, entitled Language R, Lee asserted that this is not a curriculum but, rather, the table of contents of a variety of text books. She further asserted that it was not a curriculum because it lacks consistency from class to class and from grade to grade. Ms. Lee testified that the Superintendent said that something had to be done to improve and develop a curriculum for the John Fenwick School; however, the Superintendent gave Lee no direction or leadership as to what should have been done (TR III, pp. 141-143).

Ms. Lee testified that there was no formal curriculum at the Fenwick School in the area of social studies except at its grade 4, where New Jersey Social Studies is taught. Ms. Lee also reviewed documents from the Salem City High School in the area of mathematics (Exhibit P-50a through P-50l). Ms. Lee, who had been qualified at these proceedings as an expert, testified that these documents did not represent curriculum guides but, rather, course guides or course outlines in the area of mathematics. Ms. Lee asserted that the same was true with respect to the course outline for Compensatory Education, English I (Exhibit P-51a through P-51l).

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Respondent Napoli admitted on the record that he is not a curriculum expert and further that he would leave the curriculum to the principal and the teacher actually teaching the subject matter. Respondent defended the curriculum outline R-79, Language R, but admitted that this was the table of contents of a variety of textbooks and further that he had allowed the publisher of the textbook to dictate the curriculum for the Salem City pupils. Respondent Napoli admitted on the record that he recommended P-79, P-80, P-81 and P-82 to the Board as the curriculum guides for the John Fenwick School. He asserted that these documents were acceptable to him and, therefore, he recommended their adoption by the Board (TR IX, p. 46-49). Napoli testified further that during his tenure as Superintendent of Schools, he had never proposed a long-range curriculum development plan for the district, despite recognizing that the district has unique curriculum problems. It was further demonstrated that the purported curriculum guides P-50 and P-51 were considered to be minimal at best for the purposes of TE Monitoring Process. Notwithstanding, respondent's reaction to the monitoring comments was to disagree with them and to stand behind the two documents.

The board asserts that respondent's incompetence is also demonstrated by his unilateral delegation of his own responsibilities and job duties in educational areas to the Assistant Superintendent of Schools for Business. The Board contends that respondent's delegation for such duties was in violation of the job description for the position which does not encompass the educational sphere and since it was without a vote by the Board, it was in violation of statute (see, N.J.S.A. 18A:25-1).

The Board contends that the Superintendent's incompetence is demonstrated by the dismal showing of the district pupils on statewide standardized tests; the failure of the school district to achieve five of its six goals to improve the district results on the HSPT under respondent's leadership; and, finally, respondent's incompetence shown through the Board's evaluation of him and his responses.

Respondent answers the Board's allegations by asserting that under the flag of "incompetency," the Board's battalion of witnesses testified how little they knew about what was going on in the district. The witnesses demonstrated that there is room for improvement in areas such as curriculum, as there is in any district. The proofs did not, however, demonstrate incompetency.

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Respondent alleged in his Answer that the charge of incompetency is mislabeled, and if anything, should have been "inefficiency." The Board clearly did not provide a 90-day period of observation prior to filing the charges. As set forth in the Guidelines for Implementation of the Tenure Employees Hearing Law, N.J. Dept. of Ed. (May 3, 1977):

> The determination by a local board of education as to whether a specific charge constitutes inefficiency should be made as follows: inefficiency presumes that the teaching staff member is capable and competent to perform the specific duty or function, but if performing that duty or function in a careless, ineffective or inefficient manner. Inefficiency is particularly distinguished from incompetence because incompetence presumes that the teaching staff member is not capable of performing a specific duty or function (at II-B, page 5).

The Board's witnesses demonstrated that the first time Salem City students took the HSPT, they did poorly. They were, however, doing better than other schools in their DFG (see, Exhibit R-56). More importantly, however, they showed dramatic improvement the next time. Dr. Napoli did not give up or conclude that they could not do better, but took on changes to promote improvement that worked. He showed that he is capable of leading the district.

Respondent contends that the curriculum approved by the Board, and which has belatedly changed its mind regarding its acceptability, was never sufficient to fully satisfy Napoli. Esther Lee, offered as an expert and relied upon largely in the Board's argument with respect to this charge, was recommended for hire by Napoli because of her experience in curriculum. Napoli admitted he held no expertise in curriculum and that he consistently requested a curriculum coordinator, but the position was never funded or created by the Board.

Respondent asserts that the record shows that Napoli was willing to learn, to change, and to modify things in the district at the direction of the Board. Where he performed things inefficiently, it was because he was bogged down in the frequent "projects" or requests for information from individual Board members. He did not defiantly tune out the Board and refuse to change. He has improved and so has the District. Where he recognized that the curriculum should be improved, he delegated measures to improve it. The "incapability" of Napoli was never demonstrated.

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I **FIND** and **CONCLUDE** that the Board has failed to affirmatively demonstrate, by a preponderance of the credible evidence, its charge that Frank J. Napoli is incompetent to fulfill the duties and responsibilities of the Office of Superintendent of Schools of the Salem City School District.

Although it has demonstrated that certain of the charges against respondent are true, as drafted, the Board has failed to establish the rebuttable presumption that Napoli "is not capable of performing a specific duty or function." Guidelines for Implementation of the Tenure Employees Hearing Law, at II-B, p. 5. It is a generally accepted proposition that the Superintendent of Schools is a generalist rather than a specialist. The Superintendent, by statute, has general supervision over the schools under his/her direction and control and must keep him/herself informed to their condition and progress and shall report thereon, as directed by the board. He/she has such other powers and performs such other duties as the board may prescribe and "shall have a seat on the board . . . and the right to speak on all educational matters at meetings of the board . . . but shall have no vote." N.J.S.A. 18A:17-20. As stated in the Encyclopedia of Educational Research (Macmillian Co: New York, 1960):

> Under the broad policies of the board of education, the superintendent of schools through his assistant administrators and teachers directs the operation of the school system. Standing as a link between professional employees and the laymen who are members of the board of education, the superintendent of schools represents each to the other and in addition serves in many capacities to represent the school system to the community which it serves. In small school systems, the superintendent acts in the several roles of school business manager, instructional leader of the schools, personnel officer, and director of the physical properties of the system. In large school systems, the superintendent of schools has assistant administrators serving in each of these and other capacities.

Thus, it is recognized that the Superintendent of Schools is a manager of the educational enterprise whose major role is to facilitate, guide, motivate and integrate the goals and objectives as laid down by the local board of education through the Commissioner, the State Board of Education and the Legislature. (See, Robert R. Blake, et al, The Managerial Grid, Gulf Pub. Co., Houston, Tx, 1964.)

Here, Napoli admits to his lack of expertise in the field of curriculum development. However, the Board failed to provide the necessary expertise to its

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curricular program when requested by Napoli, and did nothing until such time as respondent recommended the employment of Esther Lee to fill the position vacated by Ponti. The record demonstrates that while the Board's curriculum guides represented the very "minimal" acceptable standard for T and E monitoring purposes, they were, nonetheless, approved for that purpose.

For all of the foregoing reasons, I **FIND** and **CONCLUDE** that the Board has failed to carry its burden with regards to the charge that respondent Napoli is incompetent to fulfill the duties of the Office of Superintendent of Schools of the City of Salem.

Accordingly, the charge of incompetency is hereby **DISMISSED.**

TENURE CHARGES
DISCUSSION AND CONCLUSIONS

This tribunal has found, as true, the Board's allegations as set forth in Charges Nos. 1, 2, 3, 5 and 6 of the first set, and Charges Nos. 1, 7 and 8 of the second set. It is observed that where the allegations are found to be true, the finding is based upon the manner in which the charge is drafted, in whole or in part. In only one instance did this tribunal find and detemine that the charge, as proved, gave rise to the conclusion that respondent demonstrated unbecoming conduct. That is in regard to Charge No. 8 of the second set, where respondent is found to have used improper and unacceptable foul and offensive language to a staff member in the presence of pupils. Notwithstanding the Board's lack of proof that any pupil heard respondent utter the profanities, his admission that he uses such language in the schoolhouse is sufficient to warrant the determination that his conduct is unbecoming.

The proof of Charge 8, second set, standing alone, is not sufficient grounds to remove respondent from his tenured position. See, In the Matter of the Tenure Hearing of Peter J. Romanoli, School District of the Township of Willingboro, Burlington County, 1975 S.L.D. 352. Nor is there a sufficient basis to remove respondent from his tenured position as a consequence of finding seven of fourteen charges true, as stated. This tribunal is well aware of the guidance given by our courts when considering whether or

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not a teaching staff member may be removed from his/her tenured position. In Redcay v. State Board of Education, 130 N.J.L. 369 (Sup. Ct. 1943), aff'd 131 N.J.L. 326 (E & A 1944), it was said that:

> Unfitness for a task is best shown by numerous incidents. Unfitness for a position under the school system is best evidenced by a series of incidents. Unfitness to hold a post might be shown by one incident, if sufficiently flagrant, but it might also be shown by many incidents. Fitness may be shown either way. (Id. at 371.)

Rather than determine respondent unfit for the position of Superintendent of Schools, it has been shown that Napoli exhibited poor judgment, particularly in his interpersonal relations with certain staff members. This poor judgment, while not condoned, does not constitute unbecoming conduct or incompetency. There must be, however, accountability for one's judgment, good or poor. Here, respondent's judgment has been costly to the Board through extensive and various litigation which, after careful thought and consideration, need not have been brought. PERC, Ponti, Calabrese.

I **CONCLUDE**, therefore, that a penalty is warranted based upon the finding that seven of the fourteen charges certified to the Commissioner are true, as stated, and that respondent is guilty of unbecoming conduct with respect to Charge 8, second set.

I further **CONCLUDE** that, notwithstanding the Board's proofs with respect to seven of the fourteen charges, if hereby sustained, standing alone or collectively, are not sufficient to warrant the unnecessarily harsh penalty of respondent's dismissal from his tenured position. In the Matter of the Tenure Hearing of Joseph A. Maratea, Township of Riverside, Burlington County, 1966 S.L.D. 77, aff'd State Board of Education at 106, aff'd Dkt. No. A-515-66, New Jersey Superior Court, Appellate Division, December 1, 1967 (1967 S.L.D. 351).

ORDER

Accordingly, it is hereby **ORDERED** that Frank J. Napoli immediately be restored to his tenured position as Superintendent of Schools of the Salem City School District.

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It is further **ORDERED** that respondent Frank J. Napoli be denied payment for the 120 days he was suspended by the Board, without pay, pursuant to N.J.S.A. 18A:6-14. In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967).

ISSUE NO. 4

At the prehearing conference held on February 13, 1987, respondent raised several issues, one of which is as follows:

> 4. Whether the vote on the charges as certified should be declared null and void due to the inclusion of the vote of the Board member who drafted the changes, which constitutes a conflict of interest.

RESPONDENT'S ARGUMENT

Respondent now argues that the Certificates of Determination filed with both sets of tenure charges indicate that the first set of charges was found credible by a majority vote of persons. As to the Second Set, the votes to find probable cause to credit the evidence was 5 for Charges A 1 through 4, 6 for Charge 7, and 5 for Charge 8. Since the Board of Education has 9 seats, at least five affirmative votes must be found for each charge. N.J.S.A. 18A:6-11.

Respondent has raised as an affirmative defense to both sets of charges the conflict of interest of the vote of the Board member drafting the charges and certifying to their validity, Mr. Ochs. Now that testimony has been given by other Board members, respondent argues that the charges must be dismissed by virtue of the votes of two Board members.

Respondent relies primarily upon the case of In the Matter of the Tenure Hearing of Wilma J. Colella, School District of the Borough of Elmwood Park, Bergen County, OAL DKT. EDU 5144-83, 7787-84 (December 14, 1984), decided by Commissioner (February 1, 1985). That case held that the resolution to certify the charges against Colella was void since the votes of two Board members were disqualified because of a taint of self-interest. Those two Board members had expressed a personal bias prior to the vote. The result of the disqualificiation of those member from the vote was the finding that the resolution adopting the certification of charges was void ab initio. As stated by Administrative Law Judge Naomi Dower-LaBastille:

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> An interest which the public officer has in common with all other citizens or Board members is not a disqualifying one. Aldom v. Borough of Roseland, 42 N.J. Super. 495 (App. Div. 1956). The mere fact that voting Board members expressed themselves verbally for or against Colella would not show disqualifying interest. Conversations and the expression of opinions for and against an action are to be expected during deliberations prior to a vote. Two interests can coexist: one would be the interest in common with other Board members for a properly functioning school system. The alleged disqualifying interest is different: it is a personal interest capable of producing bias whether or not bias was actually operative in **motivating the vote. It is capacity of the interest to tempt the official which makes the interest disqualifying.** [Van Itallie v. Franklin Lakes, 28 N.J. 258 (1958) at 268.] It is the existence of the interest which is decisive, not whether the interest was actually influential. [Griggs v. Princeton Borough, 33 N.J. 207 (1960) at 219, 220.] Thus the Board members' affidavits describing their common interests and intent may be accepted as entirely true, but these sworn facts are not dispositive of the question. The court describes such interests as invalidating dual interests. Griggs, supra, 218. [Collella at 5] [Emphasis in original, boldface added.]

In addition, Judge LaBastille particularly noted that one of the Board members disqualified had expended personal funds to hire a handwriting expert, demonstrating impermissible bias.

Respondent observes that the drafter of the charges, Mr. Ochs, expended his personal funds to purchase some 20 paid advertisements in the local press for a diatribe against Dr. Napoli (TR XI, p. 194, 195 and 196). This Board member, who voted on the certification of charges, literally took out ads to state that his political platform has always included ". . . 2. The elimination of the present superintendent of schools" (Exhibit R-50). Mr. Ochs demonstrated his bias against Dr. Napoli in his campaign for Council and Mayor of Salem City by ridiculing him on campaign advertisements and posters. Mrs. Acton testified that Mr. Ochs stated that he wanted to see Dr. Napoli removed from his position as Superintendent on a couple of occasions before he came on as a Board member (TR XI, p. 123). Mr. Call testified that Mr. Ochs stated when he first took his seat as a Board member that "the only reason he was on the Board was to get rid of Napoli" (TR XII, p. 27). Mr. Ochs admitted that he spent his personal time walking through the schools with the architect stating that a thorough report was needed so that it could be used in tenure charges (TR XI 200). Mr. Ochs spoke to Mr. Ponti, the principal who filed a federal court action against the Board, every day for at least 10 or 15 minutes

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(except weekends) while the case against the Board was pending (TR XI, p. 202). Further, Mr. Ochs testified that Dr. Napoli never said much about Mr. Ponti in front of him "because he knew of our relationship" (TR XI p. 225). Mr. Ochs went to the trouble of erecting a lumber platform on his truck with three suitcases (one of which was for Dr. Napoli) to drive around town to embarrass Dr. Napoli (TR XI, p. 203).

Mr. Ochs also testified that the Board did not know he was going to seek counsel to aid in the drafting of tenure charges, and volunteered to pay the legal expenses for having the charges drafted if a bill was forwarded (TR XI, p. 234).

Finally, Mr. Ochs demonstrated the blind ambition with which he sought to eliminate Dr. Napoli to this administrative tribunal on July 16, 1987, when he deliberately attempted to intimidate the confidential secretary of Dr. Napoli, Jeanette Harbeson, just prior to her testimony, by approaching her in the courtroom with an anonymous letter to the editor and stating that he knew she wrote it. The letter had been written several years earlier, and he had never before mentioned it to her. Mrs. Harbeson was not only visibly shaken, but testified that she was intimidated by this action (TR XIV, p. 24). In light of the fact that Mrs. Harbeson is still an employee of the Board, the action was in a severely threatening vein. The stated purpose of Mr. Ochs was to ensure that the witness knew that he could find out who wrote notes to the paper (TR XIV p. 89). Finally, it was revealed that Mr. Ochs was in the business office of Dr. Napoli's secretary nearly every day.

It is submitted that the totality of the conduct of Mr. Ochs which found its way into the record more than demonstrates the type of bias and self-interest which has been held to invalidate the votes of board members in cases such as Colella. With the disqualification of Mr. Ochs' vote, the second set of charges (January 8, 1987) would be reduced to charge 7 (athletic ticket procedures) and the incompetency charge.

THE BOARD'S ARGUMENT

The Board disputes respondent's claims that one or more Board members have acted improperly. However, even if respondent could argue or prove that one or more Board members did something improper, that would not justify the actions of the respondent that underlie the instant tenure charges. None of the respondent's allegations go to the merits of any of the tenure charges against Napoli.

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None of the respondent's allegations of improper behavior involve the issue of whether or not Napoli engaged in conduct which is violative of employees' rights and constitute violations of the New Jersey Employer-Employee Relations Act.

None of the respondent's allegations of improper behavior involve the issue of whether or not Napoli told the truth while testifying under oath in his capacity of Superintendent of Schools in PERC proceedings.

None of the respondent's allegations of improper behavior involve the issue of whether or not Napoli has engaged in conduct which was violative of Ponti's rights and caused litigation involving the Board thereupon.

None of the respondent's allegations of improper behavior involve the issue of whether or not Napoli failed to detect or failed to report the embezzlement in the district's cafeteria program.

None of the respondent's allegations of improper behavior involve the issue of whether or not Napoli's conduct lead to needless litigation over the inclusion of compensatory education teacher salaries in Salem's tuition rate for its sending districts.

None of the respondent's allegations of improper behavior involve the issue of whether or not Napoli has engaged in conduct which was designed to or which resulted in unwarranted friction, dissention, controversies and/or litigation between the Board and its employees.

None of the respondent's allegations of improper behavior involve the issue of whether or not Napoli was involved in a shoplifting incident.

None of the respondent's allegations of improper behavior involve the issue of whether or not Napoli was involved in causing or advising the district to accumulate an excessive budget surplus or in opposing the reduction thereof.

None of the respondent's allegations of improper behavior involve the issue of whether or not Napoli failed to properly, adequately or accurately evaluate or caused the district's administrators and supervisors to be evaluated.

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None of the respondent's allegations of improper behavior involve the issue of whether or not Napoli intentionally or negligently allowed the physical conditions of Salem's buildings and fixed assets to unreasonably deteriorate.

None of the respondent's allegations of improper behavior involve the issue of whether or not Napoli established or allowed the continuation of a system for the sale and distribution of athletic event tickets without adequate fiscal controls.

None of the respondent's allegations of improper behavior involve the issue of whether or not Napoli used improper and unacceptable foul and offensive language when functioning in his capacity of Superintendent of Schools.

None of the respondent's allegations of improper behavior involve the issue of whether or not Napoli is incompetent to serve in the position of Superintendent of Schools for the Salem School District.

In summation, even if there were improper behavior by one or more Board members, it does not eliminate the conduct of Napoli, which the Board asserts has been proven in the instant proceeding and which is sufficient to form the basis of Napoli's dismissal.

DISCUSSION AND CONCLUSIONS

I **FIND** and **CONCLUDE,** based upon the unrefuted facts advanced by respondent, that Mr. Ochs' conduct and behavior constitutes a taint of self-interest in bringing the tenure charges against Frank J. Napoli. Mr. Ochs' conduct in analogous to that of boardmember Stockton in In the Matter of the Tenure Hearing of Harry I. Buch, School District of the Township of Delanco, Burlington County, 1977 S.L.D. 95, where the Commissioner said at 103:

> On the other hand, schools cannot operate effectively when individual board members ignore, disobey, or are indifferent to the rules and procedures which have been designed for the good order of the school and the welfare and protection of all those individuals associated with the institution. Such misconduct is not tolerated among its employees and pupils, nor can it be tolerated among board members. When Complainant Stockton entered upon his duties as a member of the Delanco Board of Education he did take the official oath of public office as provided in N.J.S.A. 18A:12-2.1

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and N.J.S.A. 41:1-1 et seq. Complainant Stockton did swear (or affirm) that he would, "***faithfully, impartially and justly perform all the duties of the office***." (N.J.S.A. 41:1-3). In addition to his membership on the Delanco Board of Education, he also became a member of the New Jersey School Boards Assocation (N.J.S.A. 18A:6-45 et seq.) which promulgated a Code of Ethics for the conduct of its members. The New Jersey School Board Member Code of Ethics states, inter alia, that:

> "I will recognize that authority rests with the whole board assembled in public meeting and will make no personal promises nor take any private action which will compromise the board."

The Commissioner observes that Complainant Stockton violated his oath of office wherein he was not impartial and just in performing his duties and additionally violated the Code of Ethics by entering into a personal promise and private action without the knowledge of the full Board.

I similarly **FIND** that Mr. Ochs' bias and prejudice against Napoli is in violation of his oath to be impartial and that he violated his official oath of public office, N.J.S.A. 18A:12-2.1 and N.J.S.A. 41:1-1 et seq., and the Code of Ethics of the New Jersey School Boards Assocation, of which he is a member.

I **CONCLUDE**, however, that such violations, under the circumstances here, do not warrant the dismissal of the tenure charges certified to the Commissioner and transmitted to the OAL.

Accordingly, respondent's application for the dismissal of the tenure charges is hereby **DENIED** and **DISMISSED**.

RESPONDENT'S PETITION FOR DECLARATORY JUDGMENT
(OAL DKT. NO. EDU 2776-87)

At the prehearing conference, Frank J. Napoli advanced issue No. 6, which reads as follows:

> 6. Whether the tenure charges as certified should be dismissed because they are tainted by bad faith and conflict of interest, in that person replacing respondent is acting chief school administrator is the same person employed and retained by the Board to prepare the evaluation and district review leading to the tenure charges.

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Thereafter, Napoli petitioned the Commissioner seeking a declaratory judgment concerning the application of N.J.S.A. 18A:17-16 to declare the Board's appointment of Richard Rhau to the position of Assistant Superintendent with instant tenure void ab initio.

The relevant facts are not in dispute. The facts, as set forth in count one of Napoli's petition, are as follows:

1. Petitioner is and has been the Superintendent of Schools of the Salem City School District at all times relevant to this action, notwithstanding the fact that the Board of Education has suspended petitioner proportedly pursuant to the provisions of N.J.S.A. 18:6-10 et seq. effective December 12, 1986.

2. During December 1986 and January 1987 Board meetings, the respondent Board took the following formal action in public session:

   a. Appoint Richard Rhau to the position of Acting Superintendent for a period of six months, and;

   b. Appoint Richard Rhau to the position of Assistant Superintendent effective with instant tenure thereafter.

3. At no time did the petitioner herein, who holds the title of Superintendent of Schools, nominate, suggest, appoint, or elect Richard Rhau to fill the position of Assistant Superintendent of Schools.

N.J.S.A. 18A:17-16 provides that:

> The board or boards of education of any school districts having a superintendent of schools may, upon nomination of the superintendent, by a recorded roll call majority vote of the full membership, of the board or of each of such boards, appoint assistant superintendents of schools. They may be removed by a like vote of the members of the board or of each board employing them, subject to the provisions of chapter 28 of this title.

Napoli argues that in light of the fact that he did not recommend or nominate Richard Rhau to the position of Assistant Superintendent, his appointment with instant tenure should be set aside as nonconforming with N.J.S.A. 18A:17-16, and that the proportionate costs of that part of the suit involving Richard Rhau be reimbursed to

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Dr. Napoli by the Board upon the submission by the undersigned of reasonable attorney fee statements to the Board. See, Ross v. Jersey City Bd. of Ed., 1981 S.L.D. 318, aff'd State Bd., 1981 S.L.D. 320 (1981).

The Board argues, among other things, that Napoli's petition should be held in abeyance pending the resolution of the tenure matter. This tribunal, having determined and ordered Napoli's reinstatement, will not consider the Board's argument to hold the decision in abeyance.

Here, the Board does not dispute that it appointed an assistant superintendent of schools who was not nominated by Superintendent Napoli. It argues that during the pendency of Napoli's suspension and pending the final resolution of the tenure proceedings, the Office of the Superintendent of Schools should be viewed by way of N.J.S.A. 18A:16-2, as though the holder of the office is absent, or under a disability or disqualification.

I disagree. While there is nothing in law to prevent the Board from appointing a caretaker replacement for Napoli during the pendency of the tenure matters, the fact remains that Frank J. Napoli holds and maintains tenure in the position of Superintendent of Schools until removed by order of the Commissioner, resignation or death. None of those conditions have been met. Therefore, Napoli is the Superintendent of the Salem City Schools, and unless or until he nominates an assistant superintendent, the Board is precluded from appointing any person to that position.

As Administrative Law Judge Moses said in Ross v. Jersey City Bd. of Ed., 5 N.J.A.R. 393, after a thorough analysis of the statute:

> Based on the foregoing analysis, the court concludes that N.J.S.A. 18A:17-16 permits the Board to appoint or reject assistant superintendents of schools, only after the superintendent has nominated said persons. The statute is mandatory in that the board may only appoint those persons who have been nominated by the superintendent. Although it is not mandatory that the board appoint the superintendent's candidates, this does not imply, nor should an inference be drawn, that a board may supplant the statutory procedure of nominations by the superintendent with its own nominations. (Id. at 400.)

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Accordingly, it is hereby **DECLARED** and **ADJUDGED** that the Salem City Board of Education action to appoint Richard Rhau as Assistant Superintendent without the nomination of Superintendent Frank J. Napoli, is void ab initio.

It is therefore **ORDERED** that the resolution appointing Richard Rhau to the position of Assistant Superintendent of Schools is hereby **DECLARED** null and void.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

December 16, 1987
DATE

Lillard E. Law 1922
LILLARD E. LAW, ALJ

Receipt Acknowledged:

DEC 16 1987
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

DEC 17 1987
DATE

Ronald J. Plantamura
OFFICE OF ADMINISTRATIVE LAW

ml/E

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IN THE MATTER OF THE TENURE	:	
HEARING OF DR. FRANK J. NAPOLI,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
SALEM, SALEM COUNTY.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law including the transcripts of the 14 days of hearing in this matter have been reviewed. The parties' exceptions and reply exceptions filed by the Board were timely pursuant to N.J.A.C. 1:1-18.4. These submissions, as well as the post-hearing briefs of the parties, are incorporated herein by reference. The exceptions and reply exceptions are summarized below.

The Board takes exception to the ALJ's conclusion that the only unbecoming conduct of respondent was in regard to Charge No. 8 of the second set wherein it was determined that respondent used improper and unacceptable foul and offensive language to a staff member in the presence of pupils. It points out that the conclusion was reached despite a further finding by the ALJ that the Board's allegations as set forth in seven other charges were proven to be true (Charges Nos. 1, 2, 3, 5 and 6 of the first set and Charges Nos. 1 and 7 of the second set).

The Board also excepts to the ALJ's dismissal of the two combined charges which asserted that respondent is incompetent to fulfill the duties of the office of Superintendent of Schools. Moreover, the Board excepts to the ALJ's conclusion that dismissal would be an unnecessarily harsh penalty in this matter.

Respondent, on the other hand, supports the ALJ's ultimate conclusion that the Board did not sufficiently prove its charges so as to warrant removal from his tenured position as superintendent. However, he avers that the ALJ erred in reaching some of the underlying findings of fact and conclusions of law. Moreover, respondent contends that the ALJ erred in the imposition of a 120 day salary forfeiture.

Each of the tenure charges will now be examined and further exceptions addressed.

I. FIRST SET OF CHARGES

1. FRANK J. NAPOLI, AS SUPERINTENDENT OF SCHOOLS HAS ENGAGED IN CONDUCT WHICH HAS BEEN FOUND TO CONSTITUTE VIOLATIONS OF THE NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT, N.J.S.A. 34:13A-1 ET SEQ.

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2. FRANK J. NAPOLI, AS SUPERINTENDENT OF SCHOOLS HAS PROVIDED SWORN TESTIMONY, IN A LEGAL PROCEEDING IN WHICH THE SALEM CITY BOARD OF EDUCATION WAS A PARTY, WHICH THE TRIER OF FACT FOUND TO NOT BE CREDIBLE.

Respondent excepts to the ALJ's determination that Charges Nos. 1 and 2 are true as stated, averring, inter alia, that the ALJ neither fully considered the context of the PERC matter, nor gave appropriate weight to the testimony of Barbara Wright, former Board President. Respondent reiterates that he is being held personally responsible for the termination of the nurse when it is only the Board which can effect a reduction in force and alleges that this matter represents the same "self-exoneration" by a Board which occurred in In re Onorevole, supra. He also argues that the Board seated at the time did not consider his actions as unbecoming conduct and alleges that the ALJ erred when saying he was not relitigating the PERC matters.

The Board avers that the ALJ erred in his determination as to Charges Nos. 1 and 2, that, although true as stated, they do not constitute unbecoming conduct.

Upon review of the record, the Commissioner concurs with the findings and conclusions of the ALJ with respect to these charges and adopts them as his own. There is no question that respondent's coercive and threatening conduct was found to constitute a violation of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., and that he was found not to be a credible witness. (P-1, P-2, P-3) Respondent's arguments of error by the ALJ on either a factual or legal basis are deemed meritless.

There is no excuse for respondent's behavior concerning the threat to eliminate a nurse if a grievance over duty-free lunch were pursued. Further, it is less than commendable that respondent's testimony in the initial PERC case (P-1) was found not to be credible. However, the Commissioner is unpersuaded that, given the factual circumstances of this matter, respondent's action constituted conduct unbecoming a teaching staff member. There is some merit to respondent's argument that, at least insofar as the second PERC litigation is concerned, the Board operative at that time was fully supportive of and acted affirmatively to reduce a nurse notwithstanding the fact the adverse unfair labor practice decision by PERC against Napoli and the Board had only just been handed down and after strong public reaction and input against such reduction had been voiced.

Thus, while the charges have been shown to be true as stated, the ALJ is correct in determining that they nonetheless do not rise to the level of conduct unbecoming a superintendent.

3. FRANK J. NAPOLI, AS SUPERINTENDENT OF SCHOOLS HAS ENGAGED IN CONDUCT WHICH CAUSED A CIVIL ACTION TO BE FILED AGAINST THE BOARD OF EDUCATION BY FRANCIS C. PONTI, PREVIOUSLY

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A PRINCIPAL EMPLOYED BY THE SALEM CITY BOARD OF EDUCATION, ASSERTING THAT MR. PONTI'S CIVIL AND CONSTITUTIONAL RIGHTS WERE VIOLATED BY FRANK J. NAPOLI'S CONDUCT.

Respondent renews his objection to inclusion of this charge as part of a tenure proceeding as the matter was initiated in a federal forum, settled, and releases exchanged. Further, he alleges that Ponti is being given a second bite of the apple. He also argues, inter alia, that if anyone caused the action to be filed it was Board Member Ochs and that the actions complained of were primarily either Board of Education actions or actions done by him with approval and encouragement of the Board. As to this he avers that the current Board is seeking to purge itself of all responsibility for the Ponti litigation by placing all former Board of Education actions upon his shoulders, a type of scapegoating rejected in In re Onorevole, supra.

The Board argues that the ALJ erred in finding that the charges, while proven true, were not conduct unbecoming a superintendent and points to such things as the testimony of Mr. Tosti, an attorney in the Ponti litigation who testified to his belief that (1) there would be no difficulty in proving Board liability in the matter and his characterization of respondent's behavior as a reign of terror (Tr. V-100-101, 129-130), (2) Napoli's admission that he and Ponti had not always had a troublesome relationship, but that (3) such deterioration began when Ponti "lied" in the PERC proceedings. (Tr. IX-146)

Upon review of the record, the Commissioner concurs with the ALJ that the charge as worded is true, i.e. respondent engaged in conduct which caused the Ponti litigation but that such action in and of itself does not rise to conduct unbecoming a superintendent. The record clearly demonstrates that Mr. Ponti was not without fault in any number of actions which prompted adverse consequences for him (Tr. II-124, 166-168, 180-181, 217-218; Tr. VII-111-114, 123-125, 130-133, 150-153; R-1, R-11, R-12) and it is likewise clear that the Board was aware and apparently supportive of what was occurring with him (Tr. XI-58-60; Tr. XII-108-116; Tr. XIII-66-69) to the point where tenure charges against Ponti were a possibility. (Tr. XI-70; Tr. XIII-67-68) However, the record is likewise clear that respondent was in no way merely carrying out Board actions or directives as he attempts to characterize it.

It is noted that the Board seeks exclusion of the ALJ's statements from the bottom of page 8 and the top of page 9 in the initial decision regarding Board Member Ochs, averring they are not related to the legal issues of this charge and postdate it. The Commissioner does not agree and does not order deletion of that text. Contrary to the Board's position, Mr. Ochs' close, on-going relationship to Mr. Ponti (seeing each other daily 10-15 minutes after the pleadings were filed in the Ponti litigation (Tr. XI-202) and Mr. Ochs' chastisement by the Board for releasing confidential information about the litigation (Tr. XI-202)) is a relevant factor to consider, given that he is the person who filed and swore to the

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charge in the first place and has been determined to have violated his oath to impartiality and oath of public office as will be discussed at a later point.

Moreover, when questioned as to what conduct respondent specifically engaged in to cause Mr. Ponti to file his case, Mr. Ochs responded, "I have no idea." (Tr. XI-206)

Finally, the Commissioner finds as meritless respondent's contention that this charge permits Ponti a second bite of the apple. It is the Board bringing this action, not Mr. Ponti, and it is the Board's right to file its own charges against respondent as it believes his conduct may constitute unbecoming conduct notwithstanding settlement of the federal matter and the exchange of releases.

4. FRANK J. NAPOLI, SUPERINTENDENT OF SCHOOLS, FAILED TO DETECT OR FAILED TO REPORT TO THE BOARD OF EDUCATION AFTER HAVING BECOME AWARE OF AN ALLEGED SCHEME TO EMBEZZLE FUNDS FROM THE DISTRICT'S CAFETERIA PROGRAM BY ONE GEORGE HART, AND POSSIBLE OTHERS.

Respondent urges that the ALJ was correct in dismissing this charge. The Board urges the opposite, contending that the ALJ's conclusion is not supported by the facts in the record and in support of this it advances the arguments considered by the ALJ in its post-hearing briefs.

Upon review of the record, the Commissioner fully concurs with and adopts as his own the ALJ's findings and conclusions as to this charge. Although the record demonstrates respondent's failure to detect the embezzlement, it likewise demonstrates that neither the district nor state auditors detected it either. More importantly, the record in no manner demonstrates that respondent was aware of the scheme prior to its discovery or that he failed to report it. The Commissioner concurs with the ALJ that while Dorothy Gage's testimony (Tr. II-5-35) was credible, one can only infer from Stoner's comments that he was in Napoli's presence when calling her since no proof exists of Napoli's presence, nor did Stoner confirm this in testimony. (Tr. XIII-57-58, 124-125)

5. FRANK J. NAPOLI, AS SUPERINTENDENT OF SCHOOLS, HAS ENGAGED IN CONDUCT WHICH LED TO NEEDLESS LITIGATION OVER WHETHER OR NOT THE SALARIES OF COMPENSATORY EDUCATION TEACHERS FUNDED FROM STATE CATEGORICAL AID SHOULD BE CALCULATED IN THE TUITION TO BE CHARGED A SENDING DISTRICT PURSUANT TO N.J.S.A. 18A:38-19 BY FAILING OR REFUSING TO DISCLOSE THAT SUCH SALARIES WERE NOT IN FACT SO INCLUDED OR BY FALSELY SUPPLYING FACTUAL DATA WHICH INDICATED THAT SUCH SALARIES WERE IN FACT SO INCLUDED.

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Respondent avers that the ALJ erred in his analysis of what occurred with the tuition litigation and in concluding that he acted inappropriately. The Board, however, argues that the ALJ erred in not finding that the supplying of inaccurate information rose to the level of conduct unbecoming a superintendent. It avows the ALJ neglected to give proper attention to the fact that by reason of respondent's conduct the Board was found to have engaged in the improper inclusion of compensatory education salaries when in fact they had not been included and that a compounding of the problem resulted when the Board instituted legal action against the State Department of Education thereby squandering and wasting resources and assets of both the Board and the Department and causing dissension between it and its sending districts. As to this, it contends among other things that:

> ***
>
> c. Had Napoli provided factual accurate data showing that the compensatory education salaries were not, in fact, included in the tuition rate, the litigation never would have occurred. (TV P11 L1 to P14 L17)
>
> d. Napoli admitted that he was the operative person in the initial supplying of the inaccurate data regarding whether or not compensatory education salaries were included in the tuition rate. (TVIII P132 L6 to L9; TVIII P134 L9 to L11; TVIII P136 to P137 L23)
>
> e. Napoli then attempted to testify that shortly after the release of the spot audit he personally pointed out that the spot audit was premised upon that inaccurate data, however, under further cross examination, Napoli retracts this claim. (See TXIII P171 L13 to P173 L1; and TIX P203 L23 to P209 L7) The extensive record of documents, pleadings, briefs and decisions in that litigation clearly show that Napoli never discovered that that litigation was premised upon factually inaccurate information which he was responsible for initially supplying. See P-95 through P-99; P-12; P100 through P-104; P-11; P-105; P-10; P-106 through P-124; and, P-9 for the documentary record of this litigation in chronological order, which clearly shows that the first disclosure of the underlying factually inaccurate premise for that litigation was by the State, not Napoli. This is a specific documented incident of the inherent untrustworthiness of Napoli's testimony.
>
> f. The documentary record set forth in "e" preceding, also establishes the extensive amount of totally wasted resources which occurred as a

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> result of Napoli initially providing the factually inaccurate data that the Board had included the compensatory education salaries in the tuition rate when in fact the Board had not done that, and as a result of Napoli never discovering or disclosing that initial error [on] his part. (Board's Exceptions, at pp. 30-32)

Upon review of the record and arguments advanced in the exceptions and reply exceptions, the Commissioner is in essential agreement with the finding and conclusion of the ALJ as to inaccurate information being provided by respondent which resulted in unnecessary and costly litigation; however, he would modify it to the extent that the record is unclear as to the degree to which such inaccurate information was personally supplied by respondent rather than by the business administrator. Nonetheless, respondent, as unit control leader, must bear ultimate responsibility for the inaccurate information.

Such finding, however, does not rise to the level of unbecoming conduct. There is no evidence whatsoever to indicate any deliberate or knowing action on Napoli's part to falsify factual information to the Department of Education. At best, what may be inferred from this episode is inefficiency on the part of both administrators. The Commissioner does agree, nonetheless, with the Board and Mr. Kent, the State Department of Education representative who testified, that if the district was aware that compensatory education salaries had not been provided there would have been no basis for the litigation as it is quite clear that at no point whatsoever did the Board deny that said salaries were included. Whether or not Napoli was aware that the disputed salaries were not included cannot be conclusively deduced from the record. Suffice it to say, however, that it does stretch the bounds of credibility that the Board would have raised so strong a resistance (Motion to Stay Commissioner's decision and affidavit of Board administrator (P-106)) about the second set of audits which ultimately revealed the noninclusion of compensatory education salaries had respondent and the Board attorney been knowledgeable of the fact that the original information provided to the department was inaccurate.

> 6. FRANK J. NAPOLI, AS SUPERINTENDENT OF SCHOOLS HAS ENGAGED IN CONDUCT WHICH IS DESIGNED TO OR WHICH RESULTS IN UNWARRANTED FRICTION, DISSENSION, CONTROVERSY AND/OR LITIGATION BETWEEN THE BOARD OF EDUCATION DISTRICT EMPLOYEES.

The record is quite clear that this charge is true as stated. The Commissioner nonetheless agrees with the ALJ that conduct unbecoming a superintendent has not been demonstrated. What does become apparent is that respondent tends to employ an autocratic, authoritarian and unreasonable management style when confronted with challenge to his authority by subordinates rather than to discuss, mediate, or negotiate an issue in a mature and reasoned fashion as indicated by the ALJ. Moreover, this charge may

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be viewed as tantamount to a synthesis or restatement of the other individual charges in this first set of charges, none of which were deemed to constitute unbecoming conduct.

II. SECOND SET OF CHARGES

1. FRANK J. NAPOLI IS CHARGED WITH AN ALLEGED INCIDENT OF SHOPLIFTING AT THE SALEM ACME IN JANUARY 1984.

Respondent avers in his exceptions that this charge should be dismissed because on its face the charge does not set forth facts which, if true, would warrant dismissal. He contends that the only witness with direct testimony of the incident was not produced. Moreover, respondent argues that this type of charge has been determined by the Commissioner to be insufficient to warrant either dismissal or reduction in salary (In re Tenure Hearing of Michael Wallwork, School District of Orange, Essex County, decided July 1, 1985), even when arrest and charges of crime are at issue.

The Board likewise cites In re Wallwork, supra, however, for a different reason than respondent, i.e., that the case supports that, when an event occurs which may constitute criminal conduct, tenure charges may be based on the alleged underlying event rather than on an arrest or criminal charge flowing from the alleged event. It also cites a series of other tenure cases to strenuously object to the ALJ's conclusion that this charge, although proven true, was not conduct unbecoming a superintendent. (Board's Exceptions, at pp. 37-52) More specifically, the Board alleges that (1) the three reasons cited by the ALJ to reject a finding of unbecoming conduct either separately or taken together do not negate the fact that respondent's actions do constitute unbecoming conduct and (2) he totally ignored the legal basis of the charge.

Upon review of the record, the Commissioner concurs with the ALJ's findings and determination with respect to this charge. Contrary to the Board's argument, the Commissioner finds that the ALJ did not ignore the legal basis of the charge. By allowing the issue to be heard in these proceedings, he clearly recognized that, even though respondent had neither been arrested nor had criminal charge been filed against him, the factual circumstances attendant to the episode could be considered as part of the tenure charges. This does not prevent the ALJ from subsequently weighing such facts determining that unbecoming conduct was not proven.

What has been proven in this hearing is precisely what the charge states and nothing more, namely, that respondent was involved in an alleged incident of shoplifting. The role of the ALJ was to determine, based on the factual circumstances, whether unbecoming conduct was proven as well. The mere proof that certain actions allegedly occurred does not automatically lead to a conclusion of unbecoming conduct.

In the instant matter the ALJ had an opportunity to weigh the testimony of the witnesses, review the document signed by

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respondent (P-66) and ascertain if unbecoming conduct was proven. As to this the Commissioner agrees that the totality of the factual circumstances and the plausibility of respondent's version of the events do not substantiate such a conclusion. Despite the Board's arguments in support of that charge, the fact remains that no testimony by a witness who could demonstrate direct observation of the events was presented; the Board did not seek to enforce the subpoena of such a witness; no arrest, charge, prosecution nor conviction for the alleged offense resulted; and no testimony was presented to rebut respondent's explanation of the alleged shoplifting occurrence and his signing of P-66.

2. FRANK J. NAPOLI IS CHARGED WITH CAUSING AND ADVISING THE DISTRICT TO ACCUMULATE A BUDGET SURPLUS OF APPROXIMATELY FOUR AND ONE HALF MILLION DOLLARS WITH A DISTRICT BUDGET OF APPROXIMATELY SIX AND ONE HALF MILLION DOLLARS.

3. FRANK J. NAPOLI IS CHARGED WITH STRENUOUSLY OPPOSING THE BOARD'S ATTEMPTS TO REDUCE THE AFOREMENTIONED BUDGET SURPLUS.

The Board urges by way of reply exceptions that the ALJ should have found that the Board proved the charges to be true in fact and that they constitute unbecoming conduct by respondent. Upon review of the record, the Commissioner fully supports the ALJ's findings and conclusions which he adopts as his own. The record is resoundingly clear that the Board, the Board of School Estimate and the City Council were supportive of the excessive surplus and, more importantly, that the Board itself is the only legal authority "to cause" such budget surplus. Unquestionably, the record of this matter provides no basis whatsoever to attribute causality to Napoli as opposed to the Board itself (see Tr. VIII-19-28, 30-35; Tr. X-21-36, 72; Tr. XI-42-49, 75; Tr. XII-33-38, 136-139; Tr. XIII-16-31, 91-97), although he certainly subscribed to and encouraged it. Moreover, what is also apparent is that with the change in the composition of the Board and the type of school district, a change in philosophy about surplus occurred. This does not, however, mean that respondent's support of and the following out of the Board's wishes for "redlining" and accruing high interest from surplus building constitutes conduct unbecoming. To rule otherwise would be clearly erroneous.

4. FRANK J. NAPOLI IS CHARGED WITH FAILURE TO PROPERLY, ADEQUATELY OR ACCURATELY EVALUATE THE DISTRICT'S ADMINISTRATIVE AND SUPERVISORY STAFF.

Upon review of the record including the Board's exceptions, the Commissioner finds as did the ALJ that the Board has presented no basis whatsoever to substantiate this charge. Ample evidence exists that the evaluations were, in fact, done and were done using Board adopted procedures and forms. If dissatisfied with them, the Board has the right to change them and work cooperatively with the

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superintendent to implement them. While Napoli's disclosure of Ponti's evaluation to fellow administrators is clearly inappropriate and not to be condoned, regardless of Ponti's own dissemination of the evaluation to individual Board members, such conduct in and of itself does not serve to substantiate this charge.

> 5. FRANK J. NAPOLI IS CHARGED WITH INTENTIONALLY OR NEGLIGENTLY ALLOWING THE PHYSICAL CONDITION OF THE DISTRICT'S BUILDINGS AND FIXED ASSETS TO DETERIORATE IN AN UNREASONABLE AND UNACCEPTABLE MANNER AN EXTENT DUE TO LACK OF PROPER MAINTENANCE AND REPAIRS.

No exceptions were filed by either party in regard to this charge. Upon review of the record, the Commissioner agrees with and adopts as his own the ALJ's finding and conclusion that the Board offered no proofs to support the charge. Moreover, the Commissioner questions the propriety of (1) the Board's action in hiring as a consultant a firm with whom respondent's replacement, Mr. Rhau, was previously employed and (2) Mr. Ochs' actions with respect to the charge, namely, his informing the architect that the report was to be used as evidence in the tenure charge case and his accompanying the architect on the "walk through of the buildings" subsequent to his filing and the Board's certification of the charge. (Tr. XI-200-201)

> 7. FRANK J. NAPOLI IS CHARGED WITH ESTABLISHING OR ALLOWING THE CONTINUATION OF A SYSTEM FOR THE SALE AND DISTRIBUTION OF ATHLETIC EVENT SPECTATOR TICKETS WITHOUT ADEQUATE FISCAL CONTROLS.

Respondent excepts to the ALJ's determination that this charge is true as stated. In support thereof, he cites In re Onorevole as standing for the proposition that a superintendent is under no obligation to respond to any directive except that which is properly promulgated by the board. Further, respondent avows that nowhere is it alleged that the safeguards used violated or did not comply with Board policy, directive or operational practice. He also points to the fact that the charge alleges "inadequate" fiscal controls, but the evidence neither supports such inadequacy nor is there any allegation that money was unaccounted for. Lastly, he alleges that the ALJ erred in finding he did nothing between October 1985 and August 1986 to implement new procedures, arguing that the ALJ misunderstood the new form put in place subsequent to the October 1985 auditor's report.

The Board, on the other hand, argues that the ALJ erred in not finding the charge, although true as stated, was conduct unbecoming a superintendent.

The Commissioner, upon review of the record and various arguments of the parties, does not agree with the ALJ's finding and conclusion with respect to this charge. The Commissioner disagrees

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with the way respondent casts In re Onorevole. What was being conveyed therein was that no obligation exists to respond to individual board member directives. He does, however, agree that the charge alleges "inadequate" fiscal control and that said charge was not demonstrated by the record.

The auditor's testimony clearly indicates that he found that records were kept and that there was no indication of anything wrong. He, nonetheless, felt that the procedures did not lend themselves to good control. (Tr. IV-142-143) Nowhere does the record demonstrate inadequate fiscal controls. Respondent is correct in pointing out that no allegation was made of monies missing or being unaccounted for. Rather what is evident is the auditor desired to have good controls so that no tickets could be sold without an accounting of revenues being turned back to the school, a standard which he feels has not even yet been achieved by the district. (Tr. IV-166-167)

The record does demonstrate that respondent did take some steps to set up color coding and a system for separate tickets for other school activities although apparently not much if anything was done about it until 10 months later. The record likewise demonstrates that the Board did not issue any directive to the superintendent with respect to the athletic ticket system. This does not of course mean respondent could not have been more aggressive in his response to the auditor's recommendation, particularly in light of the scandal associated with the cafeteria funds, but this certainly does not rise to the level of conduct unbecoming a superintendent.

8. FRANK J. NAPOLI IS CHARGED WITH THE IMPROPER AND UNACCEPTABLE USE OF FOUL AND OFFENSIVE LANGUAGE WHEN SPEAKING TO DISTRICT TEACHING STAFF MEMBERS IN THE PRESENCE OF DISTRICT STUDENTS.

Upon review of the record the Commissioner is in complete agreement with the ALJ's finding and conclusion that this charge is true and that it rises to the level of conduct unbecoming a superintendent. Any argument presented by respondent to the contrary is deemed entirely meritless and selfserving. The Commissioner therefore adopts as his own the ALJ's determination as to this charge for the reasons stated in the initial decision.

III. INCOMPETENCY AS CHARGED IN BOTH THE FIRST AND SECOND SET OF CHARGES

FRANK J. NAPOLI IS INCOMPETENT TO FULFILL THE DUTIES OF THE OFFICE OF SUPERINTENDENT OF SCHOOLS OF THE SALEM CITY SCHOOL DISTRICT.

Respondent, while urging affirmance of the ALJ's dismissal of the incompetency charges in both the first and second set of charges, continues to seek a ruling that, if anything, the charges relate to inefficiency not incompetency and that he did not receive 90 day notice pursuant to N.J.S.A. 18A:6-11. The Board, on the

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other hand, argues that the ALJ improperly dismissed the charges citing a series of cases defining and explaining incompetence which are incorporated by reference herein.

Upon review of the record, the Commissioner finds and determines, as did the ALJ, that the Board has failed to demonstrate by a preponderance of the credible evidence that respondent was incompetent or not capable of performing specific duties or functions of a superintendent notwithstanding the fact the Board did succeed in demonstrating that certain of the charges are true as stated.

As correctly noted by respondent, incompetence is distinguishable from inefficiency. As can be seen in the following passage from In the Matter of the Tenure Hearing of Patricia Nafash, Ridgefield Bd. of Ed., decided by the Commissioner March 12, 1984, 1984 S.L.D. _____, which reads:

> ***The charge of incompetence, as distinguished from the charge of inefficiency, presumes that the proofs in support of the charge will demonstrate that respondent is so lacking in competency to perform the responsibilities of classroom teacher that the requirements of the 90-day improvement period, required for a charge of inefficiency, N.J.S.A. 18A:6-11, would be a useless exercise. (See, Tenure Hearing of Inez McRae, 1977 S.L.D. 572, 584.) Incompetence requires proof that the affected person, regardless of the assistance offered by certified supervisors, does not have the ability or capacity to be an effective teacher. School Dist. of Tp. of East Brunswick, Middlesex Cty. v. Renee Sokolow, OAL DKT. EDU 6440-81 (Nov. 5, 1982), adopted, Comm'r of Ed. (Dec. 20, 1982). [affirmed State Board May 4, 1983]***
>
> (Slip Opinion, at p. 37)

See also the discussion of incompetence versus inefficiency found in In the Matter of the Tenure Hearing of Edna Booth, School District of West Orange, decided May 31, 1985, aff'd State Board April 1, 1987, aff'd Docket No. A-3985-86T8 N.J. Superior Court, Appellate Division.

The Board's recitation of the definition of incompetence doesn't differ, rather it is its conclusion that respondent's behavior meets that definition where the Commissioner differs with the Board for, in his judgment, the problems raised in this matter do not demonstrate that respondent is so lacking in competence to perform his duties as superintendent that the 90 day improvement period would be a useless exercise. For example, while the Board charges respondent with a number of offenses which all call into play his financial expertise/business management, the 1984-85 evaluation it performed states "your background as a business manager serves you in good stead. You are well versed in school

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finance and we recognize your efforts to keep school finances in line." (P-53, at p. 1)

Further, the appointed Board members who testified as to respondent's performance were consistent in their affirmation that respondent was deemed to be a competent superintendent for many years prior to the change of the Board type, composition, and size in 1985. While favorable performance in the past does not preclude incompetency charges, it does serve to demonstrate that respondent has the ability to perform satisfactorily. (See In re Booth, supra, at p. 46)

This is not to say that respondent's evaluations for 1984-85 and 1985-86 (P-53, P-58, P-63) do not raise serious concerns as to respondent's performance; however, they are so scathing and unrelentlessly critical that it is difficult to perceive of them as reasoned, rational, impartial assessments of that performance.

Unfortunately, it is clear from the record that the charges in this case cannot be considered outside of the total climate which appears to have characterized the change from Type I to Type II classification, a factor which cannot be ignored given the flaws in the Board's own conduct and in Mr. Ochs' conduct which will be dealt with subsequently.

Notwithstanding this, however, it is clear that the evaluations of the "new" Board certainly call into question respondent's efficiency and effectiveness as a superintendent. It must be emphasized, however, that he has not been charged with inefficiency nor have the mandates of N.J.S.A. 18A:6-11 been followed which call for written notice of alleged inefficiencies and at least a 90 day period to correct and overcome the inefficiency.

Consequently, for the reasons expressed by the ALJ in the initial decision, ante, the Commissioner adopts as his own the findings and conclusions as expanded upon herein. Because it is recognized that there are serious concerns about respondent's performance as superintendent raised in his 1985 and 1986 evaluations, the Commissioner emphasizes that if the Board continues to believe respondent demonstrates inefficiency in his management skills, it is in no way precluded from certifying charges to that effect in conformity with the requirements of N.J.S.A. 18A:6-11 and N.J.A.C. 6:24-5.1.

Upon reading the record of this matter in its entirety, the Commissioner seriously questions whether at this juncture it is possible to separate out what may be actual shortcomings in respondent's performance and what may be the result of deplorable relations between him and the Board. Unfortunately, the record conveys the distinct impression that the Board has embarked on a campaign of "out with the old" and "in with the new" or not unlike the Queen of Hearts in Alice's Adventures in Wonderland declaring "off with their heads, off with their heads." More distressing, however, is the Board's lamentable resort to behavior the Board itself castigates respondent for employing.

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IV. PENALTY

Respondent objects to the penalty of 120 days' salary forfeiture, while the Board argues that dismissal is warranted. Upon careful and thorough consideration and upon his independent review of the record, the Commissioner accepts and adopts as his own the ALJ's recommended penalty of 120 days' salary loss. As correctly determined by the ALJ, the charges proven true as stated neither singly nor taken together demonstrate that respondent is unfit to fulfill the duties of superintendent nor does the single count (Charge No. 8, set two) which was deemed unbecoming conduct either by itself or in conjunction with the 6 charges the Commissioner found true as worded warrant the harsher penalty of dismissal.

Although the Commissioner finds, as did the ALJ, that respondent's management style was upon those occasions cited in the record less than commendable, such actions do not justify his dismissal under the circumstances of the matter given the fact that the then-sitting boards supported him. Were he to conclude otherwise every chief school administrator whose management style was supported and condoned by one board could find him or herself the subject of disciplinary action by another board whose philosophy and approach differ from the previous board(s).

While it is important for a superintendent to work cooperatively with and in a manner consistent with the philosophy, goals and policies of the board of education presently employing him, he should not and cannot be subject to disciplinary action for past actions which were accepted by the previous board, particularly as in the instant matter, where there has been not only a change of board composition but also a changeover from a Type I appointed board to a Type II elected board.

V. VOIDING OF VOTE CERTIFYING CHARGES

Respondent urges that the ALJ erred in not voiding the vote certifying the tenure charges given that there has been a finding that Mr. Ochs violated his oath to be impartial and violated his official oath of public office even where he cast the pivotal vote. in support thereof he again cites In re Colella, supra, and In re Buch, supra. The Board likewise reiterates the arguments delineated by the ALJ in the initial decision, ante.

Upon review of the record, the Commissioner finds and concludes as did the ALJ that Mr. Ochs' behavior constituted taint of self-interest and that his bias and prejudice toward respondent is a violation of his oath to be impartial and his oath of public office. However, given the factual circumstances of this matter, the Commissioner agrees with the ALJ that the vote on the certification of tenure charges should not be voided on that basis just as the vote was not voided in the Buch tenure matter. Moreover, he determines that the factual circumstances of this matter differ markedly from the Colella matter wherein two board members had personally brought criminal charges against that respondent in another forum for precisely the same alleged action for which

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presentations made by respondent at several Board meetings. (Tr. VI-95-99; Tr. VIII-147-148; Tr. IX-70-77, 97-102; Tr. X-238-250, 257-271; Tr. XI 23-25; Tr. XIII-43-44)

While there may be much that respondent needs to do to improve and alter his autocratic, authoritarian and sometimes vindictive manner of dealing with problems, the Board itself is not blameless in its own manner of resolving problems. It is strikingly clear that the Board and its superintendent need to make a commitment to work cooperatively in addressing the Board's commendable desire to have the City of Salem School District be the best it can be. To do this, however, Dr. Napoli will need to work assiduously to change his management style and to curb inappropriate verbal responses. The Board on its part must make a commitment to provide reasonable resources and time for reaching its goals as well as constructive criticism of its superintendent or other staff when performance is not at the level expected by it.

VII. CONCLUSION

Accordingly, the Commissioner adopts the ALJ's initial decision except as modified herein. The Board is ordered to reinstate respondent immediately with no restoration of his 120 day salary loss attendant to his suspension pending the disposition of these charges. Mr. Rhau is to be terminated immediately from his assistant superintendent position as such appointment has been declared null and void ab initio.

The Board is reminded that this decision is binding until and unless it is reversed on appeal or a stay is granted. It is, therefore, cautioned not to operate contrary to the mandates of law and code with respect to this as it did earlier when refusing to resume respondent's salary on the 121st day of his suspension, thus necessitating an order of the ALJ compelling compliance. (See Respondent's Exceptions at page 23; Respondent's May 7, 1987 Motion; Board's May 18, 1987 Cross-Motion; Respondent's May 26, 1987 Reply; June 2, 1987 Order of ALJ.)

COMMISSIONER OF EDUCATION

February 16, 1988

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IN THE MATTER OF THE TENURE HEARING OF FRANK J. NAPOLI, SCHOOL DISTRICT OF THE CITY OF SALEM, SALEM COUNTY,	:	COMMISSIONER OF EDUCATION DECISION ON MOTION

The matter has been opened before the Commissioner by the City of Salem Board of Education through the filing of a Notice of Motion for a Stay to the final decision rendered in the above-captioned matter on February 16, 1988 which is currently pending on appeal before the State Board of Education. No opposing affidavit was filed by respondent within the time prescribed by N.J.A.C. 6:2-1.16(d).

In support of its application for a stay, the Board argues, inter alia, that it is arbitrary, capricious and unreasonable for the Commissioner, in accordance with N.J.S.A. 18A:6-16, to have determined upon receipt of the tenure charges in this matter that they were sufficient to warrant dismissal or reduction in salary and then upon extensive hearing to hold that six of the charges, although proven to be true, are not sufficient to warrant such penalty. It also contends that the legal standards applicable to determinations of conduct unbecoming a public employee establish that the superintendent of schools is to be held to the highest standards of conduct and relies upon the legal arguments submitted

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on pages 59-67 of its exceptions to the initial decision as support that respondent should not be reinstated during the pendency of the appeal in this matter.

In addition to the above, the Board urges that both the Commissioner and the ALJ have recognized and acknowledged the extremely divisive effect respondent's holding of the Superintendent's position has upon the education system and the community of Salem. Specifically, it avers that his reinstatement during the pendency of the instant appeal will have a substantial detrimental and adverse effect upon the entire institution and community, including, but not limited to, the students. Moreover, the Board contends that even if such effect is not brought about by wrongful conduct by respondent, it is sufficient to justify respondent's termination and, thus, should in and of itself justify granting a stay in this matter. The Board cites in support of this argument In re Grossman, 127 N.J. Super. 13 (App. Div. 1974), cert. denied 65 N.J. 292 (1974). Further, the Board points out that during the pendency of appeal, respondent is being paid full salary and emoluments whether he remains on suspension or is reinstated.

The affidavit of the Board president submitted in support of the application for a stay likewise urges that the district and community would be adversely affected if it is forced to take back an "unfit" employee as superintendent and avers that "[s]ince seven (7) of the most serious of the tenure charges certified by the Salem City Board of Education were found by the Commissioner of Education to be proven to be true, and eight (8) of such charges had been so found to be proven true by the Administrative Law Judge, the extreme seriousness of the instant matter cannot be disregarded.***" (Acton

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Affidavit, at p. 2) Also noted is the fact that the Board President has been personally informed by members of the teachers' association that should respondent be reinstated before the matter is resolved on appeal, there is serious danger of a strike or job action occurring.

In determining whether the stay shall be granted in this matter, the criteria set forth by the New Jersey Supreme Court for weighing a request for injunctive relief in Crowe v. De Gioia, 90 N.J. 126 (1982) must be applied by the Commissioner. These criteria include:

1. Relief should be granted only to prevent some imminent and irreparable harm from occurring, harm which cannot be remedied by pecuniary damages.

2. The legal right on which petitioner bases his/her claim must be one settled in law.

3. Relief should be granted only if the material facts are uncontroverted.

4. When granting such relief, the equities of the matter must be balanced to determine the relative weight of any hardship caused to the parties.

Upon a thorough and comprehensive review of the record in this matter and having carefully applied the Supreme Court criteria for injunctive relief to the Board's arguments in support of a stay, the Commissioner determines that the Board has not met the legal burden to demonstrate that any irreparable and imminent harm or inordinate hardship would occur in the district if respondent were restored to his tenured position as superintendent. Nor has the Board demonstrated that it has a likelihood of prevailing on the merits of the matter in its appeal.

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In reaching this determination, it must be emphasized that the Commissioner was particularly mindful of and sensitive to the strong emotions which this controversy and the subsequent decisions rendered on it have evoked in the community. It has long been recognized that publicity attendant to tenure hearings may have a divisive and disruptive influence in the district. This factor is one major reason why the Legislature acted in 1960 to remove from local boards of education the authority to conduct tenure hearings and placed that authority solely with the Commissioner of Education as explained by the following passage from the New Jersey Appellate Court decision in In re Fulcomer, School District of Holland Twp., 93 N.J. Super. 404 (App. Div. 1967) (1967 S.L.D. 201) which states:

> The second and no less important purpose was to remove the trial of such cases from the publicity attendant on the local hearing which "tears the community apart" and "disrupts the orderly conduct of local school affairs." See Statements, supra. (1967 S.L.D. at 205-206)

The instant matter is certainly a case which has stirred up dissension and strong emotions among a considerable segment of the community of Salem City. Notwithstanding that fact and in full understanding of the perceptions that some members of the community have in regard to the outcome of this matter, the Commissioner must be guided solely by the requisites of law in reaching a determination relative to a stay. Neither public sentiment nor personal understanding of that sentiment may be permitted to interfere with legal obligation.

As was pointed out by the Commissioner in his decision on the merits of this matter, any tenure determination made by him pursuant to his authority under law and the standards established

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for such, by law and by the courts, must be based upon strict application of those standards as proved by a preponderance of the credible evidence and not upon any personal evaluation of an individual. Tenured teaching staff members have a right to an independent determination made by the Commissioner as to their removal based on all the evidence presented. In re Fulcomer, supra That determination can only rest upon the necessary quantum of proof - the preponderance of credible evidence.

In the instant matter, the Board during the hearing of the case on the merits failed to meet its legal burden with respect to the necessary proofs for demonstrating that respondent was guilty of unbecoming conduct for each and every specification it presented of that charge with the exception of the use of profanity for which he forfeited many thousands of dollars in salary.

Moreover, as to the second charge that respondent was incompetent, the Board likewise failed to meet the legal standard for proving such charge, a standard which bears repeating here:

> ***The charge of incompetence, as distinguished from the charge of inefficiency, presumes that the proofs in support of the charge will demonstrate that respondent is so lacking in competency to perform the responsibilities of classroom teacher that the requirements of the 90-day improvement period, required for a charge of inefficiency, N.J.S.A. 18A:6-11, would be a useless exercise. (See, Tenure Hearing of Inez McRae, 1977 S.L.D. 572, 584.) Incompetence requires proof that the affected person, regardless of the assistance offered by certified supervisors, does not have the ability or capacity to be an effective teacher. School Dist. of Tp. of East Brunswick, Middlesex Cty. v. Renee Sokolow, OAL DKT. EDU 6440-81 (Nov. 5, 1982), adopted, Comm'r of Ed. (Dec. 20, 1982). [affirmed State Board May 4, 1983]*** (emphasis in text)

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In re Nafash, Ridgefield Bd. of Ed., decided by the Commissioner March 12, 1984 (1984 (S.L.D. _____) (Slip Opinion, at p. 37)

See also the discussion of incompetence versus inefficiency found in In re Booth, School District of West Orange, decided May 31, 1985, aff'd State Board April 1, 1987, aff'd Docket No. A-3985-86T8 N.J. Superior Court, Appellate Division, November 13, 1987.

At the risk of overburdening this decision on motion, an example from the hearing on the merits bears repeating here:

> The Board's recitation of the definition of incompetence doesn't differ, rather it is its conclusion that respondent's behavior meets that definition where the Commissioner differs with the Board for, in his judgment, the problems raised in this matter do not demonstrate that respondent is so lacking in competence to perform his duties as superintendent that the 90 day improvement period would be a useless exercise. For example, while the Board charges respondent with a number of offenses which all call into play his financial expertise/business management, the 1984-85 evaluation it performed states "your background as a business manager serves you in good stead. You are well versed in school finance and we recognize your efforts to keep school finances in line." (P-53, at p. 1)
>
> Further, the appointed Board members who testified as to respondent's performance were consistent in their affirmation that respondent was deemed to be a competent superintendent for many years prior to the change of the Board type, composition, and size in 1985. While favorable performance in the past does not preclude incompetency charges, it does serve to demonstrate that respondent has the ability to perform satisfactorily. (See In re Booth, supra, at p. 46.) (Slip Opinion, at p. 69)

Since the Board could not meet the burden necessary to prove incompetence and failed to meet the 90 day legal requirement for tenure charges based on inefficiency embodied in N.J.S.A. 18A:6-11, it was unable to meet the legal standard that respondent was unfit to perform as superintendent.

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Accordingly, the Board having failed to demonstrate by the preponderance of credible evidence unfitness to serve as superintendent on the basis of either unbecoming conduct or incompetency when the matter was heard on its merits; and the Board having failed to demonstrate through its stay request that imminent and irreparable harm or undue hardship would result if respondent were restored to his duties; and the Board having further failed to demonstrate a likelihood of prevailing on the merits or appeal on this matter, the stay is herein denied.

Notwithstanding the above determination, however, it is emphasized that the Board, if it so chooses, is not precluded from continuing respondent's suspension with pay during the pendency of its appeal as permitted under the provisions of N.J.S.A. 18A:6-14. See In re John Eberly, School District of Ewing, Decision on Motion April 13, 1987, aff'd in part/rev'd in part State Board March 2, 1988.

COMMISSIONER OF EDUCATION

MAY 13, 1988

DATE OF MAILING - MAY 13, 1988

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IN THE MATTER OF THE TENURE	:	
HEARING OF DR. FRANK J. NAPOLI,	:	STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
SALEM, SALEM COUNTY.	:	
	:	

Decided by the Commissioner of Education, February 16, 1988

Decision on motion by the Commissioner of Education, May 13, 1988

Decision on motion by the State Board of Education, June 1, 1988

Decision on motion by the State Board of Education, August 3, 1988

For the Petitioner-Appellant, Barbour and Costa (John T. Barbour, Esq., of Counsel)

For the Respondent-Respondent, Jeffrey A. Bartges, Esq.

For the Amicus Curiae, New Jersey School Boards Association, Russell Weiss, Jr., Esq., General Counsel (Francis J. Campbell, Esq., of Counsel)

For the Amicus Curiae, New Jersey Association of School Administrators, Russell J. Schumacher, Esq.

On December 12, 1986, the Board of Education of the City of Salem (hereinafter "Board") certified six charges of unbecoming conduct and one charge of incompetency against Dr. Frank J. Napoli (hereinafter "Respondent"), its tenured superintendent of schools. On February 23, 1987, the Board certified an additional eight charges of unbecoming conduct and one charge of incompetency. On March 16, 1987, the Respondent filed a declaratory judgment action against the Board, challenging the Board's appointment of an assistant superintendent in January 1987 without Respondent's nomination. He also requested attorney's fees for that part of the suit. All of these matters were consolidated.

At a preliminary hearing on February 13, 1987, Respondent also raised the issue of whether the vote certifying the charges against him should be declared null and void. It was the Respondent's contention that Board member Ervin Ochs (hereinafter "Ochs"), who drafted the instant tenure charges, had demonstrated a personal bias and prejudice against Respondent even before Ochs became a member of the Board, making him incapable of rendering a

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vote in the interests of the school district. His vote, Respondent argued, should therefore be invalidated.

On December 16, 1987, following 14 days of testimony, an Administrative Law Judge (ALJ) found that the Board had sustained its burden as to the truthfulness of eight of the certified charges, but concluded that only the one charge alleging Respondent's use of foul and offensive language when speaking to teachers in the presence of students (charge 8 of the second set) constituted unbecoming conduct. He also recommended dismissal of the two combined incompetency charges. It was the ALJ's conclusion that Napoli had exhibited poor judgment, particularly in his interpersonal relations with certain staff members. Accordingly, he recommended that Respondent be restored to his tenured position but forfeit payment for the first 120 days of his suspension.

The ALJ also concluded that Ochs' action in bringing the tenure charges against Respondent was tainted with self-interest, and that his bias and prejudice against the Respondent were in violation of his oath to be impartial, his official oath of public office and the Code of Ethics of the New Jersey School Boards Association. However, the ALJ concluded that under the circumstances, such violations did not warrant dismissal of the tenure charges.

On Respondent's Petition for Declaratory Judgment, the ALJ determined that the Board's action in appointing a new assistant superintendent without Respondent's recommendation or nomination violated N.J.S.A. 18A:17-16, which precludes a board from making such appointments unless or until the superintendent nominates an assistant superintendent. Accordingly, the appointment was found to be void.

On February 16, 1988, upon a thorough review of the record, the Commissioner of Education adopted the ALJ's findings except for that finding upholding charge 7 of the second set, which alleged that Respondent allowed the continuation of a system for the sale and distribution of tickets for athletic events without adequate fiscal controls.

Accordingly, noting that "respondent's management style was upon those occasions cited in the record less than commendable," Commissioner's decision, at 71, he accepted and adopted the ALJ's recommended penalty of 120 days' salary loss.

He also agreed with the ALJ that Ochs' action was tainted with self-interest and that his bias and prejudice toward Respondent was a violation of his oath of public office. However, given the factual circumstances, the Commissioner agreed with the ALJ that the vote on the certification of tenure charges should not be voided on that basis.

As to Respondent's Petition for Declaratory Judgment, the Commissioner adopted the ALJ's findings and conclusions regarding

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the appointment of an assistant superintendent without the Respondent's nomination, and declared that appointment null and void.

On appeal, the Board alleges that the Commissioner erred in finding unbecoming conduct in only one of the seven charges found to be true and in finding that Respondent's conduct did not constitute incompetency. The Board urges us to reverse the Commissioner's determination that the Respondent is competent to remain and function as superintendent of schools and to order the Respondent's dismissal.

Although Respondent did not file a cross-appeal, he contends that the penalty imposed was unduly harsh, that the Commissioner erred in not invalidating the certification vote as a result of Mr. Ochs' biased participation and for not addressing or awarding the requested attorney's fees.

On June 1, 1988, we granted the motion of the New Jersey School Boards Association to appear as amicus curiae in this matter. It is their position that the Commissioner's holding that the charges shown to be true do not rise to the level of unbecoming conduct is inconsistent with a long line of school law decisions, and urge us to reverse the Commissioner.

On August 3, 1988, we granted a motion for leave to appear as amicus curiae filed by the New Jersey Association of School Administrators. It is their position that the Commissioner's decision should be affirmed, that five of the charges related to events which occurred 2 to 3 years before the Board certified the charges (and before the current Board was seated).

We note initially that Respondent has failed to file a cross-appeal as required by N.J.A.C. 6:2-1.1 with regard to the Commissioner's determination that the vote on the certification of tenure charges by the Board should not be voided. Similarly, Respondent has failed to file a cross-appeal regarding the Commissioner's failure to award him attorney's fees on his declaratory judgment action. Thus, these matters are not properly before us at this time.

After a thorough review of the entire record, we affirm the Commissioner's determination dismissing the incompetency charges for the reasons expressed by the Commissioner. We, however, find that the Board has shown unbecoming conduct by Respondent on charges 1 and 3 of the first set, in addition to charge 8 of the second set found by the ALJ and Commissioner.

Charge 1 of the first set involves a dispute which arose in October 1981 when Respondent unilaterally changed a past practice which allowed school nurses to leave their assigned school buildings during their duty-free lunch periods. Two school nurses alleged that Respondent threatened to cause a reduction in force (RIF) of school nurses, and thereby a termination of one of their positions, if they filed a grievance challenging Respondent's action. He also

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rejected a demand by the Salem Teachers Association (STA) to negotiate the lunch issue.[1] Thereafter, the STA filed an action against Respondent and the Board before the Public Employment Relations Commission (PERC) alleging an unfair labor practice under the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"). Following a hearing, a PERC hearing examiner made the following findings:

> 8. On October 15, 1981 the Superintendent, Frank J. Napoli, came to the office of school nurse Doris Dague when she indicated that the nurses were unhappy over the Superintendent's directive of October 7, 1981, supra, requiring that the nurses take their duty-free lunch in their school building. Dague testified credibly that Napoli stated that if a grievance was filed and he lost he was going to "fire" a nurse and that under State rules he was only required to have one nurse.
>
> 9. In or around the same time in October 1981 Napoli had a conversation with nurse Catherine J. Watford, to which her school Principal, Francis C. Ponti, was a witness. Napoli stated that he was aware that a grievance was going to be filed and that if it was pursued a nurse would be lost inasmuch as only one was required in the District. Ponti was called as witness and essentially corroborated Watford.

P-1, in evidence [In the Matter of the Salem City Board of Education, Dkt. No. CO-82-242-9, H.E. No. 83-25, 9 N.J.P.E.R. 14081 (January 27, 1983)].

The PERC hearing examiner concluded that Respondent had violated N.J.S.A. 34:13A-5.4(a)(1) of the Act in making coercive and threatening statements to the two nurses. Id.

In a subsequent hearing on additional counts brought against the Board by STA after the Board's decision on April 14, 1983 not to renew the employment contract of school nurse Watford, the PERC hearing examiner stated that he was "convinced" that Respondent was "the moving force in bringing about the Board's decision of April 14, 1983," and that Respondent's "discriminatory motivation" originated with the duty-free lunch dispute. P-2, in

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[1] The Public Employment Relations Commission subsequently determined that Respondent's directive requiring the nurses to remain in the school building during their lunch period was not negotiable and restrained arbitration of the STA's grievance challenging this directive. In the Matter of the Salem City Board of Education, Dkt. No. SN-82-67, H.E. No. 82-115, 8 N.J.P.E.R. 13163 (June 3, 1982).

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evidence [In the Matter of the Salem City Board of Education, Dkt. No. CO-82-242-9, H.E. No. 84-59, 10 N.J.P.E.R. 15156 (May 25, 1984)].

These determinations were adopted by PERC. P-3, in evidence.

The ALJ concluded that the Board had met its burden of proof as to the truthfulness of this charge. His finding was adopted by the Commissioner, who noted:

> There is no question that respondent's coercive and threatening conduct was found to constitute a violation of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., ***. Respondent's arguments of error by the ALJ on either a factual or legal basis are deemed meritless.
>
> There is no excuse for respondent's behavior concerning the threat to eliminate a nurse if a grievance over duty-free lunch were pursued.

Commissioner's Decision, at 54.

However, neither the ALJ nor Commissioner felt that Respondent's actions in this regard constituted unbecoming conduct. We disagree. The Respondent's conduct underlying the violation of the New Jersey Employer-Employee Relations Act -- threatening school nurses with a RIF (and thereby a termination of the employment of one of them) if they filed a grievance challenging his unilateral action on the duty-free lunch issue -- is condemnable and, as the Commissioner points out, inexcusable. Nor can we ignore the PERC hearing examiner's finding that Respondent was subsequently the moving force in the Board's decision to dismiss school nurse Watford.

If the standard of behavior required of teachers is stringent, the standard for high administrative personnel must be even more stringent. As was noted in In the Matter of the Tenure Hearing of Louis Cirangle, 1980 S.L.D. 95, 96, aff'd by the State Board, 1980 S.L.D. 97, aff'd, Docket #A-3967-79A (App. Div. Jan. 30, 1981), certif. denied, 87 N.J. 347 (1981):

> The position of Chief School Administrator, difficult at best, cannot be exemplified by one who displays less than the self-restraint and controlled behavior requisite as an example to the Board, teachers and pupils alike.

The Respondent, as superintendent of schools, occupies a crucial position within the school district and community. He is entrusted with the responsibility for providing educational leadership and for administering the school district so as ensure proper implementation of board policy with respect to personnel matters as well as educational programming. By making threats designed to deter the school nurses from filing a lawful grievance

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against him, the Respondent exhibited a lack of the restraint and self-control required of a chief school administrator. Such conduct sets an egregious example to the teachers, students and residents of the district, who look to the superintendent for educational leadership and, consequently, as a role model, and to the Board, that relies upon him to conduct himself properly and appropriately in fulfilling his administrative responsibilities. We therefore conclude that his actions constituted unbecoming conduct.

We must also consider an interrelated allegation, charge 2 of the first set, which alleges that Respondent's sworn testimony during the PERC hearing was deemed not to be credible by the PERC hearing examiner. In his findings of fact, the PERC hearing examiner stated that he did not credit the Respondent's denials of certain testimony by the two nurses and the school's principal. His assessment of credibility was based upon his observation and appraisal of the demeanor of the witnesses. Initial Decision, at 7.

Both the ALJ and Commissioner found that the Board had met its burden on this charge, but concluded that it did not rise to the level of unbecoming conduct. While it is true that the Respondent's testimony was not credited by the hearing examiner, there was no finding of intentional dishonesty or perjury. The hearing examiner in resolving conflicting testimony, chose to believe the nurses and school principal over the Respondent. We cannot find unbecoming conduct solely on the basis of what is before us -- a statement by the hearing examiner that he did not credit the testimony of the Respondent -- and we therefore affirm the Commissioner's finding on this charge.

Charge 3 of the first set alleges that Respondent engaged in conduct which caused a civil action to be filed against the Board by Francis C. Ponti (hereinafter "Ponti"), a former principal with the Salem City Board of Education, asserting that Ponti's civil and constitutional rights were violated by Respondent's conduct. That conduct by Respondent was alleged to include issuing a written reprimand accusing Ponti of not working within the management team; reprimanding Ponti for speaking with the president of the Teachers' Association at a Board meeting; issuing unfavorable evaluations of Ponti's performance; excluding Ponti from a Board executive session to discuss the renewal or nonrenewal of the school nurse involved in the RIF threat incident; excluding Ponti from a meeting of school principals where the Board's strategy to deal with a teacher job action was discussed and determined; and issuing a written memo to Ponti excluding Ponti from the Board's administrative team with regard to meetings and other instances of interpersonal contact. Initial Decision, at 9.

It was Respondent's contention that Ponti was involved with him and the Board's attorney in preparing defenses to the unfair labor practice charges to be heard by PERC, but that neither Respondent nor the Board's attorney knew or had been advised by Ponti that he had been subpoenaed to testify on the STA's behalf until the day Ponti appeared at the PERC proceedings as a witness against Respondent and the Board. Respondent also alleged that

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Ponti appeared at the PERC hearing, which was held outside of the school district, without notifying him in advance or requesting a personal leave day. R-11, in evidence.

Respondent testified that these events, coupled with other subsequent events, convinced him that Ponti could not be trusted with confidential matters, and he therefore excluded Ponti from certain administrative meetings and discussions. Initial Decision, at 9-10.

Ponti filed a civil action in United States District Court for the District of New Jersey against Respondent and the Board seeking compensatory and punitive damages for violation of his rights under the First and Fourteenth Amendments. The suit was eventually settled out of court for $51,000. plus attorney's fees, conditioned upon Ponti's immediate resignation.

The ALJ found the truthfulness of this charge, but believed that the Respondent's actions against Ponti did not constitute unbecoming conduct. The Commissioner concurred, noting that the record demonstrated that Ponti was not without fault in any number of actions which prompted adverse consequences for him and that the Board was aware and apparently supportive of what was occurring to the point where tenure charges against Ponti were a possibility. Commissioner's Decision, at 56.

While it may be true that Ponti was not without fault, that does not excuse Respondent's improper actions taken in apparent retaliation for Ponti's testimony against him at the PERC hearing. As the Commissioner points out, "the record is likewise clear that respondent was in no way merely carrying out Board action or directives as he attempts to characterize it." Id. Holding Respondent to the high standard expected of a superintendent of schools in administering the school district dictates a finding of unbecoming conduct.

Our position on these charges is not altered by the fact that the Board did not take action at an earlier date or that the Board's composition may have changed.[2] Again, Respondent's actions were not taken pursuant to Board directive and cannot be viewed in any sense as appropriate conduct incidental to implementation of Board policy. In resolving the instant tenure charges, we are concerned with whether Respondent's behavior rose to the level of conduct unbecoming a chief school administrator, and we

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[2] By way of further background, the Board had been classified as a Type I school district pursuant to N.J.S.A. 18A:9-1 et seq. and the predecessor statutes until January 1985 when City of Salem voters approved a reclassification as a Type II district. Respondent was appointed as assistant superintendent for business and board secretary in 1970 and then as superintendent in 1977, prior to reclassification.

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find the Respondent's actions underlying the charges involving the school nurses and Ponti, as well as the use of foul language, was, indeed, unbecoming conduct.

We, therefore, reverse the Commissioner on charges 1 and 3 of the first set and affirm on all other counts, including the finding of unbecoming conduct on charge 8 of the second set, which alleged that Respondent used foul and offensive language when speaking to teachers in the presence of students.

We turn now to the question of the appropriate penalty to be imposed. See In the Matter of the Tenure Hearing of David Fulcomer, 93 N.J. Super. 404 (App. Div. 1967). Unlike the Commissioner, we have found unbecoming conduct on three of the certified charges, and therefore conclude that a harsher penalty is warranted than 120 days' salary loss, which was based upon finding one charge of unbecoming conduct.

However, in performing the delicate balancing act required by Fulcomer, supra, we must consider all of the circumstances involved. We cannot overlook Ponti's conduct in working with Respondent on the defense to the school nurses' allegations without informing Respondent that he had been subpoenaed by the Salem Teachers Association to testify against him. And we are mindful of the "serious question" posed by the Commissioner as to "whether at this juncture it is possible to separate out what may be actual shortcomings in respondent's performance and what may be the result of deplorable relations between him and the Board. Unfortunately, the record conveys the distinct impression that the Board has embarked on a campaign of 'out with the old' and 'in with the new' or not unlike the Queen of Hearts in Alice's Adventures in Wonderland declaring 'off with their heads, off with their heads.'" Commissioner's Decision, at 70-71.[3]

As has been stated on previous occasions, we cannot stress strongly enough the importance of the establishment of a cooperative non-adversarial relationship between a board and its superintendent so as to enable them to fulfill their primary responsibility: ensuring that the school children receive the benefits of a thorough and efficient education. The responsibility to achieve such a relationship rests equally with the Board and the Superintendent. See In the Matter of the Tenure Hearing of Dr. Richard E. Onorevole, decided by the State Board, Feb. 3, 1988, appeal pending (App. Div.); Gibson v. Board of Education of the City of Newark, decided by the State Board, May 6, 1986, aff'd, Docket #A-5209-83T6 and A-3111-84T5 (App. Div. Oct. 15, 1986).

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[3] It should be noted in this context that the Board refused to resume Respondent's salary payments after the first 120 days of his suspension in violation of N.J.S.A. 18A:6-14, which resulted in the ALJ issuing an order on June 2, 1987 to compel compliance.

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Although unfitness for a position in the school system is best shown by a series of incidents, Redcay v. State Board of Education, 130 N.J.L. 369, 371 (Sup. Ct. 1943), aff'd, 131 N.J.L. 326 (E & A 1944), we conclude that dismissal is not warranted under the circumstances. The record indicates a hostile relationshipbetween Respondent and the new Board and a poor and sometimes abrasive management style by Respondent. We do however find that Respondent's conduct in three specific instances as established in these proceedings constitutes conduct unbecoming a superintendent. Further, the record shows that such conduct was reflective of Respondent's propensity towards what the Commissioner has termed a less than commendable management style. As established in these proceedings, the Respondent has too often responded to problems and disputes with hostility and unbecoming conduct. As the ALJ correctly points out, the Respondent's actions and poor judgment have been costly to the Board. Although the record does not support a conclusion of incompetency,[4] the Respondent's behavior in threatening the school nurses with dismissal, taking retaliatory action against Ponti and using foul language in the presence of students falls far short of the high degree of professional leadership expected of a superintendent of schools.

Nor can we ignore the findings of truthfulness on four other charges, including the fact that the PERC hearing examiner did not credit the Respondent's testimony in denying the school nurses' allegations, and we therefore conclude that a penalty severe enough to impress upon him the seriousness of his actions as well as the necessity of conducting himself appropriately in fulfilling his responsibilities for the administration of the district is necessary.

We therefore order that Respondent forfeit a total of ten months' compensation.[5]

Attorney exceptions are noted.
December 1, 1988

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[4] It should be emphasized that, as the Commissioner found, Respondent was not charged with inefficiency, nor were the requirements of N.J.S.A. 18A:6-11 followed with regard to providing written notice of the alleged inefficiency and at least 90 days in which to correct and overcome the inefficiency.

[5] We note that although the Legal Committee had originally recommended that Respondent forfeit a total of six months' compensation as well as suffer a loss of increments for the 1987-88 school year (see, N.J.S.A. 18A:29-4.3 which permits but does not require that a board adopt a salary schedule for its superintendent of schools), the Board has advised us in its exceptions that, in this case, there was, in fact, no yearly increment for Respondent to lose for the 1987-88 school year.

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6114-87
(remand of EDU 0569-87)
AGENCY DKT. NO. 4-1/87

BOARD OF EDUCATION OF THE SUSSEX-WANTAGE REGIONAL SCHOOL DISTRICT,
Petitioner,
v.
LYNN JENISCH TYLER,
Respondent.

R. Webb Leonard, Esq., for petitioner
(Busche, Clark & Leonard, P.C., attorneys)

Sheldon H. Pincus, Esq., for respondent
(Bucceri and Pincus, attorneys)

Record Closed: November 30, 1987 Decided: December 15, 1987

BEFORE **WARD R. YOUNG**, ALJ:

The Board of Education of the Sussex-Wantage Regional School District (Board) certified charges of unbecoming conduct against Lynn Jenisch Tyler (Tyler), a tenured teaching staff member employed by the Board for about 20 years. The Board alleged that Tyler repeatedly inflicted corporal punishment upon pupils assigned to her second grade class in violation of N.J.S.A. 18A:6-1, and subjected her pupils to physical abuse and intimidating behavior. Tyler denies all allegations excepting two, one of which she asserts was reasonable, and with no recall of the other notwithstanding the stipulation. Tyler was suspended without pay upon the certification of charges.

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. The matter proceeded to four days of hearing and an Initial Decision entered on July 17, 1987. Testimony of a Division of Youth and Family Services (DYFS) investigator was not permitted due to its hearsay character in addition to being overburdensome as the pupils he interviewed would provide direct testimony at the hearing.

The Commissioner of Education remanded the matter in a decision dated September 2, 1987 to permit the DYFS investigator to testify to determine "whether the hearsay testimony of the DYFS investigator with regard to the earlier statements made to him by those pupil witnesses would be of asssistance in the assessment of the credibility and reliability of their direct testimony adduced approximately one-year later at the tenure hearing." (slip opinion at 18).

The matter was transmitted to the Office of Administrative Law on September 8, 1987 pursuant to N.J.S.A. 52:14F-1 et seq. and proceeded to hearing on November 6, 1987. Post-hearing submissions were filed by the parties and the record closed on November 30, 1987, the date established for final submission.

The DYFS investigator testified as to his November 1986 interviews with "A.G.," "S.D.", "F.B.", "J.R.", "A.S.", and "L.R." These pupils provided testimony at the hearing held in May 1987. His testimony of what the pupils said to him will be related to their testimony at hearing to determine assistance in the assessment of the credibility and reliability of their direct testimony.

CHARGES 1(e), 1(f), and 1(g)

"M.D.", the only pupil who testified at hearing concerning any of the above charges, was not interviewed by the investigator.

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CHARGES 1(h), 1(j), 1(b), and 1(c)

The investigator testified that "J.R." told him that Tyler poked him in the head with her finger because he didn't have a book 1(h); that Tyler sat him down hard in his seat, from which he slipped and fell on the floor 1(j); Tyler made him retrieve a toy tire from the toilet bowl 1(b); and that Tyler screams loudly every day. Concerning the demeanor of "J.R." during the interview, the investigator testified that "J.R." lowered his head and eyes, had difficulty in recall, and seemed bothered and concerned about Tyler.

The credibility of "J.R.'s" testimony at hearing is severely tainted concerning 1(j). He stated at hearing that Tyler pushed him across his desk when he was getting a book out; was facing his desk when this occurred; he slid across the desk head first on his belly; his feet dragged across the desk; and he landed on the floor on his back. (See, I.D. at 4).

The investigator also interviewed "S.D." but did not testify as to any comments from the pupil concerning any of the above charges. At hearing, however, "S.D." testified that he saw Tyler pick "J.R." up as he sat at his desk and threw him in his chair, and also stated that "J.R." did not slide across the desk or fall on the floor.

Concerning the demeanor of "S.D." at interview, the investigator indicated he was confused.

I **FIND** that the testimony of the investigator as to what "J.R." told him and what "S.D." did not tell him, compared to the testimony of both at hearing, strengthens the initial finding that the Board has failed to meet its burden of proof by a preponderance of credible evidence as to the truthfulness of charges 1(h) and 1(j) of the FIRST COUNT on charge 1(c) of the SECOND COUNT.

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CHARGE 1(i)

The investigator testified that "A.G." told him that Tyler slapped her in the face when she shouted an answer to a question asked by Tyler. He stated that no other details were provided by "A.G." and had no recall of any comments from "A.G." or any other pupils interviewed that "A.G.s" face turned red.

"A.S." was interviewed by the investigator who stated that "A.S." told him he saw Tyler slap "A.G." He also testified that "A.S." spoke in a low voice and was nervous.

The investigator also stated that "F.B." told him he saw Tyler slap "A.G.", and that "F.B." was nervous and reluctant because of questions being asked.

The significant differences in pupil responses to the investigator and testimony at hearing was the emphasis on "A.G.'s" reddened face at the latter with no mention of it at all by the investigator.

The findings incorporated in the Initial Decision related to this charge remain unchanged.

CHARGES 1(k) and 1(l)

The investigator testified that "A.S." told him that Tyler hit him in the back with an open hand when he touched a balloon, but made no mention of being hit by Tyler with a piece of paper.

"A.S." testified at hearing that Tyler hit him but once with paper, but it did not occur on "balloon-launching" day.

The credibility of the testimony of "A.S." is indeed suspect, but does not alter the findings in the Initial Decision that the Board failed to meet its burden of proof on either charge.

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DIVISION OF YOUTH AND FAMILY SERVICES (DYFS)

The Initial Decision in this matter under date of July 17, 1987 addresses the role of the DYFS investigator and a report by him under date of June 3, 1986, which was not marked for identification or submitted as an evidentiary document. It is recalled that counsel for the Board placed significant reliance on that report in certifying the charges against Tyler. (See, I.D. at 9).

The investigator refreshed his memory at the November 6, 1987 hearing by reviewing another report addressed to the Superintendent of Schools under date of May 8, 1987. Both counsel for the Board and petitioner indicated they were not aware of the existence of this report until the day of hearing. This report was marked for identification but not submitted as an evidentiary document.

It is recalled that the investigator testified at the initial hearing that the case "was not appropriate for referral to the County Prosecutor." (See, I.D. at 9).

The investigator testified on November 6, 1987 that that his conclusion from the pupil interview process was that Tyler was unfit to teach but since the Board intended to certify tenure charges against Tyler, no action was taken by DYFS. It is not known whether the DYFS determination to take no action was based on other reasons.

I am constrained to indicate a perception that the role of DYFS is to investigate child abuse complaints, not the fitness of one to teach, and to refer positive findings for prosecutorial action. No such referral was made in this matter.

A thorough review of the entire record in this matter, supplemented by the testimony of the DYFS investigator on remand, strengthens my conviction that the findings and conclusions in the Initial Decision have validity and the imposed penalty recommended is appropriate.

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This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

15 December 1987
DATE

WARD R. YOUNG, ALJ

Receipt Acknowledged:

DEC 17 1987
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

DEC 18 1987
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE TENURE	:	
HEARING OF LYNN JENISCH TYLER,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF SUSSEX-	:	DECISION ON REMAND
WANTAGE REGIONAL, SUSSEX COUNTY.	:	
	:	

The Commissioner has reviewed the entire record of this matter including the initial decision on remand rendered by the Office of Administrative Law. It is noted that the purpose of the Commissioner's remand of this matter to the Office of Administrative Law on September 2, 1987 was limited to obtaining further testimony at a hearing from the DYFS investigator regarding those prior interviews he had with pupils A.G., S.D., F.B., J.R., A.S. and L.R. who had also testified against respondent with regard to the Board's tenure charges at the tenure hearing in May 1987.

It is also observed that the Board's exceptions to the initial decision on remand, as well as respondent's reply to those exceptions, were filed with the Commissioner pursuant to the applicable provisions of N.J.A.C. 1:1-18.4 and 1:1-18.8.

Both parties also rely on their previous submissions of their exceptions to the initial decision handed down in this matter on July 17, 1987, as well as their post-hearing submissions to the ALJ in support of their respective positions. They are so noted by the Commissioner and incorporated herein by reference.

The Board in its exceptions to the initial decision on remand in this matter argues that the ALJ erred in failing to corroborate and validate the testimony of six pupil witnesses (A.G., S.D., F.B., J.R., A.S. and L.R.) with their earlier statements given to the DYFS investigator to which he testified at the limited hearing on remand in this matter. The Board in support of its exceptions on remand has cited the specific portions of the earlier transcripts of the testimony of these pupils with the testimony of the DYFS investigator adduced at the hearing on remand. The Board concludes as follows in its exceptions on remand:

> There is overwhelming evidence in this case that Respondent has slapped, struck, and abused her students with the improper use of her hands on many occasions. The children's testimony at the original trial of this matter has been well corroborated by the testimony of the DYFS investigator, Antonio Villegas. It is respectfully urged that the Commissioner make independent findings of fact that Respondent is guilty of corporal punishment and other conduct unbecoming a teacher which warrants her dismissal. (Board's Exceptions, at pp. 5-6)

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The Commissioner observes that respondent in her post-hearing letter brief to the ALJ excepts to his determination to proceed with the hearing on remand on the following grounds:

> Preliminarily, respondent wishes to reiterate the objection which was placed on the record relative to permitting any testimony by the DYFS investigator. As noted, the Commissioner's order of limited testimony related solely to the 1985-86 school year. However, a review of the tenure charges certified in this matter demonstrates that no allegations of unbecoming conduct are set forth that pertain to the 1985-86 school year.
>
> Your Honor determined to receive the testimony, conjecturing that the Commissioner really meant to say 1986-87 school year, as opposed to 1985-86. It is submitted, however, that receipt of the testimony was beyond the limited grant of jurisdiction conferred upon you by the Commissioner, on remand.
>
> The petitioner Board of Education had ample opportunity to appeal the issue to the New Jersey State Board of Education. Alternatively, it was incumbent upon petitioner (who bears the burden of proof in this matter) to at least seek a clarification order from the Commissioner. Its failure to pursue either alternative should not have been excused by receipt of the testimony
>
> (Post-Hearing Letter Brief, at pp. 1-2)

In all other respects, however, respondent does not take issue with the ALJ's findings and conclusions and, in reply to the Board's exceptions on remand, she argues that:

> A review of petitioner's exceptions serve[s] to provide absolutely no basis on which to overturn Judge Young's Initial Decisions in this matter (December 15, 1987 and July 17, 1987). Twice Judge Young has made critical credibility determinations based on his having conducted full hearings, and his having had a full opportunity to observe the demeanor of witnesses. Judge Young has carefully weighed the testimony of all witnesses and concluded that dismissal of respondent is not warranted under the facts presented by petitioner. This process delicately and thoroughly address[es] student testimony, recognizing that a word spoken does not always connote what actually happened. The process involves much more; to wit, a detailed assessment of gauging a student's ability to perceive, understand, relate and remember.

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> Petitioner over-simplifies the heavy burden of responsibility which Judge Young has demonstrated in this case, by its nit-picking and selective quotation from portions of the transcript. It is respectfully submitted that this does nothing to outweigh the vast and overwhelming evidence which goes against the position asserted by the petitioner herein. It is particularly disturbing that petitioner seeks to elevate the DYFS investigator to a position of "super-fact-finder", since a total review of his hearing testimony (both direct and cross-examination) leaves even a detached observer to conclude that the investigator's procedures were lacking in thoroughness and replete with superficial conclusions based on a dearth of facts. Respondent can do no better than to attach, and incorporate by reference, [her] post-hearing letter brief to Judge Young, dated November 19, 1987, which sets forth the testimonial shortcomings of the DYFS investigator. A review of this document will assuredly convince the Commissioner why so little weight was attached to his testimony when analyzing the limited issue on remand. (Reply Exceptions, at pp. 1-2)

Initially upon review of the record with respect to respondent's claim that the ALJ erred in allowing the limited hearing on remand to be extended to testimony encompassing the 1986-87 school year rather than those incidents which may have occurred during the 1985-86 school year as directed by the Commissioner in his decision on remand, the Commissioner determines that the ALJ in making such ruling correctly concluded that the year in question in his earlier decision resulted from a typographical error.

The Commissioner has thoroughly reviewed the record of this matter which includes the respective arguments of the parties and the transcripts of the testimony of the witnesses who testified at the initial hearings and the limited hearing conducted on remand in the instant matter. (See In re Morrison, 216 N.J. Super. 143 (App. Div. 1987).)

Based on such review of the record, the Commissioner adopts as his own those findings and determinations of the ALJ with respect to the following tenure charges against respondent:

First Count:

1(f) On or about April 17, 1984 [respondent] slapped [K.B.].

1(g) On April 24, 1984, [respondent] slapped [K.B.].

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Second Count:

1(b) On or about October of 1986 she required [J.R.] to remove a toy from a toilet bowl.

The Commissioner also adopts as his own those findings and determinations in the initial decision which hold that the following tenure charges against respondent be dismissed for lack of sufficient credible evidence.

First Count:

1(e) On or about January 1984, [respondent] slapped [K.B.].

1(h) On or about October 13, 1986 [respondent] "poked" [J.R.] on the side of his head.

1(j) On or about October or November 1986 [respondent] threw [J.R.] across his desk or into his seat.

1(k) On or about November 24, 1986 [respondent] hit [A.S.].

1(l) On December 1, 1986 [respondent] struck [A.S.] in the face with paper.

Second Count:

1(c) During the current school year, 1986-87, [respondent] has constantly singled out [J.R.], has yelled at him and called him names in front of his class.

The Commissioner, however, rejects those findings and determinations in the initial decision which recommend dismissal of the following tenure charge:

First Count:

1(i) [Respondent] hit [A.G.] on October 14, 1986.

In regard to tenure charge 1(i) of the First Count, the Commissioner has reviewed the testimony of the pupil witnesses A.G., A.S., F.B., L.R. and S.D.

It is noted that the testimony of S.D. was not relied upon with respect to this charge, not because of its lack of credibility but, rather, because while S.D. stated to the DYFS investigator that he saw respondent slap A.G. (Tr. R.I-32), no direct testimony was

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elicited from S.D. about this incident at the time of the hearing on the tenure charges against respondent. (Tr. II-47-49) While much of F.B.'s testimony is inconclusive with regard to the circumstances surrounding the incident with which respondent is charged herein, 1(i) of the First Count, the Commissioner notes that he did testify that he saw respondent slap A.G. in the face (Tr. II-6), which is supported by the earlier statement he gave to the DYFS investigator (Tr. R.I-32), and further that A.G. was slapped on the cheek (Tr. II-12), A.G.'s face was red (Tr. II-7), A.G. sat in the front of the classroom, (Tr. II-9), respondent was at the front of the classroom when the incident occurred (Tr. II-11), and A.G. did not cry as a result of the incident (Tr. II-14).

From a review of the brief testimony of L.R. at the hearing (Tr. I-207-209), the Commissioner observes that while he did testify that he saw A.G. get slapped by respondent (Tr. I-208) and that L.R.'s testimony in this regard is the same as was earlier reported to the DYFS investigator (Tr. R.I-43), he testified that he was confused, he could not remember any of the other circumstances surrounding the incident, First Count 1(i), involving respondent and A.G. (Tr. I-207-208).

The testimony of A.G. and A.S., however, is more definitive with respect to tenure charge 1(i) of the First Count. A.G. testified that respondent slapped her hard on the cheek during class with her hand and that the slap hurt and made her cheek turn red. She further testified on cross-examination (Tr. II-20) that the incident occurred before the incident between respondent and A.S. (See 1(1) First Count) which allegedly occurred on or about December 1, 1986. (Tr. II-29) A.G. also testified that she was sitting at her desk in the front of the room and that respondent was standing when the incident occurred. (Tr. II-29-31) When asked what she was doing at the time of the incident, A.G. replied:

> We were -- Mrs. Tyler asked a question and I thought, like that it was for the whole class to say it together.
>
> Because, sometimes [respondent] would ask us questions and the whole class would say it, but we were supposed to raise our hand and I yelled it out loud and [respondent] hit me. (Tr. II-30)

A.G. had previously stated to the DYFS investigator she was slapped in class by respondent. (Tr. II-30-31)

The testimony of A.S. with regard to the First Count 1(i) involving the incident between respondent and A.G. is essentially the same as it was related by A.G. with regard to:

1. Respondent slapping A.G. in class. (Tr. I-192)

2. A.G.'s face was red as the result of being slapped. (Tr. I-192)

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3. The incident with A.G. occurred before Christmas (1986) and before the incident in which respondent hit him with paper. (See First Count 1(1).) (Tr. I-192)

4. A.G. sat in front of the classroom and A.S. sat in the rear of the classroom. (Tr. I-197)

5. A.G. was sitting at her desk when the incident occurred. (Tr. I-200)

6. Respondent was standing facing A.G.'s desk at the time of the incident. (Tr. I-200)

7. A.G. did not cry afterward. (Tr. I-198)

The Commissioner observes that A.G. stated earlier to the DYFS investigator that respondent had slapped her on the face. A.G. also stated what she was doing at the time the incident occurred. (Tr. R.I-30) Similarly, A.S. stated to the DYFS investigator that he saw respondent slap A.G. in the classroom and that the incident occurred before Halloween. (Tr. R.I-41)

The Commissioner upon review of the testimony of these pupil witnesses, as well as the testimony of respondent reported in the initial decision and in the transcript of the hearing conducted on May 30, 1987 (Tr. IV-17-20, 39-42) finds and determines that there has been sufficient credible evidence presented by the Board to sustain First Count, charge 1(i).

Accordingly, the Commissioner, in reversing the ALJ's finding with respect to the First Count 1(i), finds and determines that respondent has violated the provisions of N.J.S.A. 18A:6-1 in that she did inflict corporal punishment upon A.G. as charged by the Board and that the Board has produced sufficient credible evidence in the record of this matter to sustain such tenure charge.

What remains herein for the Commissioner to determine is whether or not the penalty recommended by the ALJ on page 12 of the initial decision dated July 17, 1987 is deemed to be appropriate insofar as respondent has been found to be guilty of the following tenure charges against her:

First Count:

1(f) On or about April 17, 1984 [respondent] slapped [K.B.].

1(g) On April 24, 1984, [respondent] slapped [K.B.].

1(i) [Respondent] hit [A.G.] on October 14, 1986.

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Second Count:

> 1(b) On or about October of 1986 she required [J.R.] to remove a toy from a toilet bowl.

In reaching a determination with regard to the penalty to be imposed herein, the Commissioner cannot ignore those findings of the ALJ with regard to those acts committed by respondent upon certain of her second grade pupils which did not rise to the level of those charges of corporal punishment sustained by the ALJ and the Commissioner. Nevertheless, such findings support the fact that respondent used her hands freely on children in her class to reinforce directions in order to achieve a desired response.

In the Commissioner's judgment, such lack of discipline as evidenced by respondent herein cannot be tolerated. In commenting upon the use of inappropriate physical force upon pupils, the Commissioner has stated in pertinent part in re In the Matter of the Tenure Hearing of Thomas Appleby, School District of the City of Vineland, 1969-70 S.L.D. 159:

> The Commissioner finds in the century-old statute prohibiting corporal punishment (N.J.S.A. 18A:6-1) an underlying philosophy that an individual has a right not only to freedom from bodily harm but also to freedom from offensive bodily touching even though there be no actual physical harm. In the Matter of the Tenure Hearing of Frederick L. Ostergren, 1966 S.L.D. 185, 186. The Commissioner said further, In the Matter of the Tenure Hearing of David Fulcomer, 1962 S.L.D. 160, 162, remanded State Board of Education 1963 S.L.D. 251, decided by the Commissioner 1964 S.L.D. 142, affirmed State Board of Education 1966 S.L.D. 225, reversed and remanded 92 N.J. Super. 404 (App. Div. 1967), decided by the Commissioner 1967 S.L.D. 215,
>
> > "***that such a philosophy with its prohibition of the use of corporal punishment or physical enforcement does not leave a teacher helpless to control his pupils. Competent teachers never find it necessary to resort to physical force or violence to maintain discipline or compel obedience. If all other means fail there is always a resort to removal from the classroom or school through suspension or expulsion. The Commissioner cannot find any justification for, nor can he condone, the use of physical force by a teacher to maintain discipline or to punish infractions. Nor can the

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> Commissioner find validity in any defense of the use of force or violence on the ground that 'it was one of those things that just happen'***. While teachers are sensitive to the same emotional stresses as all other persons, their particular relationship to children imposes upon them a special responsibility for exemplary restraint and mature self-control."

> Thus, when teachers resort "to unnecessary and inappropriate physical contact with those in their charge [they] must expect to face dismissal or other severe penalty." In re Ostergren. (at 173)

The Commissioner observes that the pattern of respondent's conduct which as the result of the tenure charges against her go back as far as the 1983-84 school year involving corporal punishment of pupils and have reemerged during the 1986-87 school year in the form of her inability to refrain from using excessive physical force in reprimanding and disciplining her second grade pupils. The Commissioner has previously relied upon the language of the court in Redcay v. State Board of Ed., 130 N.J.L. 369 (Sup. Ct. 1943), aff'd 131 N.J.L. 326 (E. & A. 1944) wherein the court adopted the following language of the Commissioner:

> Unfitness for a task is best shown by numerous incidents. Unfitness for a position under a school system is best evidenced by a series of incidents. Unfitness to hold a post might be shown by one incident, if sufficiently flagrant, but it might also be shown by many incidents. (130 N.J.L. at 371)

The Commissioner has also held on numerous occasions that those persons who enter the teaching profession exercise a significant influence upon those they teach and, consequently, must exhibit a high degree of exemplary behavior. The Commissioner's repeated admonition found in In the Matter of the Tenure Hearing of Jacque L. Sammons, School District of Black Horse Pike Regional, 1972 S.L.D. 302, wherein he said:

> Of *** concern to the Commissioner is the situation where the teacher, who should set the good example, assumes that some higher right justifies activities, which are inimical to the public interest and which are designed to impede the orderly process of public education. ***He is constrained to remind the teachers of this State, however, that they are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will

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> result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. As one of the most dominant and influential forces in the lives of the children, who are compelled to attend the public schools, the teacher is an enormous force for improving the public weal. Those who teach do so by choice, and in this respect the teaching profession is more than a simple job; it is a calling.*** (emphasis supplied) (at 321)

Although no one of the proven charges of corporal punishment standing alone might be sufficient ground to result in a penalty of dismissal against respondent, the Commissioner concludes that the cumulative effect of the charges in the instant matter goes beyond the standard in Redcay, supra, and requires that a penalty of dismissal of respondent from her tenured teaching position be imposed by the Commissioner.

Accordingly, the Commissioner adopts as his own the findings of the ALJ as supplemented herein with the exception of the penalty recommended to be imposed upon respondent.

The Commissioner hereby finds and determines that respondent shall forfeit her tenured teaching position in the employ of the Sussex-Wantage Regional School District effective as of the date of this decision. It is further ordered that pursuant to N.J.A.C. 6:11-3.7 a copy of the final decision in this matter be forwarded to the State Board of Examiners for its review and, in its discretion, any further action deemed appropriate.

COMMISSIONER OF EDUCATION

Feburary 10, 1988

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IN THE MATTER OF THE TENURE :
HEARING OF LYNN JENISCH TYLER, : STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF SUSSEX-WANTAGE : DECISION
REGIONAL, SUSSEX COUNTY. :
:

Remanded by the Commissioner of Education, September 2, 1987

Decided by the Commissioner of Education, February 10, 1988

For the Respondent-Appellant, Bucceri & Pincus
(Sheldon H. Pincus, Esq., of Counsel)

For the Petitioner-Respondent, Busche, Clark & Leonard
(R. Webb Leonard, Esq., of Counsel)

On January 7, 1987, the Board of Education of the Sussex-Wantage Regional School District (hereinafter "Board") certified charges of unbecoming conduct against Lynn Jenisch Tyler (hereinafter "Respondent"), a tenured teaching staff member employed by the Board since 1966. The Board alleged that Respondent repeatedly inflicted corporal punishment on students in her 2nd grade class in violation of N.J.S.A. 18A:6-1, and subjected her pupils to physical abuse and intimidating behavior. Respondent was suspended without pay from her teaching position pending final determination of the charges.

During four days of testimony, an Administrative Law Judge (ALJ) heard six second graders, one fifth grader and Respondent testify as to their recollections of the charged incidents. A Division of Youth and Family Services (DYFS) investigator, who had interviewed the student witnesses was not permitted to testify as to what the students had told him due to the hearsay nature of the testimony and the ALJ's belief that such testimony would be overburdensome since the students would provide direct testimony at the hearing.

Based on the testimony, the ALJ rendered his Initial Decision on July 17, 1987. Acknowledging that the credibility of the testimony was critical, the ALJ considered each charge individually. Of the ten charges considered, he found that the Board had substantiated fully by a preponderance of credible evidence two charges which alleged that Respondent had slapped a student in April, 1984 [charges 1(f) and 1(g) of the First Count] and one charge of ordering a student to retrieve a toy from a toilet bowl [charge 1(b) of the Second Count]. The latter was, however, dismissed because of its de minimus nature. He recommended dismissal of the remaining charges.

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The ALJ determined that other than charge 1(g) and a stipulated unrecalled incident in charge 1(f), the Respondent had not exercised corporal punishment. He did, however, acknowledge that "this seasoned teacher of some 20 years becomes frustrated when the conduct or response of her pupils falls short of her standards," and that Respondent "rather freely uses her hands on pupils to reinforce her directions in order to achieve a desired response." Initial Decision, at 10-11. As a result of his findings, the ALJ concluded that the imposition of a penalty other than dismissal was warranted, and recommended that compensation withheld from the Respondent during the first 120 days of her suspension be forfeited and that she suffer a loss of increments for the 1987-88 and 1988-89 school years.

On September 2, 1987, upon review of the record, the Commissioner of Education rejected the ALJ's decision to exclude the testimony of the DYFS investigator, and remanded the matter back to the Office of Administrative Law (OAL) for a limited hearing and findings of fact pertaining to the information the DYFS investigator obtained from the student witnesses during his investigation. The Commissioner based his decision to remand upon N.J.A.C. 1:1-15.5, which permits hearsay evidence to be admitted in the trial of contested cases. Commissioner's Decision, at 18. The Commissioner also disagreed with the ALJ's assertion that the admission of the hearsay testimony of the DYFS investigator would require an undue consumption of time or burden the record. "What is at issue here," he noted, "is whether the hearsay testimony of the DYFS investigator with regard to the earlier statements made to him by those pupil witnesses would be of assistance in the assessment of the credibility and reliability of their direct testimony adduced approximately one year later at the tenure hearing." Id.

On November 6, 1987, another hearing was held before the ALJ to take testimony from the DYFS investigator to assist in determining the student witnesses' credibility. At that hearing, the DYFS investigator testified as to his November 1986 interviews with the student witnesses, refreshing his memory by referring to the contents of a May 8, 1987 report addressed to the Superintendent of Schools. The investigator admitted that he had no independent recollection of the substance of his discussions with the students, although he contended that he recalled the appearance and demeanor of several students. Tr. 11/6/87, at 49-50. Both the Board and Respondent denied previous knowledge of that report.[1]

---

[1] It should be noted that on May 12, 1987 at the first ALJ hearing, the DYFS investigator testified that he had conducted an investigation of the complaint on December 10, 1984 and had submitted a report to the Superintendent of Schools under date of June 3, 1986. That report was not marked for identification or submitted into evidence at that hearing. The investigator made no mention at that time of the May 8, 1987 report. Tr. 5/12/87, at 120-31.

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On December 15, 1987, the ALJ recommended upholding the findings and conclusions and penalty imposed in his Initial Decision of July 17, 1987, noting: "A thorough review of the entire record in this matter, supplemented by the testimony of the DYFS investigator on remand, strengthens my conviction that the findings and conclusions in the Initial Decision have validity and the imposed penalty recommended is appropriate." Initial Decision, at 5.

On February 10, 1988, upon review of the record, including the testimony of the DYFS investigator and the Initial Decision of December 15, 1987, the Commissioner adopted all of the ALJ's findings and determinations except for his dismissal of charge 1(i) of the First Count, which alleged that Respondent had slapped a student in her second grade class in October, 1986. The Commissioner determined that there was sufficient credible evidence presented to sustain that charge, and found that Respondent had violated N.J.S.A. 18A:6-1 in that she did inflict corporal punishment upon the student. He concluded that the cumulative effect of the charges required a penalty of dismissal of Respondent from her tenured teaching position.

Respondent seeks to reverse the Commissioner's decision and urges us to adopt the findings and recommended penalty of the ALJ. Respondent argues that the DYFS investigator's testimony revealing information contained in his report of May 8, 1987 violates the confidentiality requirements of N.J.S.A. 9:6-8.10(a), which limits the release or disclosure of child abuse records, reports and information obtained by DYFS in investigating such reports. As Respondent points out, the only specific section of that statute upon which release or disclosure of this report may be founded is section b(6), which provides:

> b. The division may release the records and reports referred to in subsection a, or parts thereof, to:
>
> (6) A court, upon its finding that access to such records may be necessary for determination of an issue before the court, and such records may be disclosed by the court in whole or in part to the law guardian, attorney or other appropriate person upon a finding that such further disclosure is necessary for determination of an issue before the court.

Respondent, however, challenges the status of the Office of Administrative Law and Commissioner of Education as a "court" within the meaning of the statute, and argues that the Commissioner's decision dismissing Respondent should be reversed since it relies on reports and information expressly prohibited from disclosure. We agree.

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Despite the fact that the work of the OAL and Commissioner of Education in these matters is typical of judicial proceedings, "an administrative agency is not a court." N.J. Board of Optometrists v. Nemitz, 21 N.J. Super. 18, 25 (App. Div. 1952). As noted in Mulhearn v. Fed. Shipbuilding and Dry Dock Co., 2 N.J. 356, 365 (1949):

> Were the rule otherwise and were every executive, administrative, legislative or municipal adjudication deemed judicial and the official or body making the adjudication regarded as a judge or court, we should be driven to treat every public official in the State, from the Governor to the members of a local board of adjustment passing on a zoning question or of a board of education trying a school teacher on charges, as a judge or court - a conclusion so extravagant that its mere statement demonstrates its fallaciousness as well as its undesirability. Once... it is conceded that the courts are not the exclusive instrumentalities for adjudication, the true nature of the administrative adjudications, commonly termed 'quasi-judicial' becomes apparent. This term serves to characterize not the quality of the adjudication but its origin outside the judicial branch of the government.

Under current procedure, the Commissioner of Education acts as the decision-maker for the board of education in tenure disputes. After consideration of the charge, statement of position and statements of evidence from the charged employee, the board determines by majority vote whether probable cause exists to credit the evidence in support of the charge. N.J.S.A. 18A:6-11. If the board so finds, it then forwards the charge to the Commissioner for a hearing. Id. N.J.S.A. 18A:6-10 provides that a tenured board of education employee may be dismissed or reduced in compensation only after a hearing held by the Commissioner or a person appointed by him to act in his behalf after the board votes to forward a charge to the Commissioner.

The fact that such disputes are initially heard by an ALJ does not change the nature of the proceedings. As noted in In re: Uniform Adm'v. Procedure Rules, 90 N.J. 85, 94 (1982): "In creating an independent Office of Administrative Law, the Legislature intended no alteration of the regulation authorizing or basic decisional powers of administrative agencies."

The court therein had noted that "administrative agencies are not judicial tribunals... Rather, administrative agencies are part of the executive branch of government, charged with the responsibility of faithfully executing the laws. N.J. Const. (1947), Art. 5, section 1, paragraph 11. Agencies are specially created by the Legislature to administer laws in accordance with the statutory duties that have been selectively delegated to them...Thus, 'the adjudicative functions of administrative agencies are actually an

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aspect of their regulatory powers and, in essence, do not embrace or constitute an exercise of judicial authority.'" Id. at 92-93, quoting City of Hackensack v. Winner, 82 N.J. 1, 29 (1980).

The fact that the OAL and Commissioner are conducting hearings and making decisions on behalf of the board of education after disputes are certified to the Commissioner does not alter the basic administrative nature of the tribunal.

Thus, since the OAL and Commissioner are not courts, the contents of the DYFS investigator's report could not be released or disclosed in proceedings before such tribunals without a court order. In this case, the DYFS investigator admitted to having no independent recollection of the substance of the students' statements, and so relied upon the information contained in the report in testifying. In light of these circumstances, we find that consideration of his testimony as to the substance of the students' statements contained in the report would be contrary to the express prohibition of N.J.S.A. 9:6-8.10(a), which protects the confidentiality of records of child abuse reports and information obtained by DYFS in investigating such reports.[2] In that we have concluded that the DYSF investigator's testimony upon which the Commissioner based his substantiation of charge 1(i) was not proper, we must now review the record in order to make a determination on that charge.

In the Initial Decision handed down on July 17, 1987, in which the testimony of the DYFS investigator was not permitted, the ALJ found that the Board had not met its burden as to the truthfulness of charge 1(i). The ALJ based his decision upon his "observation of the demeanor of all witnesses, particularly of the tender ages of 7 or 8 years, and the determination of the credibility of testimonial evidence." Initial Decision, at 7. It was the ALJ's conclusion that Respondent used her hand on "A.G." to sit her down, but did not hit her as alleged. Id.[3] After a thorough review of

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[2] We acknowledge that in the matter now before us, the Board, as well as the Respondent and the Commissioner in ordering the remand, were apparently unaware of the existence of this report until the DYFS investigator revealed it during his testimony before the ALJ on November 6, 1987.

[3] It should be noted that the ALJ in his Initial Decision dated December 15, 1987, in which he considered the DYFS investigator's testimony in assessing the credibility and reliability of the student witnesses, reached the same conclusion with regard to this charge. In fact, he found "significant differences" in the pupils' responses to the investigator and their testimony at the hearing. At the hearing, they emphasized "A.G.'s" reddened face after the alleged incident, yet apparently made no mention of that fact to the investigator. Initial Decision, at 4.

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the record, including the transcripts, we agree with the ALJ that the Board has failed to meet its burden of proof by a preponderance of credible evidence as to the truthfulness of this charge.

At the hearing held before the ALJ, "A.G." testified that Respondent had asked a question which she thought was for the whole class to answer out loud. But this was not the case and, according to "A.G.," when she yelled out an answer, Respondent hit her on her cheek with an opened hand. "A.G." testified that her cheek hurt and turned red and that she felt like crying but was too embarrassed. Tr. 5/13/87, at 20-31.

Pupil "F.B." testified that while he sat far away from "A.G.," he saw Respondent hit "A.G." on the cheek with an opened hand. He stated that "A.G." showed him her red cheek later that day, that there was no noise at the time of the alleged slap, and that "A.G." didn't cry and went back to what she had been doing. "F.B." could not state with clarity where he sat in relation to "A.G.," and also stated that he had had Respondent as a teacher before when in fact he had not. Tr. 5/13/87, at 6-15.

Pupil "A.S." stated that he saw Respondent's hand on "A.G.'s" cheek, but didn't see how her hand came to be there. He further testified that "A.G." didn't say anything or cry, but that her cheek was red. Tr. 5/12/87, at 197-98.

Pupil "L.R." at first testified that he saw the incident but didn't see if Respondent just pushed "A.G." or not. He then stated that he didn't remember what happened. Tr. 5/12/87, at 208-9.

Pupil "S.D." stated that he didn't see Respondent hit or push anyone. Tr. 5/13/87, at 48.

It was Respondent's contention that while the students may have perceived the incident as a slap, she had simply placed her hand on the side of "A.G.'s" face and shoulder to turn her around and sit her down. Respondent stated that she used no force, but merely drew the student around. She testified that "A.G." sat down and went back to work. Tr. 5/30/88, at 17-20, 39-43.

It has long been recognized that the testimony of children of tender age must be examined with great caution. See, In the Matter of the Tenure Hearing of William Simpson, 1978 S.L.D. 368, 374 aff'd by the State Board of Education, 1978 S.L.D. 377; In the Matter of the Tenure Hearing of Fredrick J. Nittel, 1974 S.L.D. 1269, 1278-9, aff'd by the State Board of Education, 1975 S.L.D. 1111.

In this matter, only two student witnesses, including "A.G.," testified as to the Respondent hitting her. One of them, "F.B." admitted to being far away from "A.G." at the time, could not state with clarity where he sat in relation to A.G., and also stated that he had had Respondent as a teacher before when in fact he had not. "A.S." saw Respondent's hand on "A.G.'s" cheek, but didn't know the specifics of the incident. "L.R." first said he saw the

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incident but then said he couldn't remember it. Several students testified that "A.G." didn't say anything or cry, but went back to what she had been doing. "S.D." stated that he didn't see Respondent hit or push anyone.

The ALJ considered the demeanor of the witnesses, particularly of the 7- and 8-year-old students, and reached the conclusion that Respondent used her hand on "A.G." to sit her down, but did not hit her as alleged. From a cautious review of the record, we find contradictions and inconsistencies in "F.B.'s" testimony that, in light of statements that "A.G." didn't cry or say anything when allegedly struck and went back to her work, make it difficult to credit his version of the incident without independent corroborating evidence. We find it difficult to believe that a second-grader struck in the face with force sufficient to redden her cheek would react without crying or making any sound, but by simply returning to her work. We note also, in this context, "F.B.'s" statement that the alleged slap made no noise. The evidence presented is simply too tenuous and inconsistent to sustain this charge.

We turn now to a consideration of the appropriate penalty to be imposed. The matter before us involves findings of truthfulness on two charges alleging that Respondent slapped a student (and one charge of forcing a student to retrieve a toy from a toilet bowl, which was dismissed as de minimus). Both upheld slapping incidents [charges 1(f) and 1(g) of the First Count] involved "K.B.," whose mother concedes is a troublesome child who was once suspended for hitting a teacher. Initial Decision, at 3. On charge 1(f), Respondent testified she had no recall of the incident, notwithstanding that it was stipulated that it occurred. Id. On charge 1(g), Respondent testified that three students were on the floor engaged in a fight, with "K.B." on top. When Respondent pulled "K.B." off of the pile, he yelled at her indicating that he didn't start the fight, and Respondent slapped his face. Id.

We cannot overstate the serious nature of these offenses.

> Competent teachers never find it necessary to resort to physical force or violence to maintain discipline or compel obedience. If all other means fail there is always a resort to removal from the classroom or school through suspension or expulsion. The Commissioner cannot find any justification for, nor can he condone the use of, physical force by a teacher to maintain discipline or to punish infractions. Nor can the Commissioner find validity in any defense of the use of force or violence on the ground that "it was one of those things that just happen....." While teachers are sensitive to the same emotional stresses as all other persons, their particular relationship to children imposes upon them a special responsibility for exemplary restraint and mature self-control.

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In the Matter of the Tenure Hearing of Thomas Appleby, 1969 S.L.D. 159, 173, aff'd, State Board, 1970 S.L.D. 448, aff'd, Docket #A-539-7 (App. Div. March 14, 1972), quoting In the Matter of the Tenure Hearing of David Fulcomer, 1962 S.L.D. 160, 162, remanded to the State Board of Education, 1963 S.L.D. 251, decided by Commissioner, 1964 S.L.D. 142, aff'd, State Board of Education, 1966 S.L.D. 225, rev'd and remanded, 93 N.J. Super. 404 (App. Div. 1967), decided by Commissioner, 1967 S.L.D. 215.

The balancing act necessary for the determination of a just and reasonable penalty was set forth in Fulcomer, supra:

> We hold no brief for the teacher's conduct in this case. Other proper means were available to him to maintain discipline or compel obedience. Nor have we any doubt that unfitness to remain a teacher may be demonstrated by a single incident if sufficiently flagrant. See Redcay v. State Board of Education, 130 N.J.L. 369 (Sup. Ct. 1943), affirmed o.b. 131 N.J.L. 326 (E. & A. 1944).
>
> Here, however, there is no indication in the record that the teacher's acts were premeditated, cruel or vicious, or done with intent to punish or to inflict corporal punishment. Rather, they bespeak a hasty and misguided effort to restrain the pupil in order to maintain discipline.
>
> Although such conduct certainly warrants disciplinary action, the forfeiture of the teacher's rights after serving for a great many years in the New Jersey school system is, in our view, an unduly harsh penalty to be imposed under the circumstances. The Commissioner noted that the teacher received his full salary during his suspension by the township board. However, consideration should be given to the impact of the penalty on appellant's teaching career, including the difficulty which would confront him, as a teacher dismissed for unbecoming conduct, in obtaining a teacher position in this State, with the resultant jeopardy to his equity rights in the Teacher's Pension Fund accruing from his 19 years credit.
>
> At the time appellant was suspended he had 23 years' teaching experience and held a master's degree. He had been employed since 1954 by the Holland board. It appears that if this teacher, who is aged 56, is re-employed in New Jersey, he will be eligible for retirement in approximately four years with a pension for life of one-half of his last year's salary - in this case an annual pension of at least $3,500. We observe that the

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> local board recognized that Fulcomer's teaching record was good and his teaching ability unquestioned. He had not been disciplined in any manner by the board prior to the date of the incidents involved in these charges, and he had consistently received pay raises each year.
>
> This matter is therefore remanded to the Commissioner of Education for the purpose of making an affirmative decision as to the proper penalty to be imposed. Such penalty should be based upon the Commissioner's findings as to the nature and gravity of the offenses under all the circumstances involved, any evidence as to provocation, extenuation or aggravation, and should take into consideration any harm or injurious effect which the teacher's conduct may have had on the maintenance of discipline and the proper administration of the school system.

93 N.J. Super. at 421-22.

Here, as in Fulcomer, although Respondent's conduct certainly warrants disciplinary action, the forfeiture of her teaching position after serving for twenty years in the New Jersey school system is an unduly harsh penalty to be imposed under the circumstances. There is also no indication in the record that her acts were premeditated, cruel or vicious or done with intent to punish or to inflict corporal punishment. While we have no indication of the specific circumstances surrounding the stipulated incident in charge 1(f), the incident described in charge 1(g) occurred when Respondent broke up a fight. There is no indication on the record that the student was injured in either incident.

However, we cannot ignore the fact that Respondent had been reprimanded during the 1981-82 school year for similar behavior while she was teaching Kindergarten, and that in 1979, a memorandum had been written by her former principal regarding similar behavior. P-1, in evidence. In addition, Respondent acknowledged in response to a reprimand following the 1984 slapping incidents that "on rare occasions, I react immediately without thought to the ultimate consequence of my action." P-2, in evidence. And as Charles E. Lorber, the school principal notes in a memo to the Superintendent of Schools, the student-witnesses "spoke freely of their fear of their teacher." P-5, in evidence. We also cannot overlook the fact that the student involved in the two slapping charges we have upheld was a second grader, 7 or 8 years of age. We cannot lightly dismiss Respondent's failure to use self-control when dealing with students of such tender age, regardless of the circumstances.

Nor can we overlook Respondent's admission under charge 1(i) of the First Count that she touched a student's face and shoulder to turn her around and sit her down, albeit without force. Tr. 5/30/87, at 17-20, 39-43. While not rising to the level of

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corporal punishment, such conduct demonstrates a lack of proper restraint by Respondent, especially when considered in light of the charges we have upheld, the previous warnings issued to her and the ALJ's conclusion that Respondent "rather freely uses her hands on pupils to reinforce her directions." Initial Decision, at 11.

Therefore, while we concur with the ALJ that the record supports a finding of the truthfulness of the incidents alleged in charges 1(f) and 1(g) of the First Count, and that dismissal of Respondent is too harsh under the circumstances, we conclude that Respondent's conduct calls for more severe disciplinary action than that imposed by the ALJ. The record establishes that on several occasions, despite previous warnings, Respondent failed to exercise the high degree of restraint and self-control expected of teaching professionals.

In light of these circumstances, we believe that a penalty severe enough to impress upon the Respondent the seriousness of her actions is necessary. See, In the Matter of the Tenure Hearing of Robert E. Doyle, decided by the Commissioner, March 15, 1984, rev'd by the State Board, Nov. 7, 1984, aff'd in part, vacated in part and remanded, 201 N.J. Super. 347 (App. Div. 1985), decision on remand by the State Board, June 4, 1986, aff'd in part and remanded, Docket #A-4885-85T5 (App. Div. Nov. 13, 1986), decision on remand by the State Board, Jan. 7, 1987, aff'd, Docket #A-4885-85T5 (App. Div. June 3, 1987), certif. denied, 109 N.J. 55 (1987); In the Matter of the Tenure Hearing of Frederick L. Ostegren, 1966 S.L.D. 185. We therefore increase the amount of monetary loss Respondent would suffer were we to adopt the penalty recommended by the ALJ and direct that she forfeit six months' salary,[4] as well as suffer loss of increments for the 1987-88 and 1988-89 school years.

Attorney exceptions are noted.

November 1, 1988

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[4] The ALJ recommended that Respondent forfeit salary withheld during the first 120 days of her suspension. As provided by N.J.S.A. 18A:6-14, that amount represents loss of pay for a period of 120 calendar days, which would equal the loss of four months' salary.

Pending N.J. Superior Court

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4795-87
AGENCY DKT. NO. 151-5/87

CHARLES CWIERKO AND MARK KOHL,
Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,
Respondent.

Reba Carmel, Esq., attorney for petitioners
(Oxfeld, Cohen, Blunda, Friedman, LeVine and Brooks, attorneys)

William A. Massa, Esq., attorney for the Board

Record Closed: December 28, 1987 Decided: January 6, 1988

BEFORE **JAMES A. OSPENSON,** ALJ:

Charles Cwierko, previously a tenured teacher employed by the Board of Education of the City of Jersey City, Hudson County, was employed during the 1984-85 school year in the position of social worker. Mark Kohl, previously a tenured speech correctionist, was employed by the Board during the 1983-85 school years in the position of coordinator, speech correction. By resolutions on September 18, 1985 and August 28, 1985, the Board reassigned Cwierko to the high school as an English teacher and Kohl to his former

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position of speech correctionist. In a petition of appeal filed against the Board, Kohl and Cwierko alleged their involuntary transfers were not effectuated through Board resolution, in violation of school laws, and that their involuntary demotions were the result of political animus and harassment against them in violation of law and Article I, Section 1 of the New Jersey Constitution. They demanded judgment reinstating them to their positions. The Board in answer admitted petitioner's prior tenured positions but denied they had acquired tenure either as social worker or as coordinator, speech correction; denied Board action in transfer and reassignment of petitioners was without appropriate Board resolution; raised affirmative defenses including the untimely filing of the petition under N.J.A.C. 6:24-1.2; and alleged further that petitioners took their respective grievances to arbitration unsuccessfully, the arbitrator's opinion having been dated April 29, 1987.

The petition of appeal was filed in the Bureau of Controversies and Disputes of the Department of Education on May 22, 1987. The Board's answer was filed there on June 29, 1987. Accordingly, the Commissioner transmitted the matter to the Office of Administrative Law on July 13, 1987 for hearing and determination as a contested case in accordance with N.J.S.A. 52:14F-1 et seq.

On notice to the parties the matter was set down for prehearing conference and an order entered on September 17, 1987, establishing a hearing date on November 17, 1987. By order of the administrative law judge on October 29, 1987, the parties were directed to confer and prepare before hearing, for submission at hearing, a stipulation of facts and documentation relative to the Board's first, second and fifth separate defenses to the petition of appeal, which dealt with the defense of the bar of the limiting period of N.J.A.C. 6:24-1.2, the defense of the bar of laches and the defense of the non-compliance by petitioners with N.J.A.C. 6:24-1.3(b), requiring petitioners to have pleaded the result of arbitration proceedings concluded on April 29, 1987.

The matter was addressed at hearing on November 17, 1987, therefore, as if on cross-motions for summary decision on the separate defenses. A factual and documentary record was stipulated. Thereafter, time for posthearing submissions having elapsed, the record closed on December 28, 1987.

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ADMISSIONS, STIPULATIONS, DOCUMENTATION AND FINDINGS OF FACT

The parties having so admitted, stipulated and agreed on documentation, I make the following **Findings of Fact:**

1. Petitioner Charles Cwierko taught English at Dickinson High School from 1970 to September 1984. Cwierko is a tenured teacher.

2. During the 1984-85 school year, Cwierko was employed in the non-tenured position of social worker at the Bureau of Pupil Personnel Services. He was appointed by Board resolution at its August 29, 1984 meeting.

3. On August 27, 1985, Cwierko was notified by letter from the assistant superintendent in charge of personnel that he was being reassigned to Ferris High School as an English teacher. He was reassigned by Board respolution at its September 18, 1985 meeting. (Copy of the resolution is R-1 and is attached hereto).

4. Cwierko was not tenured in the position of school social worker and therefore held no seniority in that position.

5. Petitioner Mark Kohl worked as a speech correctionist in the Bureau of Pupil Personnel Services during the 1974-83 school years.

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6. Kohl applied for a vacancy involving the position of coordinator, speech correction. He was so appointed and served in that capacity during the 1983-85 school years.

7. On August 29, 1985, Kohl was notified by the assistant superintendent in charge of personnel that he was being reassigned to his former position of speech correctionist. (Copy of Board resolution that reassigned Kohl is R-2 and is attached hereto).

8. Both petitioners were returned to their tenured positions by Board resolutions.

9. Neither petitioner acquired tenure in the positions from which they were transferred in August and September 1985.

10 Arbitration requests were filed by both petitioners in July 1986, almost one year later. Hence, no action before the Commissioner was instituted in any forum within the 90-day rule. P-14; P-33.

11. Arbitration was held before arbitrator Lawrence Hammer. Hearings were held on September 11, 1986 and February 25, 1987. P-36.

12. The arbitrator found in favor of the Board on April 29, 1987, unappealed. He denied the grievances. P-36.

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DISCUSION

Stipulated facts make clear the gravamen of claims of both petitioners is their reassignment by the Board in August and September 1985, some twenty months before their petition of appeal was filed in the Department of Education on May 22, 1987, whether viewed as improper transfers under N.J.S.A. 18A:27-3.1 et seq. or as transfers improperly motivated and impelled by political animus. In either case, the timeliness of their petition is controlled by N.J.A.C. 6:24-1.2(b), which provides:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education which is the subject of the requested contested case hearing.

Petitioners' prompt resort to grievance procedure under the binding arbitration procedure of Article II of the negotiated agreement between Jersey City Board of Education and Jersey City Education Association (R-3), without equally prompt protection of their right to resort to the disputes resolution jurisdiction of the Commissioner under N.J.S.A. 18A:6-9, has been held indefensible under recent and well-recognized decisional law. See Riely v. Hunterdon Central High School Bd. of Ed., 173 N.J. Super. 109, 112 (App. Div. 1980); Bd. of Ed., Bernards Twsp. v. Bernards Twsp. Education Association, 79 N.J. 311 (1979), in which the procedural relationship between arbitration and administrative appeal was explained:

> Under N.J.S.A. 18A:29-14, the Commissioner has been delegated the responsibility to promulgate rules and regulations concerning the matter in which an aggrieved teacher may appeal adverse board determinations. Pursuant to this grant of authority, such rules have been adopted. See N.J.A.C. 6:24-4.1, N.J.A.C. 6.24-1.1 to 6:24-1.9. These rules require a teacher to file a petition with the Commissioner within 90 days of his receipt of notice of the board's decision to withhold an increment. N.J.A.C. 6:24-1.2. A teacher who proceeds to advisory arbitration is not relieved from

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> compliance with this 90-day filing requirement. However, in order that the goals underlying our decision to permit this type of arbitration be achieved, the Commissioner must wait until the arbitration is completed and an advisory decision rendered before conducting a hearing on the merits of the teacher's petition. [79 N.J. at 326-327, n. 4].

Petitioners themselves have recognized the relationship, citing in their brief [at 1-2] Gincel v. Bd. of Ed. Twsp. of Edison, 1980 S.L.D. 943, aff'd State Bd. of Ed., Nov. 5, 1980, aff'd Superior Court, App. Div., 1982 S.L.D. 1503, in which the Appellate Division said:

> Proceeding with a claim to arbitration does not toll the 90-day period for filing an appeal with the Commissioner. Such appeals must be filed within 90 days of notice of the action appealed from whether or not the claim is first submitted to arbitration. No claim is made here, however, that by virtue of his attempt to have the matter resolved by arbitration, [petitioner] has somehow fulfilled the requirements of N.J.A.C. 6:24-1.2. [Id. at 1507].

In North Plainfield Education Association v. Bd. of Ed., Borough of North Plainfield, 96 N.J. 587 (1984), a case in which two teachers sought credit on the salary scale for time spent on sabbatical but had not filed timely petitions of appeal, preferring instead to exhaust grievance and arbitration procedures as allowed in the negotiated agreement, the Supreme Court held (1) statutory annual increments in teachers' salary were subject to annual evaluation of teacher performance and thus were not statutory entitlements; (2) since awards of annual increments were not matters of statutory right but subject to denial for inefficiency or good cause, they were subject to the 90-day time bar of N.J.A.C. 6:24-1.2; (3) petitions of teachers who were aware they had not been advanced on the salary scale when they received their first paychecks for the subsequent school year but did not file petitions until more than a year later and more than nine months after expiration of the 90-day period of limitation were time-barred; (4) the time bar applied to future years; and (5) withholding of the increments did not constitute a continuing violation. Id. at 593-5.

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Thus here, if petitioners indefensibly gambled on grievance-arbitration procedures and lost on the issues actually grieved (whether the Board violated the collective bargaining agreement by notifying grievants of their change in assignment before April 30 of the school year, under Article 24-1 of R-3), their delay in filing the present petition alleging for the first time political animus in their reassignment was even more plainly indefensible.

Since there is no doubt as to presumptive untimeliness of the petition under N.J.A.C. 6:24-1.2(b), the only remaining question is whether literal application of the rule ought to be relaxed or dispensed with under N.J.A.C. 6:24-1.17. It provides:

> The rules herein contained shall be considered general rules of practice to govern, expedite and effectuate the procedure before, and actions of, the Commissioner in connection with the hearing and determination of controversies and disputes under the school law. They may be relaxed or dispensed with by the Commissioner, in his discretion, in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice.

The acts of reassignment of petitioners occurred in August and September 1985. Petitioners were untenured in the positions from which they were returned to their tenured positions. If claims of improper political animus were valid today, they were equally valid in 1985. The only "continuing" circumstance is in petitioners' having been re-situated in tenured positions. There is no excuse presented on this record for not having filed timely petitions. There are no circumstances calling for relaxation or dispensation of the 90-day limiting bar. If anything, an injustice that would result from relaxing the rule would be an injustice done the Board, which would be faced with investigation and defense of claims made stale by passage of twenty months. In such cases, the bar of the 90-day rule should be strictly applied. Cf. Caldwell-West Caldwell Educ. Assn. v. Bd. of Ed. of Caldwell-West Caldwell Sch. Dist., Essex County, 1987 S.L.D. — (Commissioner's dec., Sept. 10, 1987; slip op. at 10-12).

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CONCLUSION

For the foregoing reasons, I **CONCLUDE** summary decision in favor of the Board should be, and is hereby, **GRANTED** on its affirmative defense of the bar of the limiting period of N.J.A.C. 6:24-1.2(b), there being no occasion presented here under N.J.A.C. 6:24-1.17 for relaxation or dispensation therewith. The petition of appeal is **DISMISSED**. Under the circumtances, I express no opinion on failure of petitioners to have complied with N.J.A.C. 6:24-1.3(b). See Caldwell-West Caldwell Educ. Assn., supra, at 12-13.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN** , who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

January 6, 1988
DATE

JAMES A. OSPENSON, ALJ

JAN 0 3 1988 JAN [illegible]
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

JAN 1 1 1988
DATE

Mailed To Parties:

FOR OFFICE OF ADMINISTRATIVE LAW

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CHARLES CWIERKO AND MARK KOHL,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions filed on behalf of Petitioner Kohl were untimely pursuant to N.J.A.C. 1:1-18.4.

Upon review of the record in this matter, the Commissioner is in full agreement with the ALJ's well-reasoned analysis and conclusions. He, therefore, adopts as his own the recommended initial decision which determines that the matter is time barred pursuant to N.J.A.C. 6:24 and that the circumstances of the case do not warrant relaxation under N.J.A.C. 6:24-1.17. Notwithstanding any arguments presented by petitioners to the contrary, there is no excuse for their failure to file an appeal within the timelines prescribed by N.J.A.C. 6:24-1.2 even while grievance and arbitration remedies were being pursued. (Riley v. Hunterdon Central, 173 N.J. Super. 109 (App. Div. 1980))

Accordingly, the Petition of Appeal is hereby dismissed with prejudice for the reason expressed in the initial decision.

COMMISSIONER OF EDUCATION

February 10, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7151-86
AGENCY DKT. NO. 336-9/86
(On Remand from State Board of Education Dkt. No. 15-87)

ROBERT BRUNNQUELL,
Petitioner,
v.
SCOTCH PLAINS-FANWOOD REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION and DONALD E. SHELDON,
Respondents.

Robert P. Glickman, Esq., for petitioner

Casper P. Boehm, Jr., Esq., for respondent

Record Closed: November 16, 1987 Decided: December 31, 1987

BEFORE **DANIEL B. MC KEOWN,** ALJ:

In a decision dated July 1, 1987, mailed to the parties July 6, 1987, the State Board of Education reversed the Commissioner of Education and remanded this case to Ward R. Young, ALJ, for an evidentiary hearing on the question of whether the state of mind of Robert Brunnquell (petitioner) a teacher with a tenure status in the employ of the Scotch Plains-Fanwood Regional School District Board of Education (Board), was "* * * such as to render his resignation [tendered to and accepted by the Board] involuntary and to warrant relaxation of the 90 day rule." (State Board slip op., at p. -). On or about July 23, 1987 Judge Young recused himself from further participation in the matter. The case was then assigned this judge.

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During a prehearing telephone conference call on August 3, 1987, the following issues on the remand and according to the filed Petition of Appeal were identified and set forth in a prehearing order:

1. The ultimate issue is petitioner's state of mind between April 1 through September 22, 1986. That is, whether petitioner establishes by a preponderance of credible evidence that his state of mind was such between those dates so as to conclude his proffered resignation on April 1, 1986 was involuntary and that the Board's acceptance on April 22, 1986 is a nullity. In addition, petitioner's state of mind is in issue between April 1, 1986 through September 22, 1986 when he filed a petition of appeal challenging the Board's acceptance of his resignation and whether given the circumstances of his state of mind the 90 day rule should be relaxed.

2. If petitioner carries his burden of proof to what relief is he entitled.

While not specifically stated above or in the pleading, petitioner's essential argument is that he was coerced into proffering his resignation as a consequence of duress to which he was subjected by his immediate supervisor. An evidentiary hearing was conducted as directed by the State Board of Education on October 27, 1987 at the Office of Administrative Law, Newark. The Board was granted leave to file a letter memorandum and it did so on November 9, 1987. Petitioner elected not to file a reply. The record closed November 16, 1987.

PROCEDURAL HISTORY

The following procedural history of the matter is taken directly from the decision on remand of the State Board of Education.

> Petitioner was a tenured School Social Worker who petitioned the Commissioner of Education on September 29, 1986, seeking recission of his letter of resignation from the Board's employ, which he submitted to the Board on April 1, 1986. In his petition, he alleged that his resignation was not voluntary, asserting among other claims that the resignation was invalid because of his mental and physical condition. Petition, at 20. The Board asserted that Petitioner failed to state a cause of action and also sought dismissal on the grounds that the petition was time-barred by N.J.A.C. 6:24-1.2.

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> The Administrative Law Judge (ALJ) [Young] found that there was no evidence in the record to support Petitioner's contention that his state of mind at the time he submitted his resignation rendered such resignation involuntary, or that such state of mind continued until he sought legal counsel on August 27, 1986, following which he filed his petition. Although the ALJ found that the petition was filed beyond the time period specified by N.J.A.C. 6:24-1.2, he concluded that the record did not provide any evidence concerning whether failure to relax the 90 day requirement of the regulation pursuant to N.J.A.C. 6:24-1.17 would result in injustice. The ALJ therefore denied the Board's motion to dismiss and directed plenary hearing to establish Petitioner's state of mind during the relevant periods, noting however that the Board was not precluded from resubmitting its motion to dismiss at the conclusion of the hearing.
>
> Upon the Board's request, the Commissioner granted interlocutory review pursuant to N.J.A.C. 1:1-9.7. The Commissioner determined that the record in the matter was sufficiently developed to decide whether the Board's action in accepting Petitioner's resignation was proper, concluding that it was correct in all ways in accordance with N.J.S.A. 18A:28-8. In the absence of any support for Petitioner's claim concerning his state of mind aside from the allegations in his petition, or other compelling reason offered by Petitioner to warrant relaxation, the Commissioner reversed the ALJ's determination and dismissed the petition pursuant to N.J.A.C. 6:24-1.2.
>
> Petitioner appealed to the State Board, asserting that he has a right to a hearing and arguing that the record was not sufficiently developed to permit the Commissioner to determine the effect of his resignation. He further argues that relaxation of [the] 90 day requirement is warranted because of his state of mind and that, in any event, he filed his petition within 90 days of his request to the Board that it reconsider its action * * *
>
> We conclude that, as the ALJ determined, Petitioner in this case is entitled to an evidentiary hearing on the question of whether his state of mind during the relevant periods was such as to render his resignation involuntary and to warrant relaxation of the 90 day rule. . .

BACKGROUND FACTS NOT IN DISPUTE

Petitioner possesses a masters degree in psychology awarded him by Columbia University. He has been employed 18 years by the Board as a school social worker assigned to the Office of Pupil Services. At all relevant times, petitioner has been a member of one of the Board's several child study teams. Under a variety of titles, Donald E. Sheldon has been the director of pupil special services for the past 18 years. For the

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past 15 years, Sheldon has been petitioner's immediate supervisor. As Sheldon explains, he is responsible for the supervision of all services for pupils outside the Board's basic instructional program. Throughout all employment with the Board, petitioner received all salary and adjustment increments his due. There is no evidence in the record to show petitioner was ever subject to formal disciplinary action.

Petitioner advised Sheldon by letter dated April 1, 1986 as follows:

> Please be advised that I am resigning my position as School Social Worker effective April 25, 1986.
>
> (C-1)

On or about April 22, 1986 the Board accepted petitioner's proffered resignation. Petitioner now seeks to have the proffered resignation be declared invalid on the grounds Sheldon coerced and harassed him into submitting the resignation and that therefore the resignation was not voluntarily submitted by him. In the Verified Petition of Appeal[1], petitioner alleges in paragraph 9

> From almost the beginning of [Respondent Sheldon's] services as Director of Special Services, he acted in such a manner towards Petitioner, Robert Brunnquell, so as to make Petitioner's life miserable, so as to intimidate Petitioner, to make him anxious and depressed and require treatment and therapy from a therapist and to finally force him to resign, which act of resignation on Petitioner's part was not voluntary nor of his free will.

Thereafter, the Verified Petition of Appeal sets forth asserted instances of Sheldon's conduct in support of the conclusory allegation of paragraph 9. A substantial part of the documentary evidence submitted by petitioner in support of his allegations regarding Sheldon's conduct consists of various memoranda (P-2 through P-73) sent him by Sheldon mainly during the period September 22, 1981 through October 16, 1981 (P-45 through P-73), four of which documents (P-55 and P-61, 56 and 65, 57 and 59, and 54 and 71) are copies of each other. Documents marked P-58, 62 and 64 are petitioner's response to various memoranda sent him by Sheldon all of which are dated October 15, 1981, while

[1]Extraneous writings have been placed on the original Verified Petition of Appeal by person or persons unknown.

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P-60 is a duplicate of P-58. In addition, petitioner submitted memoranda between September 17, 1985 through March 25, 1986 (P-2 through P-44) exchanged between him and Sheldon. It is noted that P-25 and 27 are copies of each other, while P-16 and P-44 are also copies. It is also noted that P-6, 9, 17, 20 and 21 are petitioner's responses to some of the memoranda he received during this period of time. P-36 is a memorandum dated January 23, 1984 from Sheldon to 12 individuals, including petitioner, who comprised the Board's various child study teams regarding parent interpretation conferences. Finally, P-22 and P-23 are letters addressed to Shedon from the Piscataway Regional Day School of the Middlesex County Educational Services Commission dated January 23 and 24, 1986 neither of which appear on their face to be relevant to petitioner's claim here.

In the main, the 1981 memoranda (P-45 through P-73) address tasks petitioner, or petitioner and others, were obligated to perform as members of the Board's child study teams. In addition, the memoranda address reports or requests which had been addressed to petitioner but not yet answered by him. The subject matter of the memoranda include petitioner's timely arrival at school (P-73), parent interpretation conferences (P-71), incomplete work on out-of-district cases (P-72), submitting forms identified as "417 forms" for pupils identified as E.O. (P-45), B.S. (P-46), O., M. and T. (P-50) together with a criticism of the performance of petitioner's child study team, and like kinds of matters. Petitioner's written reponses dated October 15, 1981 addressed the parent interpretation conferences (P-58), child study team projections (P-62), and staffing times (P-64). The 1985-86 memoranda include a reminder to petitioner that he is obligated to personally sign out (P-33), a suggestion regarding the recording of information on three pupils (P-31), a request from Sheldon that petitioner and two other members of the child study team meet with him (P-38), a reminder to petitioner from Sheldon that a recommendation had not yet been received regarding classified students (P-39), and other kinds of similar matters.

It is noted that the memoranda petitioner received from Sheldon and submitted here as evidence were dated in large part after January 1986. Specifically, five memoranda (P-31, 32, 33, 38 and 39) carry dates between September through December 1985. Two separate memoranda (P-40 and 41) were sent by Sheldon to petitioner on January 3, 1986, one (P-42) on January 8, one (P-30) on January 10, one (P-29) on January

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13, one (P-43) on January 17, three (P-16 or 44, P-25 or 27 and 28) on January 20, one (P-18) on January 27, one (P-19) on February 6, two (P-12 and 13) on February 7, two (P-15 or 34 and 35) on February 11, one (P-14 or 24) on February 11, one (P-11 or 37) on February 12, one (P-10) on February 21, one (P-5) on March 7, one (P-8) on March 18, one (P-2) on March 21, one (P-7) on March 25, and two (P-3 and 4) on March 25, all in 1986. In addition to Sheldon reminding petitioner to do certain things, or to submit certain reports to him, Sheldon also took the opportunity of reminding petitioner that his performance was less than satisfactory, as in the memorandum (P-30) dated January 10, 1986.

In order to set the tenor of the relationship which more likely than not existed between petitioner and Sheldon three memoranda are reproduced here, the first of which (P-44) was sent by Sheldon to petitioner regarding an interim evaluation report, petitioner's response (P-17), and Sheldon's reply (P-18) to the response:

> [Sheldon to petitioner on January 20, 1986]
>
> In your Interim Evaluation Report received by you on January 16, 1986, you were requested to take remedial action by specified dates. Due to your extended absence due to illness, the original dates are no longer realistic. Amended dates are noted on the attached copy of the Interim Evaluation Report.
>
> (P-16 and P-44)

> [Petitioner's response to Sheldon on January 21, 1986]
>
> I do not agree with the general intent or any of the specific details of my interim evaluation. I will, however, conform to your requests providing that you (1) apprise me in writing of my rights as an employee under this procedure and (2) give me a copy of this procedure so that I may know the parameters under which I can continue to discharge my duties. In the meantime, I will continue to function efficiently and effectively as I have done this school year and as I have done for the past eighteen years serving the parents, students and the administration of the Scotch Plains-Fanwood Regional school district.
>
> (P-17)

> [Sheldon's reply to petitioner on January 27, 1986]
>
> In response to your letter dated January 21, 1986, the Interim Evaluation given to you on January 16, 1986 was prepared in accordance with Board of Education policy GBI. The Interim Evaluation identified specific deficiencies in your performance and provided a plan for correction of these deficiencies.

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For your information, enclosed are the following documents pertaining to evaluation of your position.

GBI Staff Evaluation

GBI-EI Evaluative Criteria

Criteria for the Evaluation of Teaching Staff

Criteria for the Evaluation of Child Study Team Members

GBI-R Staff Evaluation, Rules and Regulations

GBI-RH Job Description, School Social Worker

(P-18)

Petitioner testified that were he to prepare his response (P-17) to Sheldon today, he would prepare it in the exact same manner he did and would change nothing. This concludes a recitation of the background facts of the matter not in dispute between the parties.

PETITIONER'S PROOFS

Petitioner testified that the foregoing memoranda is but a sample of the various memoranda he received from Sheldon. He says that the actual volume of memoranda received on a daily basis from Sheldon, together with copies of the memoranda being placed in his personnel file, was tremendous. According to petitioner, the memoranda contained nothing of significance other than Sheldon's attempt to harass and coerce him into resigning.

Petitioner testified that at the beginning of the 1985-86 academic year, the then president of the teachers' association, William Tronolone, told him privately he "better watch out; the word is out; Sheldon is out to get you." On cross examination, petitioner explained that the exact words used by Tronolone attributed to Sheldon were "Good bye Bob." Several weeks later, petitioner approached Sheldon and asked him directly if he intended to get rid of him. According to petitioner, Sheldon's response was that he, Sheldon, knew that the association president told him of their conversation because he had only told the president and his own wife of his intentions. Petitioner testified that

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thereafter he began having sleepless nights because of the continuing onslaught of memoranda being sent him by Sheldon in sealed envelopes with copies being filed in the personnel office. Petitioner explained that about the middle of December 1985, having in the meantime unsuccessfully attempting humor or avoidance with what he perceived to be Sheldon's tactic of harassment, directly asked Sheldon to set task priorities for him and that he, petitioner, would proceed to work on the set priorities. According to petitioner, Sheldon's response was everything is a priority in pupil personnel services.

Thereafter, petitioner testified that he could not sleep at night he began having palpatations of the heart which he never experienced before and he believed he was going to have a heart attack. Petitioner testified that on one occasion while shaking hands with Sheldon, Sheldon squeezed his hand and pulled his arm. Petitioner explained he became frightened of Sheldon at that conduct. According to petitioner, he began losing his appetite, food had no taste for him, that everything tasted bland. Petitioner testified he then began having nightmares of Sheldon chasing him down the street. In petitioner's words he felt he was in a boxing match with Sheldon but that his hands were tied. In petitioner's view, Sheldon could punch out memoranda to him at will.

Petitioner testified that he began weekly therapy with a "social worker in Bloomfield." Petitioner told the Board's psychiatrist as stated in the latter's psychiatric report (R-1) that the therapy began during November 1985, and was once a week for about a year. Petitioner was also "treated" by a Richard Feinsod during approximately the same period of time. (P-74). Petitioner testified that he had shown his "therapist" various memoranda received from Sheldon in response to which he was asked "how can you take this, day in and day out?". Petitioner testified that he cried in therapy and at home. During December 1985, petitioner was absent from school for what he called "kidney stones". Upon his return, petitioner testified Sheldon immediately called him into the office and, after asking him about his health, handed him five sealed envelopes containing more memoranda. Petitioner testified that he lost 15 pounds and he was to the point where he simply could not face the memoranda he expected from Sheldon. Petitioner testified he felt alone and that he became suicidal. During February 1986, he was absent from school for several days due to the death of his sister. Upon his return, petitioner testified that the memoranda continued. Petitioner testified that finally Sheldon told him he would receive no salary increment for 1986-87, that he laid claim to getting rid of one person a year since he has been the director, and that he would recommend that his, petitioner's, employment contract not be renewed. Thereafter, petitioner tendered the proffered resignation.

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Petitioner testified that prior to April 1, 1986 he often discussed his perceived difficulty with Sheldon with his wife who is a social worker with the State. Furthermore, petitioner testified his wife knew of his intention to resign as did their mutual friend because he and his wife went to the friend's house in order to get a "good typewriter" to prepare his formal resignation. Petitioner explained that the friend knew he intended to resign but that she offered no advice to the contrary. Petitioner testified that his therapist, whom he identified by the name of Valerie, knew of his perceived problem with Sheldon because he related to her on a weekly basis the problems he was experiencing. It is noted that petitioner did not tell anyone at school that he was seeing a therapist. The therapist knew of petitioner's intention to resign and she advised him to the contrary. Petitioner testified that he in fact resigned because he did not see any alternatives to the harassment he perceived Sheldon heaping upon him. Petitioner explains that when he told the association president he resigned, he was advised the association would fight for him if he did not want to resign but that he, petitioner, would probably lose because Sheldon documents everything.

Petitioner testified that after he submitted his resignation, neither the Board nor the superintendent asked why he resigned from his employment. He felt depressed because he was without employment, he was constantly crying and suicidal, and he was losing friends. Petitioner testified he could not discuss the matter with anyone, although he testified that after he terminated his employment, Valerie, his therapist, told him to get a job. Petitioner prepared and sent out approximately 70 resumes to prospective employers. While he was granted several interviews, petitioner did not secure employment until he was employed briefly in the 1986 summer by an executive search firm where he sought to find suitable applicants for various employers. A person there by the name of Jim Flood, having heard petitioner's account of his resignation from the Board's employ, recommended that he search out an attorney. He did so and on August 27, 1986 contacted counsel of record. Finally, petitioner testified that at no time during the 1986 calendar year was he taking any kind of medication for depression.

Presently, petitioner is employed as a teaching staff member by a board of education in Somerset County. Between November 1986 through June 1987, petitioner was employed as a substitute teacher in Middlesex County.

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BOARD'S DEFENSE

In support of his position that he was coerced into proffering his resignation on April 1, 1986, as a consequence of duress under Sheldon, petitioner submitted a report (P-1) of Stanley R. Kern, M.D., a psychiatrist who examined him on February 12 and March 17, 1987, for the purpose of this litigation. Dr. Kern, in his 5-page report, offers the conclusions that on April 1, 1986, petitioner was suffering from an adjustment disorder with depressed mood such that his resignation was involuntary and that between April 1 through August 27, 1986, when petitioner sought legal counsel, he was suffering from a major depression. Dr. Kern's conclusions are predicated upon petitioner's recitation to him of the experiences he had had while working with Sheldon and substantially as recited above, the past personal history of petitioner which Dr. Kern concludes is relatively unremarkable, an examination of petitioner's mental status which resulted in Dr. Kern finding "no gross unusual mannerisms," adequate and appropriate affect, spontaneous, logical and coherent speech, no thought disorder, dillusion, nor hallucination, and complete orientation to time, place and person, with clear sensorium. Dr. Kern writes in a section he calls "Reasoning Basic-to-Opinion" as follows:

> [Petitioner] relates symptoms that are typical of a depression. During the period from September, 1985, to April 1, 1986, he felt threatened, under great pressure and helpless in his situation. Because of his basic personality characteristics of dependency and passivity he was incapable of expressing his anger, resentment and frustration toward the individual [Sheldon] who was creating his intolerable situation. Instead he became depressed. Because of the symptoms associated with his depression he was unable to concentrate or think clearly. All he knew was that he had to escape from such a painful situation and that required a resignation which he effected on April 1, 1986.
>
> Following his resignation [petitioner] became more severely depressed to the point where he was suicidal. Apparently he felt abandoned and lost. He was incapable of thinking clearly and did not believe that anything could be done to alter his situation. It was not until Jim Flood suggested that he see an attorney that the idea occurred to him and even then he did not believe that it would help him.
>
> It is clear from the situation he experienced and the symptoms he suffered prior to and at the time of the resignation that [petitioner's] resignation was involuntary. Also, due to the severity of his depression, following his resignation, which lasted at least until November, 1986, he was unable to think clearly or reason so that

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he was incapable of seeking legal advice until it was suggested to him.

(P-1)

During the 1985-86 academic year, William Tronolone was in his fifth year of a five-year term as president of the teachers' association. He is otherwise employed by the Board as a teacher of music. Mr. Tronolone testified that in or about the first or second week of school during September 1985, Sheldon approached him and advised that he was once again having problems with petitioner. In response to questions posed by Tronolone, Sheldon was to have said the present problems were similar to those experienced in 1981, and that the present problems with petitioner were salvageable. Over objection of petitioner's counsel, Mr. Tronolone testified that during 1981, petitioner requested his help regarding memoranda being exchanged between him and Sheldon. Tronolone testified that he worked long and hard to settle that 1981 dispute between them.

After Sheldon advised Mr. Tronolone of the present problems with petitioner, he met with petitioner and asked whether he perceived a problem with Sheldon. According to Tronolone, petitioner merely stated that Sheldon had talked with him. In Tronolone's view, petitioner seemed unaware of any problems which may have existed and, in fact, was surprised when Tronolone related to petitioner the conversation he had with Sheldon. Tronolone testified that petitioner did not state at that time that Sheldon was out to get him. Tronolone explained that he advised petitioner that while Sheldon believed he, petitioner, was presenting the same problems as he had in 1981 the present problems could be corrected. Mr. Tronolone absolutely denies under oath that he ever said to petitioner Sheldon spoke the words, "Good-bye, Bob."

The next time Mr. Tronolone had any conversation with petitioner regarding the matter was during April 1986, when petitioner advised him he resigned his employment. According to Mr. Tronolone, he asked petitioner whether he was certain he wanted to resign and that the association would assist him in any way possible if he elected not to resign. Petitioner in response advised Mr. Tronolone that he was resigning his employment with the Board in order to become a consultant somewhere. Mr. Tronolone testified that he was then convinced that petitioner did, in fact, wish to resign his employment with the Board in order to become a consultant somewhere and did not press the issue further. Mr. Tronolone testified that during this conversation, petitioner was

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not excited nor was he nervous. While Mr. Tronolone subjectively believed that it was strange one would just resign, he attributed petitioner's conduct in this regard to the fact that "Bob [petitioner] is Bob."

Mr. Tronolone admits that two, perhaps three other teachers, complained about the supervisory tactics of Sheldon. In fact, one former teacher was so concerned about the perceived harassment being inflicted upon her by Sheldon that she tendered her resignation from the Board's employ in return for the promise of a good recommendation.

Donald E. Sheldon testified that during the 1986 summer months, he concluded that he could no longer work alone with petitioner because of his late reports and his failure to sign in and out. He determined that steps must be taken to improve petitioner's performance. He then advised Mr. Tronolone that petitioner had to improve or he, Sheldon, would begin to document his performance for disciplinary action. Sheldon explained that the reason he discussed his concerns with the association president was because the president had helped before and he was merely seeking his help again.

Sheldon testified that within three weeks, petitioner came to him and explained he had heard that he, Sheldon, was out to get him. Sheldon testified that he advised petitioner to do the job as he is capable. Nevertheless, Sheldon does admit his intent to preserve a "record" for future discussion because of petitioner's prior practice of accusing him of not giving clear directions. Sheldon testified that in addition to the numerous memoranda (P-2 through P-73) which had been exchanged between the two, he had many conversations with petitioner encouraging him to do his job competently. With respect to the memoranda, he explained to petitioner that for purposes of communication clarity, he found it necessary to be as explicit as possible in writing. While Sheldon admits saying to petitioner that "I am building a wall out of little bricks," Sheldon contends that petitioner took that remark out of context. Nevertheless, Sheldon did not explain the context in which it was to have been uttered. Finally, Sheldon testified that he sent the memoranda to other teaching staff members during 1985-86, but not near as many memoranda as he sent to petitioner. During the course of the 1985-86 academic year, Sheldon testified that he observed no change in petitioner's behavior which would lead him to believe petitioner was feeling harassed, depressed, or not thinking clearly.

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In support of its position that the petitioner's resignation was voluntary and that its acceptance thereof is valid and enforceable against him, it submitted the report of David J. Flicker, M.D., a psychiatrist who examined petitioner on September 9, 1987, for the purpose of this litigation. Dr. Flicker, in a 6-page report, concludes as follows:

> . . .
> Accepting fully the picture presented by [petitioner] on September 9, 1987], it would appear to me that he had an adjustment disorder with depressed mood, which he has since worked through, and presently is essentially without psychopathology.
>
> As to the specific question you asked, whether or not he at the time of submitting his resignation knew what he was doing, it would be my impression from his presentation at this time that he did. It is also my belief that during the period of time from then until the present that while there was some depression, it was never so profound as to preclude him from knowing what was going on in his environment and taking such steps as might have been in his own best interest. For example, although he did so, he states, with some difficulty, he was able to get together a curriculum vitae to submit applications for various positions, etc. etc. He was able even to work for someone for a period of three weeks, even though he found that work other than enjoyable. . .

Dr. Flicker bases his conclusion on petitioner's recitation to him on September 9, 1987, of the difficulties he, petitioner, perceived Sheldon was creating for him. The recitation as contained within Dr. Flicker's report is substantially similar to the narration of the background facts of the matter and petitioner's testimony as recited above. Dr. Flicker examined petitioner's mental status and found no patterns of tension, apprehension, agitation, or upset on September 9, 1987. Furthermore, there was no indication of any anxiety nor of thought disorders. Dr. Kern found petitioner's responses to questions posed were prompt, relevant, responsive, and coherent. In fact, Dr. Flicker found that the responses petitioner gave him were consistent with the responses petitioner gave Dr. Kern. Dr. Flicker found no indication of depression, dillusion, hallucination, illusion or phobia.

This concludes the recitation of the proofs submitted by the parties.

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FINDINGS OF FACT

In addition to the background facts of the matter set forth above and essentially undisputed by the parties, I **FIND** a preponderance of evidence establishes the following additional facts:

1. Petitioner, while a long-time employee of the Board who has not been subjected to formal disciplinary action, had a professional disagreement with Sheldon, his supervisor, during 1981. This disagreement, not fully explained in this record, necessitated the intervention of the association president, Tronolone, to be corrected.

2. Petitioner is well educated and articulate. His wife is a social worker, as is he, and he often discussed with her his perceived problems with Sheldon. In fact, petitioner discussed his perceived problems with his therapist, Valerie, on many occasions prior to the time of his resignation.

3. Sometime prior to April 1, 1986, petitioner discussed his intention to resign at least with his wife, their mutual friend, and his therapist. His therapist, Valerie, cautioned him against resigning. At the beginning of the 1985-86 academic year, petitioner's performance was perceived deficient by Sheldon. This record establishes that Sheldon's perception of petitioner's deficient performance was, in Sheldon's view, a repetition of whatever difficulties may have occurred between the two during 1981.

4. While the memoranda submitted to petitioner by Sheldon during the 1985-86 academic year appears numerous, there is no indication in any of the responses petitioner submitted to Sheldon that he was suffering from depression to the extent he did not know what was occurring about him. Specifically, petitioner's response (P-17) to Sheldon on January 21, 1986, is lucid and to the point. The response demonstrates petitioner was aware that as a tenured employee, he has certain rights, though such rights were not specified in his response, and he knew that in his mind he was an efficient and effective employee.

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5. Despite the numerous memoranda exchanged between Sheldon and petitioner, each such memoranda contains subject matter within the scope of Sheldon's duties as director of pupil special services. The subject matter of the various memoranda sent petitioner are matters properly brought to petitioner's attention in his role as a social worker for the Board's child study team.

6. The Board did not formally accept petitioner's resignation until April 22, 1986, approximately 21 days after its submission. During that time, petitioner did not seek to rescind his proffered resignation, nor is there any evidence that petitioner sought out the superintendent nor any other supervisor of Sheldon to discuss the matter with him.

7. I am persuaded by the testimony of Association President Tronolone that petitioner advised him on April 1, 1986, after he submitted the resignation that he, petitioner, intended to become a consultant. I am not persuaded by petitioner's testimony that he explained to Tronolone that he resigned because he "can't take it any longer."

8. The evidence in this record regarding petitioner's "depression" is predicated solely upon his own perception. According to petitioner's own testimony, petitioner discussed with his wife, their mutual friend, and his therapist, the perceived problems he was having with Sheldon. Yet, no one of those three persons was called as a witness to corroborate petitioner's perception of his depression.

9. I am not persuaded by Dr. Kern's conclusion as stated in his report that between April 1 through August 27, 1986, petitioner was suffering from a major depression to the implied extent his volition was impaired. Dr. Kern, in his supporting Reasoning Basic-To-Opinion section of his report addresses petitioner's "basic personality characteristics of dependency and passivity" although there is nothing in the report itself to show that petitioner is unduly dependent or passive. Nor is there anything in Dr. Kern's report to support his conclusion that petitioner ". . .was incapable of expressing his anger, resentment and frustration."

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10. Given the relevant and material facts of this matter, I am more persuaded by Dr. Flicker's report that while petitioner may have been depressed because of the numerous memoranda he received from Sheldon that that depression was not so profound as to preclude him from knowing what he was doing every step of the way.

LEGAL ANALYSIS

When a tenured teaching staff member such as petitioner wishes to resign their employment, their obligation to effect that result is set forth at N.J.S.A. 18A:28-8 which, in part, reads as follows:

> Any teaching staff member, under tenure of service, desiring to relinquish his position shall give the employing board of education at least 60 days written notice of his intention, unless the board shall approve of a release on shorter notice * * *

In this case, petitioner tendered his notice on April 1, 1986 of his intention to resign his employment effective April 25, 1986. The Board, exercising is discretionary authority, approved petitioner's release from his tenured employment on the shorter notice specified by petitioner than is required by law. In prior cases, the Commissioner has held that a proffered resignation becomes effective upon acceptance by the board. Cullen v. West New York Bd. of Ed., 1974 S.L.D. 1236. Applying that rule to this case, petitioner's proffered resignation became effective on April 25, 1986 the date the Board accepted it.

Nevertheless, it is basic that a resignation from one's employment, thereby waiving all accrued rights to that employment, must be knowingly and voluntarily proffered without duress or coercion. A resignation may be withdrawn at any time before it is accepted, but after the resignation has been accepted it is effective as against the subsequent attempt to withdraw or offer to serve, even though the teacher attempts to withdraw before the effective date of his resignation. Andrew Kozak v. Waterford Tp. Bd. of Ed., 1976 S.L.D. 633, 638, citing 78 C.J.S. 1101, 1102. If duress is established, then the resignation and acceptance may be void.

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In Gobac v. Davis, 62 N.J. Super. 148, 156 (Law Div. 1960), the court, citing 2 Restatement of the Law of Contracts, sec. 492, p. 938, adopted the Restatement definition of duress which is as follows:

> Duress in the Restatement of this subject means (a) any wrongful act of one person that compels a manifestation of apparent assent by another to a transaction without his volition, or (b) any wrongful threat of one person by words or other conduct that induces another to enter into a transaction under the influence of such fear as precludes him from exercising free will and judgment, if the threat was intended or should reasonably have been expected to operate as an inducement.
>
> * * *
>
> Duress consists of threats that cause such fear as to induce the exercise of volition, so that an undesired act is done. In duress of this latter type neither the threats alone nor the fear alone is duress. The same threats may cause fear in one person and not in another. The test of what act or threat produces the required degree of fear is not objective. The threat need not be such as would put a brave man, or even a man of ordinary firmness, in fear. The question is rather, did it put one entering into the transaction in such fear as to preclude he exercise by him of free will and judgment.

The Gobac court, in discussing the test to be invoked in the determination of whether duress was employed, relied upon Rubenstein v. Rubenstein, 20 N.J. 359, 366 (1956) as follows:

> It would seem to be basic to the legal concept of duress, proceeding as it does from the unreality of the apparent consent, that the controlling factor be the condition at the time of the mind of the person subjected to the coercive measures, rather than the means by which the given state of mind was induced, and thus the test is essentially subjective.
>
> 62 N.J. Super. at 157.

An essential element of duress is that the threat or pressure exerted upon the individual is wrongful, not 'unlawful' in the technical sense of the term; rather, it suffices if it is 'wrongful in the sense that it is so oppressive under given circumstanes as to constrain one to do what his free will would refuse.' 62 N.J. Super. at 158, citing Rubenstein, supra.

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In Evaul v. Bd. of Ed. of City of Camden, 35 N.J. 244 (1961), Evaul, a teacher of 25 years experience became involved in a heated confrontation with the board president, superintendent and the school principal. Evaul was emotionally distraught and told her superintendent that she was going to resign. The superintendent advised her not to be hasty and to reconsider her decision. Evaul rejected this advice and insisted on writing a letter of resignation immediately and requested pencil and paper on which it write it. Unknown to Evaul, a special meeting of the board of education was scheduled to take place that very evening and she learned the next day that the board had acted on her letter of resignation. Thereafter, Evaul took steps to attempt to rescind her resignation which the board refused. The New Jersey Supreme Court, in ordering Evaul's reinstatement to her employment as a tenured teacher in the board's employ on equitable principles, stated as follows:

> It was an extraordinary concatenation of events which resulted in a loss to appellant of her tenure, seniority and pension rights acquired during 25 years of service. First, there were the disturbing incidents of March 13, 1959 which led to the submission of her resignation. The unpleasant and emotional meeting with her department head was shortly followed by the unanticipated and tempestuous confrontation in the principal's office. It is reasonable to suppose that the anxiety and distress engendered by these incidents reached the climax when her subsequent efforts to confer with the principal and the president of the school board were frustrated. It is clear to us that the submission of her resignation was an impetuous act prompted by her understandably distraught condition. The emotionally-charged words she used in her note of resignation bear this out. Second, linked to the above chain of events, was the fortuitous circumstance that a special meeting of the board had, unknown to her, previously been scheduled for a few hours after she wrote her resignation. But for that happenstance, her attempted recission, on March 15, 1959 would have been effective.

CONCLUSION

Applying the foregoing principals of law to the facts in this case, I must **CONCLUDE** that petitioner failed in his burden of persuasion to establish by a preponderance of credible evidence that his proffered resignation was submitted by him as the result of duress inflicted upon him by Sheldon. The memoranda sent to petitioner by Sheldon addressed subject matter properly within the scope of responsibility of Sheldon as the director of pupil special services and within the scope of duty reasonably assigned petitioner as a school social worker. Petitioner had the opportunity, and took advantage, of discussing his intention to resign with his therapist, his wife, and their mutual friend.

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Furthermore, petitioner was advised by the association president that if he, in fact, did not wish to resign that the association would fight for him. Nevertheless, petitioner persisted and tendered the proffered resignation from his employment.

Given these facts, I must ultimately **CONCLUDE** that petitioner's mental capacity was not impaired to the extent he did not know what he was doing at the time he tendered his resignation April 1, 1986 and that his resignation followed a reasoned approach by him to the difficulty he perceived he was having with Sheldon. That neither the superintendent nor the Board queried him about his reason for resigning is of no legal significance in this case. Nothing contained within the various memoranda nor in the testimony of petitioner demonstrates that Sheldon threatened him in any way, shape or form other than the persistent reminders to perform his job as it should be performed. This case does not present the extraordinary concatenation of events which resulted in Evaul's, supra, resignation, nor does it contain coercive measures to the extent that such measures are oppressive.

Accordingly, having concluded that petitioner failed in his burden of persuasion to establish that his proffered resignation was a product of duress, the acceptance of that resignation by the Board is valid and enforceable. Therefore, the Petition of Appeal is **DISMISSED.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

December 31, 1987 — DATE
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

DEC 31 1987 — DATE
DEPARTMENT OF EDUCATION

Mailed To Parties:

JAN 6 1988 — DATE
OFFICE OF ADMINISTRATIVE LAW

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ROBERT BRUNNQUELL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SCOTCH PLAINS-FANWOOD REGIONAL SCHOOL DISTRICT AND DONALD E. SHELDON, UNION COUNTY.	:	DECISION ON REMAND
RESPONDENTS.	:	
	:	

The Commissioner has reviewed the record of this matter including the initial decision on remand rendered by the Office of Administrative Law.

It is noted that timely exceptions to the initial decision were filed with the Commissioner by petitioner and the Board pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

In his exceptions petitioner argues that the ALJ erred in his findings and conclusions.

> 1. According to the State Board of Education's decision, an evidentary (sic) hearing was to be conducted on the question of whether petitioner's state of mind during the relevant periods was such as to render his resignation involuntary and to warrant a relaxation of the 90 day rule. Apparently, the Administrative Law Judge misperceived the decision of the State Board of Education did not address himself to this issue and dismissed the entire Petition.
>
> 2. According to the pre-hearing Order: "the ultimate issue is petitioner's state of mind between April 1 through September 22, 1986. That is, whether petitioner establishes by a proponderance (sic) of credible evidence that his state of mind was such between those dates so as to conclude his proffered resignation on April 1, 1986 was involuntary and that the Board's acceptance on April 22, 1986 is nullity. In addition, petitioner's state of mind is an issue between April 1, 1986 through September 22, 1986 when he filed a Petition of Appeal challenging the Board's acceptance of his resignation and whether given the circumstances of his state of mind the 90 day rule should be relaxed." The Administrative Law Judge did not address the pre-

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hearing issue raised in the pre-hearing Order. What he addressed is stated on Page 2 of the initial decision namely: "While not specifically stated above or in the pleading, petitioner's essential argument is that he was coerced into proffering his resignation as a consequence of duress to which he was subjected by his immediate supervisor."

This conclusion by the Administrative Law Judge of what was the issue was completely inaccurate and wrong, not set forth anywhere in any pleadings, contentions or arguments and created only in the mind of the Administrative Law Judge. Duress was not an issue in this case, was not raised in any pleadings, was not presented by any proofs and was not argued by either of the attorneys. Apparently, Judge McKeown created an issue of duress in order to be able to utilize the holdings of Andrew Kozak v. Waterford Township Board of Ed. 1976 SLD 633, 638, citing 78 C.J.S. 1101, 1102, Gobac v. Davis, 62 N.J. Super 148, 156 (Law Div. 1960) and Rubenstein v. Rubenstein, 20 N.J. 359, 366 (1956). All of those cases just cited deal with concepts of duress. The instant case has nothing to do with duress. Obviously, the Administrative Law Judge re-arranged my case in his own mind in order to be able to utilize other cases dealing with duress, rather than look at the facts of my case and apply the applicable law to my facts. This is clearly error.

3. This case involves a question of the state of mind of Mr. Brunnquell during certain periods of time and whether he was of such a state of mind that he could voluntarily resign. According to both his testimony and the report of Dr. Stanley Kern, Mr. Brunnquell was unable to think clearly or to reason, was depressed and therefore his resignation was involuntary not voluntary. All of the testimony and all of the evidence has nothing to do with the Administrative Law Judge's conclusions regarding duress. There was ample credible evidence in the record before the Administrative Law Judge to conclude that petitioner was of such a state of mind that the 90 day Rule should be relaxed. This hearing was not to be a hearing on the merits and this was misperceived by the Administrative Law Judge.

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> 4. With regard to finding of fact #8, the petitioner testified in detail about the nature and quality of his depression. This information was also set forth in Dr. Kern's report who testified how that depression affected petitioner's ability to resign voluntarily. Accordingly, there was no need to call petitioner's wife, a mutual friend or a therapist with regard to the problems petitioner was having with Sheldon.
>
> Because of the Administrative Law Judge's misperception of the State Board decision which directed the Administrative Law Judge to conduct an evidentary (sic) hearing on the question of whether or not the 90 day rule should be relaxed and because of the Administrative Law Judge's creation of a non-existent issue, namely that petitioner's resignation was a consequence of duress which nowhere appears in any pleadings, proof, arguments, pre-hearing Order or any other document, we hereby strenuously take exception to the Administrative Law Judge's decision and ask that the Commissioner of Education reject the Initial Decision.
>
> (Petitioner's Exceptions, at pp. 1-3)

The Board in its sole exception to the initial decision points out that there is an error which occurs on page 10 which is entitled "BOARD'S DEFENSE." The Board maintains that such caption actually should have been placed at the top of page 11 in the initial decision. The Commissioner concurs with the Board's exception and concurs with it to the extent that it is noted and incorporated herein by reference.

In reviewing petitioner's exceptions to the initial decision, the Commissioner relies on the specific language set forth in the State Board's decision to remand dated July 6, 1987. It reads in pertinent part as follows:

> We conclude that, as the ALJ determined, Petitioner in this case is entitled to an evidentiary hearing on the question of whether his state of mind during the relevant periods was such as to render his resignation involuntary and to warrant relaxation of the 90 day rule. We agree that the record before the Commissioner was not sufficiently developed to permit a conclusion that Petitioner's resignation was voluntary, and we find that to deny him the opportunity to present evidence concerning his state of mind, in light of his assertions in the pleadings, would be contrary to the principles of due process. Likewise, we conclude in light of the allegations, that dismissal for failure to comply with

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> the 90 day rule without a determination concerning the circumstances surrounding Petitioner's failure to file within the specified time period would result in injustice.
> (Slip Opinion, at p. 3)

In the Commissioner's judgment, a review of the record indicates that the argument advanced by petitioner claiming the ALJ erred in inquiring into the merits of the allegations set forth in the instant Petition of Appeal has been correctly stated. Based upon the directive given by the State Board in this matter it was necessary for the ALJ to examine all relevant testimony adduced from petitioner, as well as those reports of the psychiatric examinations of petitioner by Dr. Kerns and Dr. Flicker, and to weigh this evidence along with the pertinent documentary evidence admitted into the record in order to determine whether petitioner's state of mind was such as to have made his resignation of April 1, 1986 an involuntary act. To the extent that the findings and conclusions exceed the scope of the State Board's decision in this matter, they will not be considered by the Commissioner in reaching his final determination of the first issue originally identified in the prehearing order and set forth in the initial decision, ante.

However, the Commissioner in making such review finds and determines that there was sufficient relevant testimony by petitioner and also in certain exhibits marked in evidence for the ALJ to have concluded that the circumstances related to petitioner's state of mind during the periods controverted herein were not such as to render the submission of his resignation from the Board's employ on April 1, 1986 as being other than a voluntary act.

In this regard the Commissioner upon review of all of the relevant evidence presented in the record of this matter finds and determines that the ALJ's reliance on petitioner's own testimony, as well as the psychiatric report of Dr. Flicker (R-1), in conjunction with the relevant undisputed facts set forth in the initial decision, support those Findings of Fact appearing in No. 1 (first sentence), No. 3 (first sentence), No. 6, No. 8, No. 9 and No. 10 in the initial decision, ante.

The Commissioner hereby affirms those findings and conclusions of the ALJ as modified above and hereby adopts them as his own.

Accordingly in compliance with the State Board's directive on remand of this matter, the Commissioner finds and determines that petitioner has failed to carry his burden of proof in support of his contention that his resignation from the Board's employ on April 1, 1986, which was formally accepted by the Board on April 22, 1986, was involuntary due to his impaired state of mind.

In light of the foregoing the Commissioner finds and determines that relaxation of the 90 day rule is unwarranted and that the instant Petition of Appeal can be and is hereby dismissed.

COMMISSIONER OF EDUCATION

February 11, 1988

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ROBERT BRUNSQUELL,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE SCOTCH PLAINS-FANWOOD REGIONAL SCHOOL DISTRICT AND DONALD E. SHELDON, UNION COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decision on motion by the Commissioner of Education, March 19, 1987

Remanded by the State Board of Education, July 1, 1987

Decision on remand by the Commissioner of Education, February 11, 1988

For the Petitioner-Appellant, Robert P. Glickman, Esq.

For the Respondent-Respondent, Casper P. Boehm, Jr., Esq.

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

July 6, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2046-87
AGENCY DKT. NO. 38-3/87

BOUND BROOK EDUCATION ASSOCIATION,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF BOUND BROOK, SOMERSET COUNTY,
Respondent.

Stephen B. Hunter, Esq., for the petitioner (Klausner, Hunter & Oxfeld, attorneys)

David W. Carroll, Esq., for the respondent

Record Closed: November 21, 1987 Decided: January 4, 1988

BEFORE BEATRICE S. TYLUTKI, ALJ:

PROCEDURAL HISTORY

This matter concerns the allegation of the Bound Brook Education Association, petitioner, that the respondent, Board of Education of the Borough of Bound Brook (Board), has improperly assigned duties of certified school nurses to personnel who are non-certified and are not eligible to perform said duties. The Board denied the allegations and the matter was referred to the Office of Administrative Law on March 25, 1987, for a determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

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At the prehearing conference which was held on May 20, 1987, the parties agreed that the issues in this matter are:

A. Whether non-certified staff members are performing any nursing duties.

B. Did the Board fail to obtain the approval of the County Superintendent of Schools for the job descriptions of certain non-certified positions allegedly involving nursing duties?

C. Whether the County Superintendent of Schools exceeded his authority if he approved such job descriptions.

D. If the Board acted improperly in this matter, what is the appropriate remedy?

Also at the prehearing conference, David W. Carroll, Esq., on behalf of the Board, reserved the right to file a motion challenging the standing of the petitioner. Stephen E. Klauser, Esq., who represented the petitioner at the prehearing conference, indicated that he would consider the possibility of adding a named individual as a petitioner.

Thereafter, Mr. Carroll filed the motion challenging the standing of the petitioner. The Bound Brook Education Association opposed the motion and argued that it has standing. After reviewing the arguments of the party, I ordered on July 28, 1987, that the motion be denied and held that the petitioner has standing to bring this matter.

The hearing took place on October 19, 1987, at the Green Brook Township Municipal Building in Green Brook, New Jersey. After receipt of briefs, the record in this matter closed on November 21, 1987.

FACTUAL FINDINGS

I **FIND** that the facts in this matter are not in dispute. The parties stipulated to the following (J-1):

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1. The Bound Brook School District is a K-12 school district located in Somerset County. The geographical area of the entire school district is one and one-half square miles.

2. The enrollments and grade organizations of the district's schools are as follows:

SCHOOL	GRADES	ENROLLMENT
Bound Brook High School	7-12	737
Lafayette Elementary	K-3	201
LaMonte Elementary	4-6	153
Smalley Elemenatry	K-6	225

3. It has been district policy, at least since 1983, that no staff member other than a school nurse is permitted to give oral medication of any kind, including aspirin, to any child.

4. The district employs two full-time school nurses. One is regularly assigned full-time to the high school. The second nurse has responsibility for covering the three elementary schools.

5. The district also employs one nurse's aide. The nurse's aide is assigned to the elementary schools.

At the hearing, it was established that the Board created the school nurse's aide position in 1974, and has obtained the annual approval of the County Superintendent of Schools for this paraprofessional position. However, the application for the 1986-87 school year was not submitted by the Board until March 6, 1987. It was approved by the County Superintendent of Schools on the same day (P-2).

Joan Prochko has been employed by the Board as the school nurse's aide for 13 years and she has worked in the three elementary schools with Beryl Bevacqua, the school nurse assigned to the elementary schools. Ms. Prochko is a high school graduate who does not have any state education certificates, but is certified in first aid and in cardiopulmonary resuscitation (CPR).

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As the school nurse's aide, Ms. Prochko's supervisor is Ms. Bevacqua, with whom she has a good relationship. Ms. Prochko is evaluated every year by the principals of the three elementary schools.

For each school month, there is a schedule issued which indicates where Ms. Prochko and Ms. Bevacqua will be during the school day (R-1). In general, the nurse and nurse's aide are at different schools, except for the beginning of each school year, when both of them work together for a while. Thereafter, during the school year, Ms. Bevacqua and Ms. Prochko rotate between the schools, and at any given time, there is one elementary school which does not have a nurse or nurse's aide in the building.

When Ms. Bevacqua is out, the Board attempts to get a substitute nurse and if they are unsuccessful, the high school nurse assumes her responsibilities. However, when Ms. Prochko is out, the Board does not try to find a substitute. According to Ms. Bevacqua, she could only recall one time when both nurses were out, and on that occasion, the parents had to go to the schools to administer medication to their children.

Ms. Prochko testified that both she and the nurse log all of their activities on a daily sheet. The sheet contains the name of each student, the student's complaint, and the action taken by the nurse's aide or nurse (P-1). According to Ms. Prochko, she administers first aide to students for routine minor scrapes. For example, she will clean, put on medicated cream and bandage scrapes, and she will apply ice packs and warm compresses. In addition, she will establish if a child has a fever and, if so, will call the parent so that the child can be sent home. Ms. Prochko also talks to children who request a gym excuse and represents that she has developed the ability to determine which children have legitimate problems and which just do not want to go to gym. Ms. Prochko weighs all students at the beginning of the school year and also weighs kindergarten students at the end of the school year.

If Ms. Prochko is not sure of the appropriate treatment or suspects that there may be a more substantial problem, she contacts Ms. Bevacqua. Ms. Prochko stated that when she calls, Ms. Bevacqua advises her by telephone or she comes to the school to give her assistance. There is a five to ten minute travel time between elementary schools.

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According to Ms. Prochko, she assists Ms. Bevacqua by getting certain information and statistics ready for insurance claim forms and health reports; she schedules tests and physical examinations to be administered by the nurse and/or doctor; she helps set up posters, etc., regarding health programs, and she prepares the orders for supplies.

Ms. Prochko stated that she does not administer any medicine, does not have conferences with any students, does not administer any immunizations, TB tests, blood pressure tests, vision or audio screening tests, and does not conduct any nutrition or weight control programs. Ms. Prochko does not have any contact with the child study team.

The work guidelines for the nurse's aide are posted in the nurse's offices along with a list of first aid instructions, the acceptable reasons for exclusion (taking the student out of the class), and a list of the student's parents and alternates.

No testimony or exhibits were introduced regarding the duties or activities of any non-certified person, other than Ms. Prochko, who may perform nursing duties.

Ms. Bevacqua, who has been employed as a nurse by the Board for 17 years, stated that she has had a long-term concern regarding nurse's services in the elementary schools and that she has expressed this concern to the parents and the Board. Ms. Bevacqua stated that she is concerned about responding to Ms. Prochko's questions by telephone since there is a possibility of the misinterpretation of the child's symptoms. Ms. Bevacqua attempts to go to the school whenever Ms. Prochko calls for assistance.

There have been times when Ms. Bevacqua was unable to go to the assistance of Ms. Prochko because she was treating a student in another school. In such a case, Mr. Bevacqua has to determine which student needs the most assistance. If she cannot go to the school, Ms. Bevacqua stated that she will call the parents or, if necessary, the rescue squad. Ms. Bevacqua could recall only one specific incident when she could not assist Ms. Prochko. On that occasion, she was with a student who had a head injury and could not help Ms. Prochko, who had a student with an injured arm. Therefore, Ms. Bevacqua called the parents and had them make arrangements for the treatment of the arm injury.

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Both Ms. Prochko and Ms. Bevacqua stated that it is impossible to determine the number of calls Ms. Prochko makes to Ms. Bevacqua because it depends on the number of children who need assistance on any given day; however, they estimate there are about five calls per week. Also, Ms. Bevaqua stated that she gets about six calls per week from the principal or the school secretary of whichever school is without any staff for nursing services.

Ms. Bevacqua has been present when Ms. Prochko assisted students, and she stated that Ms. Prochko does provide adequate assistance to the best of her ability.

Robert Hershman, the principal of the Smalley Elementary School, testified that during his 11 years as a principal, he has observed the nursing services offered in the school and has found the services to be adequate to deal with all emergencies.

CONCLUSIONS OF LAW

Both parties agree that the law in this state requires each school district to employ at least one certified school nurse, N.J.S.A. 18A:40-1, and that there is no requirement that each school have a certified school nurse. Smith v. Caldwell-West Caldwell Bd. of Ed., 1972 S.L.D. 232, 239; Outslay v. Midland Park Bd. of Ed., 1977 S.L.D. 1033, 1038; Roe v. Mine Hill Bd. of Ed., 1976 S.L.D. 672, aff'd by State Board of Education, 1976 S.L.D. 676.

Also, the parties agree that a local board of education is permitted by regulation to create the position of either nurse's aide or health aide, N.J.A.C. 6:29-2 et seq., and that there are certain duties that can only be performed by a certified school nurse. See, Bernards Twp. Ed. Assn. v. Bernards Twp. Bd. of Ed., 1981 S.L.D. 1070, aff'd by State Board of Education, 1982 S.L.D. 1443, aff'd (N.J. App. Div., May 18, 1983, A-4211-81T3) (unreported); Ross v. Allen Home Improvement Co., 8 N.J. 219 (1951); Peterson v. Edison Twp. Bd. of Ed., 137 N.J. Super. 566 (App. Div. 1975).

In addition, there is no disagreement between the parties that certain types of activities can only be performed by a certified school nurse, except for the question of access to the student's health records which are confidential public school records. The petitioner takes the position that a nurse's aide may not have access to such records pursuant to N.J.A.C. 6:3-2.1 et seq. The Board argues that such access is now permitted

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pursuant to N.J.A.C. 6:3-2.5(c)(6), and that the petitioner has not shown a violation of this provision. As to the question of access, I **CONCLUDE** that the Board is correct.

Therefore, the main issue in this matter is whether the duties assigned to the nurse's aide by the Board are appropriate and consistent with the statute and regulations. The Board argues that the duties performed by Ms. Prochko are consistent with law and relies on the decisions in Wyckoff Ed. Assn. v. Wyckoff Bd. of Ed., 1981 S.L.D. 1128, aff'd by State Board of Education, 1982 S.L.D. 1598; and Neptune Twp. Ed. Assn. v. Neptune Twp. Bd. of Ed., OAL DKT. EDU 5780-86 (June 18, 1987), aff'd by Commissioner (July 29, 1987). These cases clearly establish that a local board of education can hire non-certified persons to administer simple first aid so long as these persons do not perform the kinds of duties which can only be performed by a certified school nurse.

In his briefs, Stephen B. Hunter, Esq., on behalf of the petitioner, disagreed that the Wyckoff case is controlling, and argued that Ms. Prochko's position is in violation of the law since she performs substantially the identical duties performed by Ms. Bevacqua. Also, in his briefs, Mr. Hunter summarized the status of the law regarding the qualifications and need for a school nurse and the limited permitted activities of a nurse's aide, and relied specifically on the decision in Plainfield Education Assn. v. Plainfield Bd. of Ed., decided by Commissioner (December 27, 1982), aff'd by State Board of Education (June 2, 1983). The Plainfield case as well as other cases cited by the petitioner clearly establish that a local board of education cannot establish a school aide position as a pretext in order to have non-certified personnel performing duties which can only be done by a certified school nurse.

After reviewing the facts and the arguments of the parties, I **CONCLUDE** that the petitioner has not shown that the Board's job description for the nurse's aide postition or the duties performed by Ms. Prochko are not consistent with the statutes and regulations or with case law, or that Ms. Prochko or any other employee of the Board is performing any duties which can only be done by a certified school nurse. Also, the facts establish that Ms. Prochko and other Board employees exercise caution and contact Ms. Bevacqua whenever there is the possibility of the need for the professional services of a trained nurse.

The only remaining issue is whether or not the Board violated the provisions of N.J.A.C. 6:11-4.9 by not seeking a timely approval of the nurse's aide position for the

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1986-87 school year. There is no question that such an approval was necessary and that the Board did not gain this approval for the 1986-87 school year until March 1987. However, I agree with the Board's argument that this matter is now moot since the appropriate approval was obtained. This is especially true since it was not a new position and has been annually been approved by the County Superintendent of Schools since 1974, and since Ms. Prochko is not a new employee of the Board. Further, I **CONCLUDE** that the petitioner has not proven that the County Superintendent of Schools exceeded his authority when he approved the Board's nurse's aide position.

Based on the foregoing, I **ORDER** that the petition of the Bound Brook Education Association be **DISMISSED.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

January 4, 1988
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

1/5/88
DATE

Receipt Acknowledged:
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JAN 7 1988
DATE

Mailed To Parties:
Ronald L. Parke 7.5.
OFFICE OF ADMINISTRATIVE LAW

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BOUND BROOK EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BOUND BROOK, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions were timely filed pursuant to N.J.A.C. 1:1-18.4. However, the Board's reply exceptions were untimely.

Petitioner, hereinafter "Association," posits two exceptions which are summarized in pertinent part below.

EXCEPTION I

> THE ADMINISTRATIVE LAW JUDGE FAILED TO MAKE ANY SPECIFIC FACTUAL FINDINGS TO SUBSTANTIATE HER LEGAL CONCLUSION THAT THE NURSE'S AIDE EMPLOYED WITHIN THE BOUND BROOK SCHOOL DISTRICT PERFORMED ONLY DUTIES AUTHORIZED BY STATUTES, REGULATIONS AND CASE LAW.

Citing the initial decision, ante, the Association avers that no specific factual findings were made by the ALJ with regard to its contentions that the nurse's aide employed by the district performed duties that could only be performed by a certificated nurse and that she acted in a manner inconsistent with case law concerning the proper role for noncertificated personnel rendering nursing services within a school district. In support of its contention that there is clear evidence in the record to establish its position, the Association states:

> For example, in her recitation of the evidence presented, Judge Tylutki finds that the nurse's aide was responsible for making exclusionary decisions with regard to ill or injured students, without reviewing this decision with anyone else employed within the district. The Association had maintained that apposite portions of N.J.S.A. 18A:40-7 and 18A:40-8 required that such exclusionary decisions be made only by certificated personnel, e.g., school nurses or classroom teachers. (Exceptions, at p. 2)

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Yet, the Association contends, the ALJ did not address the issue that N.J.S.A. 18A:40-7 and 40-8 are violated if an uncertified aide performs the function of excluding children from school.

Moreover, the Association contends that the ALJ failed to make specific factual finding as to why she agreed with the Board that the nurse's aide herein did not exceed the limited access to pupil records she might have pursuant to N.J.A.C. 6:3-2.1. Further, it contends that the ALJ did not address its argument predicated on N.J.S.A. 45:11-23 which permits a licensed practical nurse "with substantially greater nursing experience than a nurse's aide to render the nursing services that are rendered within the Bound Brook School District only under the direction of a registered nurse or licensed or otherwise legally authorized physician or dentist." (emphasis in text) (Exceptions, at p. 2) The Association submits that if LPNs can be prevented from functioning independent of any direct supervision in rendering nursing services to sick or injured patients, then nurses' aides may only perform nursing functions to which they are assigned under the direct supervision of a registered nurse. The Association claims there should be a nurse physically present at all times to supervise a nurse's aide.

EXCEPTION II

> THE JUDGE APPEARS TO CONCLUDE THAT A NURSE'S AIDE CAN BE UTILIZED TO REPLACE A SCHOOL NURSE IF CERTAIN OF THE DUTIES PERFORMED BY A NURSE'S AIDE CAN BE PERFORMED BY AN UNCERTIFIED PERSON.

The Association submits:

> It appears from reading Judge Tylutki's decision that she concludes that if a school nurse's aide primarily performs duties that are appropriately performed by her, the fact that she performs certain duties that can only be performed by a school nurse is not dispositive.
>
> (Exceptions, at p. 3)

By this, the Association suggests that arguing that particular nursing duties can be performed by uncertified personnel ignores the plain fact that the position with its "paramount responsibilities," requires certification (Id.) and "that the Commissioner of Education would not sanction an uncertified person occupying some total of a teacher's position." (Id.) Relying on its post-hearing submissions, the Association takes the position that the role of the nurse's aide, as practiced in the Bound Brook School District, is improper because it is tantamount to that of a school nurse. It claims that a nurse's aide does not have the ability to exclude ill or injured students independent of any action on the part of the school nurse or the principal; such aide does not have access to pupil records that the aide in Bound Brook does; and such aide may not perform nursing functions in a building without the direct supervision of certificated nurses and cannot perform diagnostic work concerning the severity of an injury or illness in

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determining whether or not to call the school nurse without appropriate licensure as a school nurse.

The Association requests that the Commissioner set aside the initial decision and should instead conclude that the school nurse's aide employed in respondent's district inappropriately performs school nursing functions that may only be performed by a school nurse.

Upon his careful and independent review of the record, which it is noted includes the transcript of the hearing below, the Commissioner affirms the recommended decision of the Office of Administrative Law as clarified below.

Petitioner's Exception I suggests that the ALJ failed to make specific findings of fact. The Commissioner disagrees. Pages 2 through the first half of page 6 are an analysis of the testimony under the heading FACTUAL FINDINGS. The ALJ specifically finds therein, and the Commissioner further notes transcript citations for such factual conclusions, that, in addition to her qualification as a nurse's aide,

a) Ms. Prochko is evaluated every year by the principals of the three elementary schools. (Initial Decision, at p. 4; Tr. 9)

b) She is also supervised by Ms. Bevacqua, and Ms. Robinson, the certified school nurses. (I.D., at p. 4; Tr. 8)

c) Ms. Prochko administers first aid to students for routine minor scrapes. (I.D., at p. 4; Tr. 18) Further, she "will establish if a child has a fever and, if so, will call the parent so that the child can be sent home. Ms. Prochko also talks to children who request a gym excuse and represents that she has developed the ability to determine which children have legitimate problems and which just do not want to go to gym." (I.D., at p. 4; Tr. 23, 27-28) If she is not sure of the appropriate treatment, she calls the school nurse. (Tr. 20-21)

d) Ms. Prochko assists in clerical tasks by getting certain information and statistics ready for insurance claim forms and health reports and helps with preparing orders for supplies. (I.D., at p. 5; Tr. 16-17)

e) Ms. Prochko does not administer any medicine, does not conduct conferences with students, does not administer immunizations, TB test, blood pressure tests, vision or

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audio screening tests, and does not conduct any nutrition or weight control programs. Neither does she have contact with the child study team. (I.D., at p. 5; Tr. 25-26, 53)

f) No testimony or exhibits were introduced regarding the duties or activities of any non-certified person, other than Ms. Prochko, who may perform nursing duties. (I.D., at p. 5)

g) A work guidelines sheet for the nurse's aide is posted in the nurse's office along with a list of first aid instructions, the acceptable reasons for exclusion from class of students, and a list of the pupils' parents and alternative contacts. (I.D., at p. 5; Tr. 8, 45)

h) Ms. Prochko and Ms. Bevacqua call back and forth from school to school regularly and Ms. Bevacqua stated that she gets about six calls per week from the principal or the school secretary of whichever school is without any staff for nursing services concerning pupil illnesses. (I.D., at p. 6; Tr. 44, 46, 62)

The Commissioner adopts these findings and any others noted on page 4 to the top of page 6 of the initial decision as his own.

Moreover, the Commissioner adopts as his own the recitation of the case law pertinent to the instant matter as found on pages 6-8 of the initial decision. However, the Commissioner's conclusions of law as applied to the facts in this matter differ from those of the ALJ in the following way.

The ALJ concludes that the Board's job description for the nurse's aide position or the duties performed by Ms. Prochko are not inconsistent with the statutes and regulations or with case law and that neither Ms. Prochko nor any other employee of the Board is performing any duties which can only be done by a certified school nurse. While taken as a whole, the Commissioner's view in this regard comports with the ALJ's, there is some question as to whether Ms. Prochko is excluding students either from gym class or from school without the school nurse or the principal having first approved such measure. See Tr. 22-23 wherein Ms. Prochko states:

Q. What are exclusions?

A. Exclusions is when a child comes in not feeling well, I take their temperature and if it is a hundred or so then they are excluded and we just notify, call the parents.

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***

Q. Do you clear your exclusions with anyone?

A. When Mrs. Bevacqua comes I usually tell her who was sent home because of such and such illness.

But see also Tr. 56 wherein the school nurse states:

Q. Based on your personal observations in the 13 years of working with Mrs. Prochko, what are her functions concerning the handling of gym excuses, are they the same as yours? The same in terms of handling student excuses?

A. Probably so to the best of my knowledge.

Notwithstanding the fact that there is a school policy which requires that any child with a fever over 100° be sent home, the Commissioner finds that before so doing, a school nurse aide is first required to report such occurrence to either a school nurse or principal, whereupon, before sending the child home, the nurse or principal shall approve such measure. N.J.S.A. 18A:40-7, 40-8 The same principle shall be enforced in excluding a child from gym class. A school nurse's aide has no authority to unilaterally provide such excuse or denial of excuse to a child. That authority lies with the school nurse or the school principal alone in excluding a child from school and is extended to permit a teacher as well to exclude a sick child from class. Therefore, the Commissioner directs that if the nurse's aide herein is excluding children, either from class or school, she is stepping beyond her authority and is directed to cease and desist such practice immediately.

Moreover, the Commissioner notes that Ms. Prochko does have access to pupil records, although it is not clear from the record to what extent she is supervised when she seeks to obtain the information necessary to complete the clerical portions of a child's health chart. At pages 14 to 15 of the transcript it is stated by Ms. Prochko:

A. ***I put the child's health chart in the files for Mrs. Bevacqua to check.***

Q. Is it your testimony that you and Mrs. Bevacqua work together concerning all aspects of getting the records concerning immunizations from transfer students?

A. I usually get the information for her and put it in the student's file and she does the rest.

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Q. How do you get the information?

A. Cumb (sic) folders. If a new student comes in, a lot of times I'm not at that school that Mrs. Bevacqua is in so the secretary takes the information and puts in in a cumb (sic) folder which is in the main office and I -- if there is any information pertaining [to] health I take it out and put it in our health chart and put it in the desk and she comes and she checks them.

Q. In other words, to perform these duties you have access to the student's records?

A. Yes.

Q. Have there been restrictions placed on your ability to examine pupil records concerning their health records?

A. I just look for the health immunizations. I never look at anything else or check anything else, just the health, immunization records.

Q. There are no restrictions that have been placed on you concerning what you look at in terms of students' records?

A. No, sir.

The Commissioner notes in agreement with the Board's argument that a nurse's aide is permitted access to pupil records pursuant to N.J.A.C. 6:3-2.5(c)(6). Said regulation states:

> 6. Secretarial and clerical personnel under the direct supervision of certified school personnel shall be permitted access to those portions of the record to the extent that is necessary for the entry and recording of data and the conducting of routine clerical tasks. Access shall be limited only to those pupil files which such staff are directed to enter or record information and shall cease when the specific assigned task is completed. (emphasis supplied)

However, such access is specifically limited as emphasized above. The Commissioner directs that to whatever extent, if at all, Ms. Prochko is exceeding the limitations set forth above in performing the clerical tasks assigned to her as nurse's aide, without direct supervision from certified personnel, she shall cease and desist immediately.

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Finally, the Commissioner adopts as his own the conclusion of the ALJ that while the Board may have violated the provisions of N.J.A.C. 6:11-4.5, Paraprofessional Approval (incorrectly cited, ante, as N.J.A.C. 6:11-4.9) by not seeking a timely approval of the nurse's aide position for the 1986-87 school year until March 1987, the matter is now moot since said approval has been obtained. The Commissioner does not condone such tardiness in complying with the regulations, however, and the Board herein is admonished to strictly conform with said regulatory requirements in the future.

Accordingly, the initial decision is affirmed as modified herein. The Petition of Appeal is dismissed with prejudice.

The Commissioner adopts that part of the initial decision relying on Wyckoff Ed. Ass'n, supra, and Neptune Township Ed. Ass'n, supra, that, overall, the duties assigned to Ms. Prochko are appropriate and consistent with statute and regulation as qualified herein.

COMMISSIONER OF EDUCATION

February 17, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5023-87
AGENCY DKT. NO. 200-6/87

DAVID B. BELL,
Petitioner,
v.
RIVERTON BOROUGH
BOARD OF EDUCATION,
Respondent.

Jeffrey A. Bartges, Esq., for petitioner

Ronald J. Ianoale, Esq., for respondent (Parker, McCay & Criscuolo, attorneys)

Record Closed: November 24, 1987 Decided: January 7, 1988

BEFORE **DANIEL B. MC KEOWN**, ALJ:

David B. Bell (petitioner) employed by the Riverton Borough Board of Education (Board) assigned to combined teaching and administrative functions March through June 1987, alleges the Board improperly compensated him during that time in the amount of $2,379.93. He seeks recovery of those monies. After the Commissioner of Education transferred the matter on July 21, 1987 to the Office of Administrative Law as a contested case a prehearing conference scheduled by the Newark Office of Administrative Law was conducted by this judge on September 23, 1987. It was agreed that the matter should be handled by way of cross motions for summary decision, stipulation of fact, and letter memorandum of the parties. The record closed November 24, 1987 upon receipt of petitioner's memorandum.

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STIPULATION OF FACT

On or about October 20, 1987 counsel to the parties filed a stipulation of fact, and as amended thereafter, through which they agree on the following facts:

1. David Bell was originally hired as a Reading Specialist/Administrative Assistant effective September 1977, and has been consistently employed by the Riverton Board of Education since that time.

2. David Bell signed and accepted a salary offer of $35,669 for the 1985-86 academic year on or about 5/30/85, as memorialized by J-1 attached. This salary was for a ten-month position.

3. David Bell signed and accepted a salary offer of $35,669 for the 1986-87 academic year on or about 4/25/86, as memorialized by J-2 attached. This salary was for a ten-month position.

4. On or about May 2nd, 1986, the Board and Mr. Bell entered into an Agreement wherein he would hold the position of Acting Administrative Principal/Superintendent from May 3, 1986 until such time as a permanent Principal/Superintendent could be appointed. The Board agreed to compensate Mr. Bell for the months of July and August 1986 with a stipend of $1,845 each month with one week vacation each month. This Agreement is accurately memorialized by the document attached as J-3.

5. On or about May 13th, 1986, the Board and Mr. Bell entered into an Agreement wherein he would be appointed as Acting Superintendent of the District for one year from July 1, 1986 to June 30, 1987. The salary during this period was fixed at the annual rate of $39,355 with two weeks of vacation to be taken during July or August. The Agreement also required 60 days notice in the event that Mr. Bell wished to resign from the position. This Agreement stated on its fact that it superseded any prior agreement with respect to the position of Acting Superintendent. This Agreement is accurately memorialized by the document attached as J-4.

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6. Mr. Bell did request to be returned to his former position in September of 1986, and the respondent reassigned him to a position of combined teaching and administrative functions, but not until on or about March 1, 1987.

7. Mr. Bell worked in the 12-month position of Acting Administrative Principal/Superintendent for eight months, with the following salary calculations:

$39,355 per 12 months = $3,279.60 per month
x 8 months
$26,236.80 for 8 months

8. Mr. Bell worked in the months of March, April, May and June at the rate of $2,974.92 per month, amount to $11,899.67. This figure represents his prior salary of $35,669.00 divided by twelve months. It is the Board's position that he was correctly paid at this figure.

9. Mr. Bell was actually paid $38,136.47 for the academic year 1986-87. It is the Board's position that he was correctly paid at this figure.

10. Had Mr. Bell been paid on a 10-month basis during March, April, May and June, (i.e. $35,669 divided by 10), he would have been paid $3,566.90 per month, or $14,279.60 for the 4-month period, or a total aggregate 12-month salary amount of $40,516.40 ($26,236.80 plus $14,279.60), which exceeds his Acting Superintendent 12-month salary amount for 1986-87 of $39,355, as described in paragraph 5, by $1,161.40. It is the petitioner's position that he should have been paid a$14,279.60 for the 4-month period mentioned in this paragraph No. 10.

11. It is not contested that Mr. Bell should have returned to the annual salary rate of $35,669 during March, April, May and June of 1987.

12. It is contested whether the annual salary rate of $35,669 should be calculated on a 10 or 12 month basis for the 10-month position.

13. Mr. Bell did not work, nor was he paid for, any work during the months of July and August of 1987.

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14. The amount in controversy is $2,379.93.

This concludes a recitation of all facts stipulated by the parties. Consequently, I **FIND** the facts constitute all relevant and material facts of the matter.

ARGUMENTS OF THE PARTIES

Petitioner argues that when the Board established his salary as reading specialist/administrative assistant for the period March through June 1987 it violated his tenure protection against a salary reduction under N.J.S.A. 18A:28-5. Petitioner says that rather than the Board properly establishing his salary for the four month period by dividing the salary $35,669 the Board set for his employment as reading specialist/administrative assistant on April 25, 1986 by ten to represent ten months in the 1986-87 academic year, it erroneously divided the total salary by 12 which represents 12 months in the 1986-87 school year. Petitioner explains that his employment as a reading specialist/administrative assistant is on a ten month academic year basis and, accordingly, the Board cannot subsequently change the ten month academic year basis to a 12 month school year basis.

Petitioner contends that it is immaterial that had the Board established his salary for the March-June 1987 period as he asserts it should have, his total salary for the 1986-87 year would have been greater than the amount he would have earned had he continued as acting superintendent or the amount he would have earned had he remained solely in the position of reading specialist/administrative assistant the entire year. This is so, petitioner reasons, because he actually performed services for the Board under two separate agreements.

While petitioner now says that the contract (J-4) he entered on May 13, 1986 to perform as an acting superintendent was a "bad" contract from his point of view, ostensibly because he earned less per month than he would have earned per month beginning in September 1986 as a reading specialist/administrative assistant on a ten month basis, he points out that as of March 1, 1987 he was released from the asserted inferior contract and returned to his regular ten month employment as a reading specialist/administrative assistant. Petitioner contends that because he returned to that regular ten month employment as of March 1, 1987, his salary should be properly

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established by dividing the total yearly salary set by the Board on April 25, 1986 by ten in order to determine his monthly salary for March, April, May and June 1987.

The Board disputes petitioner's claim and it questions the validity of the logic employed by petitioner to support his claim. The Board explains that petitioner was fairly compensated on the basis of his responsibilities during the entire 1986-87 school year. Petitioner was paid for his services as an acting superintendent from July 1, 1986 through February 28, 1987. The total amount he received for this eight months of service to the Board was, as stipulated, $26,236.80. The Board points out that when he returned to his regular employment as reading specialist/administrative assistant on March 1, 1987 it established his salary for the four months thereafter by considering he had started the 1986-87 year on a 12 month basis, had already been paid for eight months, and it then divided salary of $35,669 it initially set April 25, 1986 for the 1986-87 academic year by 12.

The Board, noting stipulated fact 10, contends that petitioner seeks a windfall of public monies for the 1986-87 year through his efforts of seeking a total salary of $40,516.40, an amount to which the Board did not agree to compensate petitioner for the 12 month period. The Board points out that if petitioner's argument is taken to its logical conclusion, he could have submitted a resignation as acting superintendent of schools effective August 30, 1986 after having been paid for the months of July and August in that position. He would then have earned a total of $6,559. Thereafter, had petitioner resumed his regular employment as reading specialist/reading instructor at the 1986-87 academic year salary set by the Board on April 2, 1986 he would have earned $35,669. Combining the two figures, the Board explains petitioner would have been paid for the 12 month 1986-87 year a total of $42,228. The Board maintains that at no time did it intend to enter any agreement with petitioner by which he would be paid that amount of money, or any amount of money other than the total amount of $38,136.47 he was paid.

Finally, the Board contends that the Commissioner has already established that a school principal, employed on a 12 month basis, need not be compensated a monthly equivalent to the amount he would have received had he been employed as a teacher on a ten month basis during the same year and cites Castner v. Plumsted Twp. Bd. of Ed., OAL DKT. EDU 106-2/78, (Commr. Ed. April 11, 1980) (unreported).

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INFERENCES, DISCUSSION AND CONCLUSION

In the absence of a stipulation of fact to the contrary, it is inferred that the Board has no policy governing the circumstances here presented. It is further inferred that petitioner, neither as an acting administrative principal/superintendent nor as a reading specialist/administrative assistant, was a member of the local teachers' association. Finally, it is inferred that when petitioner's salary of $35,669 was established for the ten month 1986-87 academic year on or about April 25, 1986, it was intended by the parties that petitioner's duties would commence under this arrangement the following September when school resumed following the general summer recess.

Given the stipulated facts of the matter, the inferences drawn therefrom, the arguments of counsel, and in the absence of a Board policy to the contrary, I **CONCLUDE** that petitioner has failed to establish a basis for his claim upon which relief could be granted. When petitioner and the Board agreed on or about April 25, 1986 that his 1986-87 ten month academic year salary would be $35,669, the intention of the parties was for petitioner to earn from the Board that set amount of money for services to be rendered. True, a subsequent agreement was entered by the parties by which petitioner agreed to perform services for the Board as acting superintendent for the 12 month period July 1, 1986 to June 30, 1987 at the total salary of $39,355, an increase of close to $4,000 from the amount he otherwise would have received. In neither case, however, did the Board ever intend to compensate petitioner more than $39,355 for his 12 month service to the district for a 12 month period, nor $35,669 for ten months of his service.

True, had petitioner confined his employment to that as a reading specialist/administrative assistant for the 1986-87 ten month academic year, he would have received in salary $3,566.90 a month. Rather, by accepting the 12 month position of acting superintendent he received $3,279.60 per month, a lesser monthly amount for the period September through February than he would have earned as a reading specialist. But as a reading specialist, petitioner would not have earned $3,279.60 for the months of July and August 1986 which he did earn as acting superintendent. Moreover, the salaries controverted herein are, by the evidence before me, established on a yearly basis; not on a monthly basis.

There is no evidence to show that when petitioner returned to the position of reading specialist/administrative assistant on or about March 1, 1987 that he and the Board agreed he would return under the original salary offer made and accepted by him of

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$35,669 divided by ten months in order to arrive at a monthly salary for the period March through June 1987. Of course, the Board could have entered such an agreement if it so desired, but the fact remains there is no evidence to show it did. What the evidence does show is that the Board used a reasonable basis to arrive at petitioner's salary for the period March through June 1987 by considering its initial 1986-87 salary obligation to him on a 12 month basis. Because petitioner returned to the position with a lesser salary expectancy than that of the acting superintendent's position, the Board proportioned the yearly amount it would have compensated petitioner as a reading specialist/administrative assistant on the basis of 12 months employment, petitioner's own contractual obligation he signed on May 13, 1986 to arrive at the salary to which he was entitled post March 1987.

The calculation of petitioner's salary by the Board from March 1, 1987 forward does not constitute a violation of petitioner's tenure right against a reduction in salary. Rather, the Board's calculation of petitioner's salary was arrived at after considering the amount of money petitioner had already been compensated from July 1, 1986 through the end of February 1987, and pro rating the salary initially called for petitioner as a reading specialist/administrative assistant but on a 12 month basis. I **FIND** nothing improper nor erroneous, arbitrary or capricious, or unlawful in the Board's method of determining petitioner's salary.

Therefore, I **CONCLUDE** petitioner has failed in his proofs to establish by a preponderance of credible evidence the validity of his claim that the Riverton Board of Education is indebted to him for compensation in the amount of $2,379.93. Therefore, the petition of appeal is **DISMISSED**.

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This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

January 7, 1988
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

JAN 0 9 1988
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

Mailed To Parties:

JAN 12 1988
DATE

OFFICE OF ADMINISTRATIVE LAW

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DAVID B. BELL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RIVERTON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions were not timely filed pursuant to N.J.A.C. 1:1-18.4.

Upon review of the record, the Commissioner is in agreement with the findings and conclusions of the ALJ that the Board acted properly in calculating petitioner's salary from March 1, 1987 to June 30, 1987. Contrary to his arguments, petitioner did not experience a reduction in salary in violation of his tenure rights. The salary for the first 8 months of his 12 month contract (July 1, 1986 - June 30, 1987) was calculated at the monthly rate of 1/12th of $39,355 or $3,279.60, for a total of $26,236.80. Due to his change in duties, however, the salary for the remaining 4 months of the 12 month school year was calculated monthly based on the lower salary expectancy of $35,699 which resulted in a monthly rate of $2,974.92 (1/12th of $35,699) for a total of $11,899.67. The net effect of all this was a yearly salary of $38,136.47. As determined by the ALJ, this is a reasonable action by the Board considering its initial 1986-87 salary obligation to him on a 12 month basis to be the acting chief school administrator.

Accordingly, the Commissioner adopts the initial decision as the final decision in this matter for the reasons expressed by the ALJ. The Petition of Appeal is therefore dismissed.

COMMISSIONER OF EDUCATION

February 18, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7942-87
AGENCY DKT. NO. 344-11/87

HAROLD SUGGS,
Petitioner,
v.
ASBURY PARK CITY
BOARD OF EDUCATION,
Respondent.

Kevin E. Daniels, Esq., for petitioner (Daniels & Davis-Daniels, attorneys)

J. Peter Sokol, Esq., for respondent (McOmber & McOmber, attorneys)

Record Closed: January 4, 1988 Decided: January 11, 1988

BEFORE **DANIEL B. MC KEOWN**, ALJ:

PROCEDURAL HISTORY

Harold Suggs (petitioner) filed a petition of appeal before the Commissioner of Education to challenge the appointment of Leo C. Polisano by the Asbury Park Board of Education (Board) to the position of assistant superintendent for curriculum and instruction. The Board filed an answer in which it raises five affirmative defenses, including an asserted failure to state a cause of action. The Board also filed a letter memorandum and exhibits in support of its motion to dismiss for failure to state a cause of action. Thereafter, the Commissioner transferred the matter on December 2, 1987 to

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the Office of Administrative Law as a contested case under N.J.S.A. 52:14F-1 et seq. Petitioner filed a letter memorandum on December 7, 1987 in response to the motion; the case was then assigned this judge on December 18, 1987; and, the Board filed a rebuttal memorandum on December 21, 1987. The record closed January 4, 1988.

For the reasons which follow, the Board's motion to dismiss the Petition of Appeal is **GRANTED** for failure to state a cause of action.

BACKGROUND

The Petition of Appeal requests the Commissioner to consider an asserted controversy which was to have arisen between petitioner and the Board "* * * by reason of the following facts". Reproduced here are the asserted facts set forth in the Petition of Appeal:

> 1. On or about August 20, 1987, the respondent, Board of Education of the City of Asbury Park (Board), appointed Mr. Leo Polisano to the position of Assistant Superintendent of Curriculum and Instruction, in direct violation of the Board's policy regarding the job description and qualifications for the position of Assistant Superintendent for Curriculum and Instruction, adopted September 18, 1986.
>
> WHEREFORE, petitioner requests that the Commissioner of Education declare that the action of respondent Board in appointing Leo Polisano to the position of Assistant Superintendent of Curriculum and Instruction null and void; rule as improper and revoke the appointment of Leo Polisano as Assistant Superintendent of Curriculum and Instruction, grant petitioner costs of suit, reasonable attorney's fees, punitive damages, and such other and further relief as may be necessary and proper.

Harold Suggs verified under oath that he is the petitioner in the matter and that "* * * the facts contained therein are true to the best of my knowledge and belief."

MOTION TO DISMISS

The Board asserts that a review of the job description for the position assistant superintendent for curriculum and instruction (Exhibit 1), two job announcements for that

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position (Exhibits 2 and 3), and the qualifications and experience of Leo C. Polisano set forth in his resume (Exhibit 4) show that he, Polisano, is qualified for the appointment.

Petitioner, through counsel, in opposition to the motion to dismiss, alleges Polisano does not meet the expressed qualifications for the position of (1) successful experience as an assistant superintendent, director or supervisor of curriculum on a district wide basis with three or more years of experience, and (2) successful experience in developing, writing, and implementing curriculum on a district wide basis. Counsel for petitioner also asserts certain "facts" not otherwise contained within the Petition of Appeal nor supported by an affidavit executed by petitioner nor are counsel's assertions supported in any manner by any writing filed. Consequently, counsel's assertions contained within his letter in opposition to the Board's motion to dismiss shall not be considered

Nevertheless, petitioner's essential position is that the appointment of Leo C. Polisano to the position assistant superintendent for curriculum and instruction by the Board must be set aside because it appointed him in violation of its own adopted qualifications.

LEGAL ANALYSIS AND DISCUSSION

N.J.S.A. 18A:17-16 provides in full as follows:

> The board or boards of education of any school district or school districts having a superintendent of schools may, upon nomination of the superintendent, by a recorded roll call majority vote of the full membership, of the board or each of such boards, appoint assistant superintendents of schools. They may be removed by a like vote of the members of the board or of each board employing them, subject to the provisions of chapter 28 of this title.

N.J.S.A. 18A:17-17 provides in full as follows:

> No person shall be appointed, or act as, or perform the duties of, superintendent or assistant superintendent of schools, unless he holds an appropriate certificate as prescribed by the state board.

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The State Board of Education prescribes at N.J.A.C. 6:11-10.4(a) and (b) that for one to serve as an assistant superintendent of schools the person must be in possession of a school administrator endorsement on an administrative certificate (a) or an endorsement as a principal (b).

While the foregoing statute and administrative rule sets forth the minimum qualifications necessary for appointment to a position of assistant superintendent, the appointing board may also make its own rules governing such appointment. N.J.S.A. 18A:11-1 provides in part that "The board shall * * * [m]ake, amend and repeal rules * * * for the employment * * * of its employees * * *." Specifically, N.J.S.A. 18A:27-4 provides in full as follows:

> Each board of education may make rules, not inconsistent with the provisions of this title, governing the employment, terms and tenure of employment, promotion and dismissal, and salaries and time and mode of payment thereof of teaching staff members for the district, and may from time to time change, amend or repeal the same, and the employment of any person in any such capacity in his rights and duties with respect to such employment shall be dependant upon and governed by the rules in force with reference thereto.

"Teaching staff members" as used in the statute includes the position assistant superintendent under the definition of teaching staff member set forth at N.J.S.A. 18A:1-1.

In this case, the Board adopted a job description (Exhibit 1) on September 18, 1986 for the position assistant superintendent for curriculum and instruction. That position, it appears, had been vacant since at least May 20, 1986 when the Board first posted a position announcement (Exhibit 3) for the vacancy. The qualifications set forth in the job description are as follows:

> Eligible for Administrator's Certificate (New Jersey)
>
> Successful experience as assistant superintendent, director or supervisor of curriculum on a district wide basis (three or more years preferred)
>
> Successful experience in developing, writing and implementing curriculum
>
> Master's Degree or higher from an accredited institution

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The position vacancy was again announced in writing (Exhibit 2) on April 15, 1987 and that announcement, identical to the earlier announcement (Exhibit 3), sets forth the position's qualifications as above with the following exception. The position announcement calls for expertise in developing, writing, implementing and monitoring curriculum as opposed to successful experience in developing, writing and implementing curriculum.

The resume (Exhibit 4) of appointee Leo C. Polisano shows that he received a Master's Degree from an accredited university; he holds endorsements as a New Jersey school administrator, school principal, secondary school principal, and a teacher of secondary science. His professional experience includes being a teacher of science, and having written an earth science curriculum; an athletic director in addition to continuing as a teacher of science; being a middle school vice principal, including the planning and moving three elementary schools to the then new middle school; being an elementary school principal for nine years; being a codirector of a summer preschool program; a bilingual coordinator; a "T & E coordinator"; and that his present position is that of a school principal. Polisano's resume shows that he was appointed to be a member of an evaluation team regarding two state and one private institutions of higher education; he was the Asbury Park Board's representative in San Juan, Puerto Rico at a special conference for bilingual education; and he is the author of the Board's initial five year educational plan. Petitioner does not dispute that Polisano's resume reflects the foregoing, nor does he dispute the validity or accuracy of Exhibits 1 through 4 as attached to the Board's letter memorandum in support of its motion to dismiss.

Regarding the Board's motion to dismiss, reference must be made to N.J.A.C. 6:24-1.3 which sets forth the requirements of a Petition of Appeal to properly invoke the authority of the Commissioner at N.J.S.A. 18A:6-9 to hear and determine a controversy or dispute which arises under school law. That rules provides in paragraph (a) in full as follows:

> The petition must include the name and address of each petitioner, the name and address of or a description sufficient to identify each party respondent, and a statement of the specific allegation(s) and essential facts supporting them which have given rise to a dispute under the school laws, and must be verified by oath. The petition should also cite, if known to petitioner, the section or sections of the school laws under which the controversy has arisen * * *

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CONCLUSION

Petitioner's "facts" are nothing more than conclusory statements that the qualifications of Leo C. Polisano are in direct violation of the Board's job description requirements for appointment to the position assistant superintendent for curriculum and instruction. Petitioner sets forth no facts whatsoever in support of his conclusion; rather, it is a bare assertion that Polisano is not qualified. The asserted facts petitioner's counsel relates in his letter reply to the Board's motion to dismiss are not verified by petitioner himself, nor does counsel provide any writing which would tend to support the assertions made. Moreover, even if the assertions made by counsel were taken at face value it is doubtful even then whether the asserted dispute would rise to a justiciable level.

Boards of education have authority to appoint assistant superintendents upon nomination by the superintendent. Petitioner sets forth no allegation in this case that the superintendent did not nominate Polisano. Petitioner does not allege Polisano was appointed by less than a recorded roll majority vote of the full membership of the Board. Petitioner does not allege that Polisano is not in possession of the appropriate certificate for the position.

Boards of education enjoy wide latitude with respect to such matters as the appointment, transfer, dismissal or nonrenewal of teachers subject only to Fourteenth Amendment limitations. Winston v. Bd. of Ed. South Plainfield, 125 N.J. Super. 131, 143 (App. Div. 1973). Petitioner does not allege any constitutional claim, nor does he set forth any facts which would tend to provide a basis to overcome the presumption of correctness which attaches to the actions of a board in its selection process of employees.

For all the foregoing reasons, the petition of appeal is **DISMISSED**. It is noted that the matter has been scheduled for a telephone prehearing conference on February 1, 1988. In view of the disposition herein, that prehearing telephone conference call is cancelled.

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This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

January 11, 1988 — Daniel B. McKeown
DATE — **DANIEL B. MC KEOWN**, ALJ

Receipt Acknowledged:

Jan 12, 1988 — [signature]
DATE — DEPARTMENT OF EDUCATION

Mailed To Parties:

JAN 14 1988 — [signature]
DATE — OFFICE OF ADMINISTRATIVE LAW

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HAROLD V. SUGGS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions were timely filed pursuant to N.J.A.C. 1:1-18.4 as were the Board's reply exceptions thereto.

Relying on Miltz v. Borroughs-Shelving, a Division of Lear, 203 N.J. Super. 451, 458 (App. Div. 1985) and DiCristofaro v. Laurel Grove Memorial Park, 43 N.J. Super. 244, 252 (App. Div. 1957), petitioner avers that although he did not state until later, in the reply brief filed by his attorney, that Mr. Polisano's qualifications and experience did not meet the qualifications for Assistant Superintendent for Curriculum and Instruction as contained in the adopted Board policy for that position, "this essential fact was obvious and could be gleaned from the specific allegation" set forth in the Petition of Appeal. (Exceptions, at p. 2) Further, petitioner argues that it is also clear from the Board's responsive papers that it was fairly apprised of the claim and issue for trial, that is, that the Board violated its adopted policy of September 18, 1986 in appointing Mr. Polisano to the position of Assistant Superintendent of Curriculum and Instruction. He contends that

> the specific allegation that respondent violated its adopted policy when it appointed Mr. Polisano to the position of Assistant Superintendent of Curriculum and Instruction and the essential fact that Mr. Polisano was not qualified for the position based on that policy where (sic) supported by the copy of the job description, job announcements, and the resume of Mr. Polisano, which were supplied to the Judge and used by him in rendering his Initial Decision. (Id., at pp. 2-3)

Petitioner avers that the essential facts that he raised in his letter brief, that is, that Mr. Polisano has no successful experience as an assistant superintendent, director or supervisor of curriculum on a district-wide basis and, further, that he has no successful experience in developing, writing and implementing curriculum are supported by the resume of Mr. Polisano, raise a

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justiciable issue and were not commented on by the ALJ in his initial decision. Petitioner requests that the Commissioner reject the initial decision and schedule this matter for plenary hearing.

The Board's reply exceptions state that it is in agreement with the initial decision and finds "absolutely no merit in the exceptions filed by the Petitioner." (Reply Exceptions, at p. 1) The Board asks that the initial decision be accepted by the Commissioner without exception.

Upon his careful and independent review of the record of this matter, the Commissioner adopts the initial decision for the reasons stated therein as clarified below.

The Commissioner notes the ALJ's conclusion in the initial decision, ante, finding that

> Petitioner's "facts" are nothing more than conclusory statements that the qualifications of Leo C. Polisano are in direct violation of the Board's job description requirements for appointment to the position assistant superintendent for curriculum and instruction. *** The asserted facts petitioner's counsel relates in his letter reply to the Board's motion to dismiss are not verified by petitioner himself, nor does counsel provide any writing which would tend to support the assertions made.***

He dismisses the matter relying on N.J.A.C. 6:24-1.3, which sets forth the requirements in filing a Petition of Appeal before the Commissioner. Although argued by the Board, the ALJ did not refer to N.J.A.C. 1:1-12.4(a), (b) and (c) which state:

> 1:1-12.4 Affidavits; briefs and supporting statements; evidence on motions
>
> (a) Motions and answering papers shall be accompanied by all necessary supporting affidavits and briefs or supporting statements. All motions and answering papers shall be supported by affidavits for facts relied upon which are not of record or which are not the subject of official notice. Such affidavits shall set forth only facts which are admissible in evidence under N.J.A.C. 1:1-15, and to which affiants are competent to testify. Properly verified copies of all papers or parts of papers referred to in such affidavits may be annexed thereto.
>
> (b) In the discretion of the judge, a party or parties may be required to submit briefs or supporting statements pursuant to the schedule established in N.J.A.C. 1:1-12.2 or as ordered by the judge.

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> (c) The judge may hear the matter wholly or partly on affidavits or on depositions, and may direct any affiant to submit to cross-examination and may permit supplemental or clarifying testimony.

The Commissioner's affirmance of the initial decision is predicated on both of these regulations. Were petitioner appearing pro se or were he a candidate who had been rejected for the position in question, the Commissioner might review the pleadings filed in this matter with somewhat less than exacting requirements. However, under the circumstances, petitioner, through his counsel, on two separate occasions, set forth allegations without so much as a single document or affidavit in support of those statements. Petitioner first failed to provide such information with his Petition of Appeal as required under N.J.A.C. 6:24-1 et seq. and thereafter failed to do so in replying to the Board's Motion to Dismiss, as required under N.J.A.C. 1:1-12.4. The Commissioner finds, as did the ALJ, therefore, that he has no choice but to dismiss the matter for failure to properly meet his burden of moving forward. N.J.A.C. 6:24-1.1 et seq.; N.J.A.C. 1:1-12.4

Accordingly, for the reasons expressed in the initial decision as clarified herein, the instant Petition of Appeal is dismissed with prejudice.

COMMISSIONER OF EDUCATION

February 23, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4988-87
AGENCY DKT. NO. 188-6/87

LOUISE H. WARD,

Petitioner,

v.

WESTFIELD BOARD OF EDUCATION,

Respondent.

Reba Carmel, Esq., for petitioner (Oxfeld, Cohen, Blunda, Friedman, LeVine & Brooks, attorneys)

William D. Peek, Esq., for respondent (Nichols, Thompson, Peek & Meyers, attorneys)

Record Closed: December 23, 1987 Decided: January 8, 1988

BEFORE **DANIEL B. MC KEOWN**, ALJ:

Louise H. Ward (petitioner) claims a tenure status as a teaching staff member in the employ of the Westfield Board of Education (Board). The Board contends petitioner has not served the requisite period of time under law in its employ as a teaching staff member to have acquired a tenure status. After petitioner filed a Petition of Appeal before the Commissioner of Education seeking relief upon her claim, the matter was transferred to the Office of Administrative Law on July 20, 1987 as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq. A prehearing conference was conducted September 9, 1987 at which the issues presented were agreed upon and the matter was scheduled for hearing November 20, 1987 at the Office of Administrative Law, Newark. Because of a scheduling conflict with petitioner's counsel, the matter was rescheduled for hearing and heard December 1, 1987. The record closed December 23, 1987 upon receipt of the Board's reply letter memorandum.

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STIPULATED FACTS

At the opening of the record on December 1, 1987 the following facts of the matter were stipulated by the parties.

1. Petitioner, in possession of a comprehensive instructional certificate as a teacher of social studies, was initially employed by the Board as a teaching staff member, under written contract, for the period November 15, 1983 through June 30, 1984.

2. On or about April 30, 1984 the Board offered and petitioner accepted a written contract of employment for the following 1984-85 academic year.

3. Despite the offer and acceptance of the contract for the following year, the Board learned during June 1984 that two other teachers with tenure who had been subject to an earlier reduction in force had a greater claim to the teaching position for 1984-85 for which the Board and petitioner had already entered a contract.

4. The Board, because of the other teachers' legally enforceable claim to the position already offered petitioner for 1984-85, rescinded the contract it offered petitioner for the same period of time. The Board paid petitioner for 30 days as was required under the notice of termination clause contained within the contract.

5. During the same month, June 1984, a teacher of social studies, Richard F. Veit, suffered what was subsequently diagnosed as a massive myocardial infarction.

6. Sometime during the 1984 summer petitioner had communication with a representative of the Board which resulted in petitioner performing the duties Mr. Veit would have performed during 1984-85 but for his heart attack.

7. During 1984-85 petitioner did not have a written contract of employment; she was paid at a daily rate of a long term substitute teacher; she began

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the 1984-85 academic year on the same date and time as all regularly employed teachers; she had the same duties Mr. Veit would have had but for his heart attack; petitioner had the same pupils in June 1985 with whom she began in September 1984; petitioner was not a member of the Teachers' Pension and Annuity Fund for 1984-85; and, she received no paid sick leave, nor holidays during the year.

8. Petitioner was reemployed for 1985-86 as a regular teaching staff member, under written contract, and assigned to teach social studies at Westfield High School.

9. Petitioner's contract of employment was renewed for 1986-87 and at the same assignment she had for 1985-86.

10. Petitioner's 1984-85 experience with the Board was credited for salary purposes in 1985-86 and 1986-87.

This concludes a recitation of the facts stipulated at the time of hearing. In addition to the foregoing facts, however, it is important to note that the pleadings establish the parties further agree that by letter dated April 30, 1987 petitioner was advised she would not be reemployed for the 1987-88 school year and that she did not enjoy a tenure status.

PROOFS IN SUPPORT OF PETITIONER'S TENURE CLAIM

Petitioner, in addition to the foregoing facts, anchors her claim of a tenure status on what she perceives to be her employment as a teaching staff member during the 1984-85 academic year when she performed the duties Mr. Veit would have performed as a social studies teacher at the Board's Roosevelt Junior High School had he not had the heart attack. In this regard petitioner testified that she was present in the school building at the time Mr. Veit was stricken. The attack occurred on a day close after the day the Board rescinded her 1984-85 employment contract.

During the 1984 summer, petitioner testified she stayed in touch with the Board's personnel office to see if any jobs were expected to open for 1984-85 and because she

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knew Mr. Veit had had the heart attack and, in her view, in all probability he would not be able to return. Petitioner explained that when she asked the principal whether Mr. Veit was to return for 1984-85 the principal responded that he had no idea if Mr. Veit would return. Petitioner testified that a teacher Brown told her that it "looks like Mr. Veit cannot return so [you] don't worry about a job" for 1984-85. Finally, petitioner testified she knew Mr. and Mrs. Veit a long time and she stayed in touch with Mr. Veit's wife during the 1984 summer.

Petitioner testified that during August 1984 the Board's director of personnel, Marie Scian, told her she had a job at the junior high school if she wanted it in the place of Mr. Veit. Petitioner testified there was no mention of how long the employment was to last.

Petitioner testified that at the close of September 1984, after the 1984-85 academic year had commenced, she told the superintendent she would like a written contract of employment. However, petitioner admits the superintendent advised her that because Mr. Veit was the teacher assigned to the position she was occupying, she cannot receive a contract. In petitioner's words, the superintendent explained that the Board cannot issue two contracts for one position of employment. Petitioner explains that the superintendent stated that as soon as Mr. Veit decided not to return to his employment with the Board, that position would then be hers. Petitioner had a similar conversation with the school principal with a similar result. That is, petitioner testified the principal advised her a contract of employment cannot be issued her until Mr. Veit determines that he would not return to his employment.

Petitioner testified that during her employment under contract as a teaching staff member between November 15, 1983 through June 30, 1984 her salary was established at the fourth step of the teacher's salary guide because the Board recognized prior teaching experience she had. Nevertheless, during 1984-85 petitioner testified her salary was based on the first step of the teacher's salary guide divided by the number of days she actually worked. Other than the one discussion with the director of personnel during August 1984, the discussion with the superintendent and with the principal as noted above, petitioner had no further discussions with any Board representative during 1984-85.

As noted above, petitioner was employed by the Board as a teaching staff member for 1985-86 but her assignment was to teach social studies at the Board's

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Westfield high school. In the meantime, Mr. Veit advised the superintendent in writing (R-2) on May 16, 1985 that he learned on May 3 from his physician that he was permanently disabled and would not return to his teaching duties. At or about the same time, a teacher of social studies who had been recently transferred to the high school from the junior high school elected to return to the junior high school in Mr. Veit's position. Consequently, the Board assigned petitioner to teach social studies at the high school in the vacancy created by that teacher electing to return to the junior high school. Petitioner testified that during September 1985 the superintendent apologized to her for "treating her shabbily" by allowing another teacher to take the junior high school social studies position.

This concludes a recitation of petitioner's proofs, in addition to the stipulated facts, in support of her claim to a tenure status in the Board's employ.

BOARD'S PROOFS

The linchpin in the Board's contention that petitioner did not serve the requisite period of time under law to acquire a tenure status is its view that petitioner was a substitute teacher, albiet long term substitute teacher, during 1984-85 and under N.J.S.A. 18A:16-1.1 petitioner's employment during 1984-85 is not creditable for tenure purposes.

Director of Personnel Marie Scian testified that it was not until on or about August 28, 1984 when school officials learned of the health status of Mr. Veit in regard to his return to active duty for 1984-85. On or about August 28, 1984 Mr. Veit's physician submitted the following note (R-1) to the superintendent who, in turn, sent a copy to Ms. Scian. The note provides as follows:

> The above named [Richard Veit] is under my care for a massive myocardial infarction incurred June 21, 1984. He is still recuperating. I do not know when he will be able to return to work.

Ms. Scian testified that she then contacted petitioner and offered her employment on behalf of the board as a substitute in Mr. Veit's class. It is noted that Ms. Scian's office contacts all individuals whose services are needed on a substitute basis. Ms. Scian testified that she advised petitioner the employment offered would be on a day to day basis and that her salary would be per diem. Furthermore, Ms. Scian testified that

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while supervisors may occasionally stop in a classroom to observe the performance of a substitute teacher, no formal evaluations of substitute teachers are prepared. The performance of regular teaching staff members is formally evaluated each year. Finally, Ms. Scian testified no one had knowledge that Mr. Veit was permanently disabled and intended to retire until the superintendent received Mr. Veit's letter (R-2) on or about May 16, 1985.

This concludes a recitation of the Board's proofs in support of its assertion petitioner has not served the requisite period of time in its employ to have acquired the legislative status of tenure.

FINDINGS OF FACT

In addition to the foregoing stipulated facts and the fact established by the pleadings, the following facts are found to exist based on a preponderance of credible evidence.

1. Petitioner was advised by Ms. Scian on or about August 28, 1984 of the need to have a substitute teacher for Mr. Veit's class.

2. Petitioner accepted the offer of Ms. Scian on behalf of the Board to perform as a substitute teacher on a day to day basis and at the per diem rate of a substitute in Mr. Veit's classroom.

3. The superintendent, based on petitioner's own testimony, was emphatically clear to her during the end of September 1984 when he advised a written contract of employment as a teaching staff member could not be offered petitioner for Mr. Veit's position of employment until such time Mr. Veit determined whether his health would prohibit him from returning to that position of employment.

4. Petitioner knew during 1984-85 that her employment status with the Board was that of a substitute teacher, albiet a long term substitute, who was acting in the place of Mr. Veit during his absence.

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5. Petitioner did perform during 1984-85 the duties and assumed the responsibilities Mr. Veit would have performed and assumed in the classroom had he not been absent during 1984-85.

LEGAL ANALYSIS

In order for petitioner to succeed on the merits of her claim, she must demonstrate that she has met the precise conditions articulated in the statute, N.J.S.A. 18A:28-5, for the acquisition of the legislative status of tenure. Zimmerman v. Bd. of Ed. City of Newark, 38 N.J. 65 (1962). A threshhold condition is that the service rendered the Board by petitioner was that of a teaching staff member. N.J.S.A. 18A:1-1 defines a teaching staff member as:

> * * * a member of the professional staff of any district * * * or any board of education * * * holding office, position or employment of such character that the qualifications, for such office, position or employment, require him to hold a valid and effective standard, provision or emergency certificate, appropriate to his office, position or employment, issued by the state board of examiners and includes a school nurse.

As noted by Judge Pressler in Sayreville Educ. Ass'n v. Board of Educ., etc., 193 N.J. Super. 424 (App. Div. 1984) the definition of teaching staff member is qualified by N.J.S.A. 18A:16-1.1, which provides for temporary employment of substitute teachers. Judge Pressler wrote, "We acknowledge that a person properly employed pursuant to N.J.S.A. 18A:16-1.1 is not entitled to the status and consequent benefits of teaching staff membership. See Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 77 (1982)." Id., at p. 427. Accordingly, the question remains whether petitioner's service to the Board during the 1984-85 academic year was service as a teaching staff member under law or was she, under law, a substitute teacher pursuant to N.J.S.A. 18A:16-1.1.

N.J.S.A. 18A:16.1.1 provides in full:

> In each district the board of education may designate some person to act in place of any officer or employee during the absence, disability or disqualification of any such officer or employee subject to the provisions of section 18A:17-13.
>
> The act of any person so designated shall in all cases be legal and binding as if done and performed by the officer or employee for

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whom such designated person is acting but no person so acting shall acquire tenure in the office or employment in which he acts pursuant to this section when so acting.

CONCLUSION

The facts in this case clearly demonstrate that petitioner was offered employment by the Board, through its director of personnel Marie Scian, for the 1984-85 academic year to act in the place of Richard F. Veit because of his absence and disability. Petitioner accepted the offer to act in Mr. Veit's place and was compensated at a daily rate of a long term substitute teacher. While petitioner performed all duties Mr. Veit would have performed had he been in attendance, it remains that petitioner's status of employment was that, I **CONCLUDE**, as a substitute teacher.

The superintendent, according to petitioner's own testimony, advised her that she could not be offered a written contract of employment until such time Mr. Veit, the incumbent, determined whether his health would prohibit him from returning to that specific position of employment. The Board engaged in no conduct which would demonstrate bad faith on its part other than to be totally honest and frank with petitioner regarding her status of employment during 1984-85. The facts in this case do not coincide with the circumstance considered in Sayreville Educ. Ass'n, supra.; rather, the facts presented here are the kind of facts clearly contemplated by N.J.S.A. 18A:16-1.1. Petitioner was a substitute teacher for Mr. Veit during 1984-85 while he was absent and disabled.

Having concluded that petitioner's employment during 1984-85 was that of a substitute teacher, I must **FIND** and **CONCLUDE** that petitioner has failed to meet the statutory requirements under N.J.S.A. 18A:28-5 for the acquisition of the legislative status of tenure. Accordingly, the petition of appeal is **DISMISSED**.

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This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

January 8, 1988
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

1/11/88
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

JAN 13 1988
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LOUISE H. WARD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WESTFIELD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions have been deemed timely filed pursuant to N.J.A.C. 1:1-18.4. The Board's reply exceptions, however, were untimely.

Petitioner contends in exceptions that the facts of the instant matter fall squarely within the parameters of Sayreville Educ. Ass'n v. Board, 193 N.J. Super. 424 (App. Div. 1984); Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 77 (1982); Rossi v. Board of Education of the City of Newark et al., 1977 S.L.D. 734, 739; and Eugene J. Williams v. Board of Education of the City of Orange, decided by the Commissioner December 30, 1987. He asserts that "irrespective of the contractual relationship between the parties, employment as a long-term substitute for an entire school year is countable toward the accrual of tenure." (Exceptions, at p. 4) Petitioner, moreover, finds the ALJ's reliance on contractual principles inapposite, in that a statutory right is at issue herein, and relies on the same cases in support of this position.

Petitioner contends that "although Mr. Veit did not formally inform the Board that he would not be returning to the District until May 1985, the Board has presented no evidence that Mr. Veit ever contemplated returning to assume his duties during or after that school year." (Exceptions, at pp. 6-7) Petitioner contends by the time he did formally resign, she had carried out all the responsibilities of the position for nearly the entire school year. Citing Driscoll v. Board of Education of Clifton, 79 N.J. 126 (1979), a maternity leave case, petitioner distinguishes the facts in that matter from the instant situation averring:

> In this case it is clear and viewing the evidence in the light most favorable to the Board, Mr. Veit's return was at best undetermined. However, the Board was clearly on notice, as early as August, 1984, of the possibility that Mr. Veit would not in fact return.
>
> (Exceptions, at p. 9)

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She contends:

> [I]t is the functional anaylsis (sic) of the appointed teacher's duties which determine whether the appointing authority can hire a long-term substitute to perform all the duties of a teaching staff member yet use that period of time served to deny that teacher her tenure rights under the statute. (Exceptions, at p. 10)

Moreover, petitioner cites Williams, supra, in support of her position, stating:

> The Commissioner held that since a vacancy did in fact exist at least from May 15, 1983 until the end of the school year, which was filled by Williams, and since that period of time constituted a substantial portion of the school year it is countable toward Williams' accrual of tenure. Similarly, in the instant matter, a vacancy did not suddenly arise at the beginning of the 1984-1985 school year which may allow the Board some flexibility to make temporary arrangements to fill Mr. Veit's position. *** Therefore, the existence of a vacancy in Mr. Veit's position for the 1984-1985 school year which was filled by Ms. Ward is unassailable.
>
> (Exceptions, at pp. 11-12)

Petitioner further argues that assuming arguendo that despite the Board's allegedly knowing in August 1984 of the vacancy in Mr. Veit's position, the Commissioner decides that the May 16, 1985 letter of resignation is the effective date upon which the vacancy arose, "the Commissioner held in Williams, that forty-five days constituted a substantial period of time during which a vacancy existed and was therefore countable towards Williams' acquisition of tenure." (Exceptions, at p. 12) Therefore, applying that principle to the instant facts, petitioner should also have the time from May 16, 1985 through the end of the 1984-85 school year counted toward the acquisition of tenure.

Petitioner submits based on the above arguments, as well as those presented in her post-hearing submissions as well as those raised at hearing, that her employment during the 1984-85 school year is countable toward tenure. Thus, she claims, she must be deemed to have been a tenured teacher of the Board and must be reinstated with full benefits, privileges, emoluments and back pay.

Upon his independent review and for the record, the Commissioner sets forth the following chronology:

November 15, 1983 through June 30, 1984	Petitioner serves under contract with the Board as a teaching staff member. She accrued thereby 7 months, 15 days service toward tenure.

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September 1984 through June 30, 1985	Petitioner serves as long-term substitute without benefits, without a contract. Tenurable time at issue in this case.
September 1985 through June 30, 1986	Petitioner serves under contract with the Board as a teaching staff member. She accrued thereby 10 months service toward tenure.
September 1986 through June 30, 1987	Petitioner serves under contract with the Board as a teaching staff member, but received notice in letter dated April 30, 1987 that she would not be renewed. She accrued thereby 10 months service toward tenure.

Initially, the Commissioner finds that the document marked in evidence as R-2 is not a letter of resignation, as found by the ALJ. Rather, it is merely a letter dated May 15, 1985 from Mr. Veit addressed to the Superintendent apprising Dr. Green that his physician had informed Mr. Veit that he was permanently disabled and not able to return to teaching duties. The letter then goes on to request that the Board consider granting him retirement "one year hence as a veteran at half-pay rather than as a disabled teacher this year at a significantly lower rate." (R-2) It is well established in case law that a resignation is effective upon the Board's acceptance of it and establishing a date certain when the resignation is effective. Andrew Kozak v. Board of Education of the Township of Waterford, 1976 S.L.D. 633 The Commissioner's independent review of the record before him reveals no document, Board minutes or other indicia making plain exactly when the Board accepted Mr. Veit's resignation, nor is it plain upon what date said resignation was to be effective.

Notwithstanding this finding, it is plain that petitioner's service during the 1984-85 school year was that of a substitute because no vacancy had been declared, since no resignation had been tendered by Mr. Veit nor accepted by the Board by the end of the 1984-85 school year. Notwithstanding the fact that petitioner assumed all the duties of his position for a full academic year, the position in which she served was by definition temporary. Said definition is set forth in Sayreville Educ. Ass'n v. Board of Educ. et al., 193 N.J. Super. 424 (1984) wherein the Appellate Court stated:

> In each district the board of education may designate some person to act in place of any officer or employee during the absence, disability or disqualification of any such officer or employee subject to the provisions of section 18A:17-13.

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> The act of any persons so designated shall in all cases be legal and binding as if done and performed by the officer or employee for whom such designated person is acting but no person so acting shall acquire tenure in the office or employment in which he acts pursuant to this section when so acting.
>
> We construe the authorization of this provision as applying when the services of a substitute teacher are required because of the temporary absence, even if protracted, of a regular teacher whose return to duty is contemplated. We do not construe it as authorizing the use of a substitute to fill a vacant position on a long-term basis. This interpretation, in our view, accords with the plain meaning of the statutory provision. The phrase, "to act in place of any officer or employee during the absence, disability or disqualification of any such officer or employee," clearly implies a temporary arrangement. That is, the "place" which is the intended subject of the statute is the place of another which that other will reclaim when his period of absence is over. The substitute is appointed to act for the other during that period. If that other employee has, however, terminated his employment, then the place which the appointee is filling is not the place of the other but rather a vacant place, and the statute ordinarily does not apply. This interpretation is, moreover, in accord with the observation in Spiewak v. Rutherford Bd. of Ed., supra, 90 N.J. at 77, that the exception to the tenure statute which N.J.S.A. 18A:16-1.1 constitutes "is limited to employees hired to take the place of an absent teacher." Again the implication is clear that the place for which the temporary substitute teacher was hired is not vacant but only temporarily unoccupied by its incumbent.
>
> Clearly, a local board of education could not indefinitely fill a vacancy by the statutory substitute technique, no matter how financially advantageous it might be. Nor could it use that technique to fill a vacancy for a full academic year. Any such attempt would constitute an obvious effort to circumvent the school laws and would be condemned as such. Cf. Jersey City Bd. of Educ. v. Wall, 119 N.J.L. 308 (Sup. Ct. 1938); Downs v. Hoboken Bd. of Educ., 13 N.J. Misc. 853 (Sup. Ct. 1935). (emphasis supplied) (at 428-9)

Whether or not Mr. Veit's physician at first stated that he did not know "when" his patient would return to his duties during

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the 1984-85 school year (emphasis supplied) (R-1), no resignation issued through the 1984-85 school year. Consequently, the Board was within its rights to hold the position open for substitute assignment for the 1984-85 school year.

As to petitioner's argument that, pursuant to Williams, she is entitled to credit toward tenure for the period from May 16, 1985 to June 30, 1985 because that was the date when Mr. Veit purportedly tendered his resignation, thus creating a vacancy, the Commissioner finds this argument to be without merit for two reasons. First, as noted above, R-2 does not represent a letter of resignation. Moreover, even if he were to assume arguendo that R-2 did represent a letter of resignation and that that letter effectively created a vacancy, petitioner's service would still fall short of the time requirements for the acquisition of tenure set forth in N.J.S.A. 18A:28-5. Adding 45 days service for the 1984-85 school year would grant petitioner a total of 29 months employment with the Board through the end of the 1986-87 school year, which is inadequate to establish tenure.

Accordingly, the initial decision is adopted with modification. The Commissioner finds and determines that petitioner has failed to meet the statutory requirements under N.J.S.A. 18A:28-5 for the acquisition of tenure. Accordingly, the instant petition is dismissed with prejudice.

COMMISSIONER OF EDUCATION

February 25, 1988

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LOUISE H. WARD,

PETITIONER-APPELLANT.

V.

BOARD OF EDUCATION OF THE TOWN OF WESTFIELD, UNION COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, February 25, 1988

For the Petitioner-Appellant, Oxfeld, Cohen, Blunda, Friedman, Levine and Brooks (Reba Carmel, Esq., of Counsel)

For the Respondent-Respondent, Nichols, Thompson, Peek, and Meyers (William D. Peek, Esq., of Counsel)

Appellant in this case, whose employment by the Board was not renewed for 1987-88, petitioned the Commissioner, claiming that she had tenure status. The Commissioner, adopting the Administrative Law Judge's determination, concluded that Appellant had failed to meet the statutory requirements of N.J.S.A. 18A:28-5 so as to have acquired tenure, specifically finding that Appellant's employment as a long-term substitute during 1984-85 was not creditable towards tenure.

For the reasons expressed by the Commissioner, we affirm that Appellant was not employed as a teaching staff member for the period requisite for tenure acquisition. In affirming that decision, we emphasize that, although employment as a long-term substitute may constitute employment as a teaching staff member pursuant to N.J.S.A. 18A:1-1 so as to entitle an individual to other statutory benefits afforded by that status, N.J.S.A. 18A:16-1.1 specifically mandates that no person designated to act in the place of another shall acquire tenure. Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 74-75 (1982). Therefore, Appellant has no claim to tenure based on her service during 1984-85, when she was employed to act in the place of a particular teacher who was absent because of a heart attack, notwithstanding that she performed the duties attending the position held by that teacher. Further, although we find that a vacancy for tenure purposes was created as of May 16, 1985, by virtue of the incumbant's written notice that he would not be returning to his employment, R-2, in evidence, and that, under Williams v. Board of Education of the City of Orange, decided by the Commissioner, December 30, 1987, aff'd by the State Board, June 3, 1988, Appellant's service subsequent to the creation of that vacancy would be creditable toward the acquisition of tenure, Appellant, as

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found by the Commissioner, did not meet the requirements of N.J.S.A. 18A:28-5 even considering her service during those 45 days.

John T. Klagholz, concurring.

Although I join in the decision in this case, I, however, am concerned about the possibility that a district board might misuse the authority conferred on it by N.J.S.A. 18A:16-1.1 by appointing a long-term substitute and then failing to monitor the status of the incumbant thereby insuring that the substitute remains in the status of a substitute for indefinite periods potentially as long as two or three years. This would be so unfair to the individual serving in the "substitute" position that, in my view, a different result would be called for. I strongly believe that a district board must act carefully to fulfill its obligations both with respect to granting and approving leave and, pursuant to the terms of a particular leave, to seek to appropriately ascertain the status of teaching staff members who are absent so that the obviously unfair result of relegating an individual to the status of a "permanent substitute" is avoided. However, while this case indicates to me the potential for this kind of abuse, the record does not support a conclusion that this was in fact the situation. Therefore, I concur in the decision with this case.

July 6, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5420-87
AGENCY DKT. NO. 216-7/87

JOE JACKSON, JR.,
Petitioner,
v.
BOARD OF EDUCATION OF THE
ESSEX COUNTY VOCATIONAL SCHOOLS
Respondent.

Wayne J. Oppito, Esq., for petitioner
(N.J. Principals and Supervisors Association

Nathanya G. Simon, Esq., for respondent
(Schwartz, Pisano, Simon & Edelstein, attorneys)

Record Closed: January 19, 1988 Decided: January 27, 1988

BEFORE **WARD R. YOUNG, ALJ:**

Joe Jackson, Jr., a tenured cooperative industrial education coordinator (coordinator) employed by the Board of Education of the Essex County Vocational Schools (Board), claims the action of the Board, in withholding his salary increments for the 1987-88 school year, was arbitrary, capricious, and/or unreasonable.

The Board asserts its action was a reasonable exercise of its discretionary authority consistent with law, and seeks dismissal of the petition.

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The matter was transmitted to the Office of Administrative Law as a contested case on August 10, 1987 pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on October 1, 1987, and proceeded to plenary hearing on December 1 and 2, 1987. Post-hearing briefs were filed and the record closed on January 19, 1988 upon receipt of final submission.

I.

The Board operates five schools located at Sussex Avenue, North 13th Street, Bloomfield, West Caldwell, and Irvington. Jackson has been employed by the Board for 24 years, and has been a math teacher and coordinator since 1975. The Board employs coordinators at each school, four of which are industrial and one being an office coordinator. Jackson was transferred from his coordinator assignment at West Caldwell to a similar assignment at Irvington for the 1985-86 school year.

The saga of this scenario begins with the annual summary evaluation of Jackson's performance at Irvington during the 1985-86 school year, wherein "placement of only seven seniors to date is nowhere near realistic and must be considered below any reasonable goal for C.I.E. placement . . ." See, R-1. (Placement refers to the coordinator's obligation to coordinate efforts between school and industry to place senior pupils in part-time jobs.) Other weaknesses (as well as his strengths) were also incorporated in the evaluation. Attached to the evaluation is Jackson's 1986-87 Professional Improvement Plan emanating from his 1985-86 evaluation, which incorporates goals and activities designed to improve Jackson's placement record.

On June 19, 1986, Superintendent Harvey met with Jackson and his supervisors, principal Southers and support services director Fishbein, concerning his 1985-86 evaluation. Jackson was advised of the dissatisfaction with his placement record and that improvement was essential. He was not disciplined, however, because it was his first year at Irvington.

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Fishbein memorialized the June 19, 1986 meeting in a letter to Jackson, which indicated Jackson's 1985-86 performance was unsatisfactory, and also stated: "Dr. Harvey stated that a similar performance next school year would necessitate his recommendation to the Board of Education to withhold your increment and salary adjustment." See, J-14.

The annual summary evaluation of Jackson for the 1986-87 school year indicated that "The goal of providing 70% of the services with C.I.E. employment was not attained. There is no evidence that previous student C.I.E. numbers have increased." It also incorporates the following weaknesses:

1. Mr. Jackson has performed analysis of seniors but does not follow through on remedies. Low skills are not indicative that a student cannot be matched with a job based upon the skills.

2. Mr. Jackson has not conferred with colleagues of their success and possible jobs which they could fill.

3. Does not make a concerted effort to acquire job sites which are accessible via public transportation.

4. Does not hold extensive classes on "mock interviews" to correct student deficiencies.

5. Should interview students and teachers extensively for job and skill matching. Shop proficiencies are relied upon too often without seeking other information of potential skills.

6. Mr. Jackson did not attain 70% level of senior placement. He has not indicated a significant improvement from last year's placement. See, J-5.

Superintendent Harvey noticed Jackson of his intended recommendation for the Board's withholding action under date of April 21, 1987. See, R-4.

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Jackson was noticed of the Board's April 27, 1987 withholding action in a letter from Harvey under date of May 1, 1987, which also stated the reasons as follows:

1. Does not match students with job.

2. Did not attain a 70% level of senior placement.

3. Has not improved significantly from last year in the placement of students. See, J-1.

II.

The thrust of Jackson's argument to set aside the Board's withholding action is the method of calculating the percentage of seniors placed. He argues that the base number of seniors to be utilized in the computation should be the total number of seniors minus those who do not meet eligibility standards for placement. He avers that shop teachers determine if pupils reach the 61.25% competency level, and refers to the 1986-87 program objectives incorporated in the Work Experience and Cooperative Education Improvement Plan for 1986-87 at one on page one for support. See, J.2.

On cross-examination, however, Jackson testified he recalled the 60% objective incorporated in R-1 for 1985-86 and discussion concerning it, and further stated he understood the district percentage calculation of seniors placed was computed with the total senior class as a base, and not just those who met the 61.25% competency level. He also testified that students who failed to reach 61.25% competency did not prohibit their placement.

Jackson also testified that deterrents to student placement were lower hourly wages than those received by students in jobs they secured for themselves, the conflict of athletic participation, lack of "apprenticable" jobs, and the lack of job sites within reach of public transportation.

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It is noted that the testimony of another coordinator, John Montague, corroborated the computational base argument of Jackson. Ironically, rebuttal witness Harry Cotyk, another coordinator, testified on cross-examination that the total number of seniors were indicated on monthly reports (J-7), and that he knew this number was utilized in computing placement percentages.

III.

Granting recognition to possible confusion concerning the base number of students to be utilized for placement percentage computations because of the incorporation of the 61.25% competency level for placement eligibility in J-2, Jackson's own testimony of his knowledge that the total number of seniors was used as a computational base in 1985-86 counters his own argument. He certainly knew or should have known that the same computational method would be utilized in 1986-87.

Jackson's computational argument leads me to believe that he perceives his failure to place 70% was the sole reason for the Board's withholding action. This is just not so. His lack of significant improvement in the placement of students over the previous year, and his failure to match students with job are sufficient reasons in themselves to support a withholding action.

Concerning Jackson's testimony of other reasons for not placing a greater number of students, it is his function to take appropriate steps to remedy causes to achieve desired results, as the Commissioner indicated in Harry J. Cotyk v. Essex County Vocational Board of Education, 1987 S.L.D. ____ (decided March 9, 1987) in quoting the Honorable Daniel B. McKeown, A.L.J.

IV.

It cannot be disputed that the withholding of salary increments pursuant to N.J.S.A. 18A:29-14 is a managerial prerogative vested in the Board by the Legislature.

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Bernards Twp. Bd. of Ed. v. Bernards Twp. Educ. Assoc., 79 N.J. 311 (1971). Nor can it be disputed that said action is set aside only if it is found to be arbitrary, capricious or unreasonable.

The standard for review is whether the Board had a reasonable basis for its factual conclusions. Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288 (App. Div. 1960).

I **FIND** that Jackson has failed to meet his burden of proof by a preponderance of credible evidence that the Board in fact did not have a reasonable basis for its withholding action. I **CONCLUDE**, therefore, that the Petition of Appeal shall be and is hereby **DISMISSED**.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

27 January 1988
DATE

WARD R. YOUNG, ALJ

1-28-88
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

DATE

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JOE JACKSON, JR.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE ESSEX COUNTY VOCATIONAL SCHOOLS, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions were timely filed pursuant to N.J.A.C. 1:1-18.4; however, the Board's reply thereto was not timely.

Petitioner excepts to the ALJ's determination that the reason for the increment withholding was his lack of significant improvement in student placement over the previous years and his failure to match students with jobs, contending that such a finding is not accurate in light of the documentary evidence. In support of this, petitioner cites in particular a variety of actions delineated in his memorandum of April 20, 1987 to the principal (J-4) which he believes demonstrates he made a major concerted effort to place a maximum number of students in work stations (140% greater than the prior year) and assisted those other students who were difficult to place.

Upon independent review of the record, the Commissioner is in full agreement with the ALJ that petitioner has failed in his burden of proof by a preponderance of credible evidence that the Board did not, in fact, have a reasonable basis for its withholding action.

The ALJ is correct to point out in the initial decision, ante, that petitioner's failure to place 70% of his students was not the sole reason for the Board's action to withhold his increment. Rather, as the ALJ indicates, the lack of significant improvement to place and a failure to match students with jobs in and of themselves constitute sufficient reasons to support increment withholding.

While petitioner argues that his placement performance improved significantly over the prior year, the Commissioner does not find it arbitrary or unreasonable that, notwithstanding an improvement, the Board herein continued to deem petitioner's placement and job matching performance as unacceptable and unsatisfactory. In other words, while petitioner's approximate 20% placement rate for 1985-86 (J-14) improved to a 31% placement rate

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in April 1987 (the month the Board acted to withhold), this does not necessarily demonstrate it was unreasonable for the Board to still find his performance unsatisfactory, particularly when nearly halfway through the school year, there were as few as 12.5% of his students placed (J-7).

As mandated by the Court's decision in Kopera, supra, it is not the role of the Commissioner to substitute his judgment for that of the Board absent a showing that its action was arbitrary, capricious or unreasonable. Having determined that petitioner has failed in such proof, the Commissioner, therefore, adopts as his own the recommendation of the ALJ to dismiss the petition for the reasons stated in the initial decision.

COMMISSIONER OF EDUCATION

March 7, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5512-87
AGENCY DKT. NO. 198-6/87

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST MILFORD,
Petitioner,

v.

THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY, VINCENT CALABRESE, ASSISTANT COMMISSIONER, DIVISION OF FINANCE, DEPARTMENT OF EDUCATION,
Respondent.

Irving C. Evers, Esq., for petitioner
(Schwartz, Pisano, Simon & Edelstein, attorneys)

E. Philip Issac, Deputy Attorney General
(Cary Edwards, Attorney General of New Jersey, attorney)

Record Closed: January 13, 1988 Decided: January 22, 1988

BEFORE **WARD R. YOUNG**, ALJ:

Petitioner alleged the Division of Finance of the New Jersey Department of Education improperly reduced its entitled state aid for the 1985-86 and 1986-87 school years pursuant to the Teacher Quality Employment Act, N.J.S.A. 18A:29-5, and/or the regulatory scheme emanating therefrom, N.J.A.C. 6:20-5.6.

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The Division of Finance, New Jersey Department of Education (Division) denies the allegation and asserts its State aid determinations were proper as a matter of law. It is noted that co-respondents named in the Petition of Appeal are the Commissioner, Assistant Commissioner responsible for the Division of Finance, and the Division itself. Although the Commissioner is responsible for subordinate actions on his behalf, and although Assistant Commissioner Calabrese and others from the Division were actively involved with petitioner's agents which triggered this dispute, references to respondents shall be either the Division or Calabrese.

The matter was transmitted to the Office of Administrative Law as a contested case on August 13, 1987 pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on October 1, 1987 and the parties agreed, inter alia, that the matter proceed to summary decision in the absence of disputed material facts. The matter was briefed and the record closed on January 13, 1988 with the final filing by petitioner.

I.

The following stipulated facts are adopted herein as **FINDINGS OF FACT:**

1. The following table represent the number of all teachers employed by the West Milford School District for the years specified:

1983-84	384.3
1984-85	381.31
1985-86	361.77
1986-87	362.22
1987-88	383.12

2. The following table represents the number of teachers employed by the West Milford School District who pursuant to contract received or presently receive a salary which was or is at least 100% of the salary for the lowest step of those designated as full-time teachers during the years specified:

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1983-84	348.3
1984-85	345.31
1985-86	340.77
1986-87	362.22
1987-88	363.12

3. The following table represents the number of teachers employed by the West Milford School District who, pursuant to contract or other arrangement, received or presently receive a salary based on a pro-rationing of the salary step on the salary guide for the years specified:

1983-84	36
1984-85	36
1985-86	21
1986-87	0
1987-88	0

4. The following table represents the number of teachers that the West Milford Board of Education had designated as "half-time" or "part-time" teachers during each of the years specified:

1983-84	2
1984-85	3
1985-86	3
1986-87	4
1987-88	3

5. In the school years 1983-84 remedial and supplemental teachers in the West Milford School District were paid on an hourly basis with an established annual salary ceiling as designated in each teacher's

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contract of employment on the basis of experience and education. Of the entire body of supplemental and remedial teachers in 1983-84, 14 teachers were contractually engaged to teach six hours per day for 180 days. An additional 22 remedial and supplemental teachers were contractually hired by the West Milford Board of Education to work six hours per day for 170 days. These 14 and 22 teachers were members of the Teachers' Pension and Annuity Fund (TPAF); all received their salary in 20 payments during the year; all were represented by the West Milford Education Association, Inc./Supplemental Instructors ("WMEA/Supp.") pursuant to the collective bargaining contract between WMEA/Supp. and the West Milford Board of Education covering the period of July 1, 1983 through June 30, 1984; all were entitled to sick leave days and maternity leave, where applicable, and personal leave days and to grievance procedure protections; all were afforded tuition cost reimbursement possibilities; all were covered by the District's health plan. A copy of the 1983-84 collective bargaining agreement between WMEA/Supp. and the Board of Education is incorporated herewith and enclosed as Exhibit "A."

6. In the school year 1984-85, supplemental and remedial teachers in the West Milford School District were paid on an hourly basis with a set annual salary ceiling as individually designated in each teacher's contract of employment on the basis of experience and education. All remedial and supplemental teachers were members of the TPAF; all received their salary in 20 payments during the year; all were represented by the West Milford Education Association ("WMEA") pursuant to the collective bargaining contract between WMEA and the West Milford Board of Education covering the period of July 1, 1984 through June 30, 1987, (incorporated herewith and enclosed as Exhibit "B"); all were entitled to sick leave days and maternity leave, here applicable,

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and personal leave days and to grievance procedure protections; all were covered by the District's health plan; and all were afforded tuition cost reimbursement possibilities. In the 1984-85 year, the District employed 10 supplemental or remedial isntructors to teach six hours per day for 180 days. An additional 26 supplemental or remedial instructors were employed by the district to teach six hours per day for 170 days.

7. In the school year 1985-86 supplemental and remedial teachers in the West Milford School District were paid a pro-rata share on the salary guide, depending on each teacher's level of education, training and experience. The district employed nine remedial or supplemental teachers at six hours per day for 180 days, and 12 remedial or supplemental teachers at six hours per day for 170 days. Pro-rationing was on the basis of 180/184 (.978) or 170/184 (.923) days. All remedial and supplemental teachers were members of the TPAF; all received their salary in 20 payments during the year; all were represented by the WMEA pursuant to the collective bargaining contract between WMEA and the West Milford Board of Education covering the period July 1, 1984 through June 30, 1987 (incorporated herewith and enclosed as Exhibit "B"); all were entitled to sick leave days and to materniity leave, where applicable, and to personal leave days and to grievance procedure protections; all were covered by the District's health plan; and all were afforded tuition cost reimbursement possibilities.

8. Insofar as the 1985-86 year is concerned (although only 21 remedial and supplemental posts existed), 28 remedial and supplemental teachers finalized a settlement agreement with the Board of Education wherein the following provisions were incorporated:

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(f) For the 1985-86 school year, all petitioners who were employed for five (5) months or more during 1984-85 and who continue to be employed for 1985-86 shall be paid on the classroom teachers' salary guide for 1985-86 at the next step above that assigned to them by this agreement in paragraph 1(b), and at their then appropriate level of said guide, except that each such petitioner's respective annual salary as specified on said guide shall be reduced in the amount of One Thousand Two Hundred and Fifty Dollars ($1,250.00) per person. The one thousand two hundred and fifty dollars ($1,250.00) deduction shall be spread equally over as many installments as will be utilized to pay the full 1985-86 salary. Individuals who were employed for less than five (5) months in 1984-85 will remain on the same salary step for 1985-86 as that assigned to them herein for 1984-85 with deduction of $1,250.00 as specified in this paragraph. The appropriate 1985-86 step for all petitiones shall be that set forth in attached Schedule 'B'. (Not included with this stipulation.)

(g) The salary established by paragraph 1(f) shall be paid in the normal course by June 30, 1986. Pro rata reductions in the annual salary due shall be made as to any petitioner who works a shorter workday, workweek or work year, as compared to a classroom teacher working full time in the same school building, in the same manner as a part-time classroom teacher's salary is pro-rated.

9. In the school year 1986-87, all supplemental and remedial teachers in the West Milford School District were paid on the basis of a full 184-day contract, depending on each teacher's level of education, training and experience. All remedial and supplemental teachers were members of the TPAF; all received their salary in 20 payments during the year; all were represented by the WMEA pursuant to the collective bargaining contract between WMEA and the West Milford Board of Education covering the period July 1, 1984 through June 30, 1987 (incorporated herewith and enclosed as Exhibit "B"); all were entitled to sick leave days and to maternity

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leave, where applicable, and to personal leave days and to grievance procedure protections; all were covered by the district's health plan; and all were afforded tuition cost reimbursement possibilities.

10. On or about September 16, 1985, Assistant Commissioner Vincent Calabrese advised all Board Secretaries/School Business Administrators by way of memorandum dated September 15, 1985 to verify aid entitlements for each school district under the minimum teacher aid salary law. Each school district in the State subject to the minimum teacher aid law including West Milford was sent said memorandum and computer printouts applicable to information to be verified. Additionally, each district was sent instructions for minimum salary schedules, examples of schedules and questions and answers about the New Jersey Minimum Teachers Salary Law. Said documentation is incorporated herewith and enclosed in Exhibit "C."

11. Petitioner, West Milford Board of Education, was sent on September 16, 1985 and thereupon received data printouts to be verified. Petitioner verified the information and returned schedules A, B, C, D and E. Said Documentation is incorporated herewith and enclosed in Exhibit "D."

12. On December 20, 1985, West Milford was sent a Notice of Entitlement to $453,534 for the 1985-86 school year. This amount was obtained from the schedules submitted by the district of West Milford. Said documentation is incorporated herewith and enclosed in Exhibit "E."

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13. On February 3, 1986, a Revised Notice of Entitlement was sent by the Department of Education to West Milford showing a revised 1985-86 entitlement of $455,752. Said documentation is incorporated herewith and enclosed in Exhibit "F."

14. On or about May 13, 1986 all Board Secretaries/School Business Administrators, Chief School Administrators and County Superintendents were advised by Assistant Commissioner Calabrese to provide the Department of Education with 1985-85 salary schedules for all teaching staff and copies of 1985-86 salary schedules for all teaching staff which were effective prior to September 9, 1985.

15. On or about June 30, 1986 all Board Secretaries/School Business Administrators were advised by Assistant Commissioner Calabrese to respond to the End-Of-The-Year Report for purposes of making adjustments to state aid entitlements for the 1986-87 school year. Said documentation is incorporated herewith and enclosed in Exhibit "H."

16. Upon review by the Department of Education of the End-Of-The-Year Report from West Milford, teachers who did not receive the full step on the salary guide were removed from eligibility for minimum teacher salary aid. Said documentation is incorporated herewith and enclosed in Exhibit "I."

17. On or about October 21, 1986, West Milford's Superintendent, Dr. William F. Koy, communicated to Mr. Paul Richards, Accountant II of the Bureau of School Finance and indicated that the West Milford Board of Education has always employed remedial teachers pursuant to conditions ad as in Superintendent Koy's letter. Said documentation is incorporated herewith and enclosed in Exhibit "J."

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18. On or about November 25, 1986, Mr. Melvin Wyns, Director, Bureau of School Finance communicated to Dr. Koy that as a number of West Milford teachers did not receive the full step on the district's salary schedule, the District was ineligible for minimum teacher salary state aid. Said documentation is incorporated herewith and enclosed in Exhibit "K."

19. On or about December 9, 1986, Dr. Koy communicated to Assistant Commissioner Vincent Calabrese that West Milford wished to appeal the decision of Mr. Wyns as communicated in the November 25, 1986 correspondence found in Exhibit "K." Said documentation is incorpoated herewith and enclosed in Exhibit "L."

20 On or about December 10, 1987, Assistant Commissioner Vincent Calabrese communicated to the West Milford Board of Education concerning adjustments to be made to the district's 1986-87 minimum salary state aid entitlement as a result of 1985-86 End-Of-The-Year Report review. For the District of West Milford, an adjustment of $84,859 ($101,091 less $16,232) was calculated by the Department of Education. The names of the teachers and their 1984-85 salaries and the amounts that were funded by the State are found in the "1985-86 Adjustments-1986-86 Entitlement." Said documentation is incorproated herewith and enclosed in Exhibit "M."

21. On or about January 13, 1987, Assistant Commissioner Vincent Calabrese communicated by letter to Superintendent Koy that the Department of Education's original decision would not be reversed. Said documentation is incorporated hereiwth and enclosed in Exhibit "N."

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22. On or about February 12, 1987, Superintendent Koy communicated to Assistant Commissioner Calabrese regarding their meeting of February 10, 1987 relative to the Department of Education's intention to reduce West Milford's minimum teacher salary aid. The language of Superintendent Koy's February 12, 1987 communication speaks for itself. Said letter is incorporated herewith and enclosed as Exhibit "P."

23. On or about February 23, 1987, Assistant Commissioner Calabrese communicated to Superintendent Koy in response to the latter's letter of February 12, 1987. The language of Mr. Calabrese's communication speaks for itself. Said documentation is incorporated herewith and enclosed as Exhibit "P."

24. On or about March 31, 1987, Assistant Commissioner Vincent Calabrese informed Superintendent Koy that he has determined to reaffirm his original decision to reduce West Milford's minimum teacher salary aid. Mr. Calabrese further informed Superintendent Koy that his decision was appealable pursuant to N.J.S.A. 18A:6-9 et seq. The language Assistant Commisisoner Calabrese's communication speaks for itself. Said documentation is incorporated herewith and enclosed as Exhibit "Q."

25. On or about April 16, 1987 the West Milford School district informed Assistant Commissioner Calabrese that it would undertake an appeal of the latter's determination on West Milford's minimum teacher salary aid. Superintendent Koy further asked for the release by the Department of Education of withheld funds until the dispute was resolved.

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26. In a meeting between Assistant Commissioner Calabrese and Superintendent Koy on May 21, 1987 to discuss the entire situation of minimum teacher salary aid for West Milford and that of the 1984-85 school year specifically, the latter asked Assistant Commissioner Calabrese whether or not the latter would revise West Milford's 1986-87 minimum teacher salary aid if the West Milford School District Board of Education would resolve to pay 170-day and 180-day teachers the full salary designated for their step on the salary guides. Assistant Commissioner Calabrese answered in the affirmative.

27. In a letter dated May 21, 1987, Assistant Commissioner Calabrese memorialized his May 21, 1987 meeting with Superintendent Koy. The language of this letter speaks for itself. Said document is incorporated herewith and enclosed as Exhibit "R."

28. On or about June 3, 1987, Superintendent Koy informed Assistant Commissioner Calabrese that the West Milford Board of Education had passed at a regular/limited meeting on June 2, 1987 a resolution adjusting the 1986-87 salaries of certain remedial teachers to a 184-day assignment from September 1, 1986 through June 30, 1987. Said documents are incorporated herewith and enclosed as Exhibit "S."

29. On or about June 23, 1987, Superintendent Koy informed Assistant Commissioner Calabrse that the West Milford Board of Education had resolved on June 16, 1987 to adjust the 1987-88 salaries of listed remedial teachers to a 184-day assignment. Said documents are incorporated herewith and enclosed as Exhibit "T."

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II.

The gravamen of this dispute is what constitutes full-time employment for a remedial/supplemental teaching staff member to enable the Board to qualify for a State aid entitlement pursuant to the Teacher Quality Employment Act (Act). The hours worked per day or the days worked per week are not in dispute. The controversy focuses on the number of days worked per year. An added controversy seems to have developed between the parties for the 1986-87 school year as to whether those teachers employed for fewer days than regular classroom teachers, but compensated as if they had worked the same number of days, would qualify the Board to receive State aid for them under the Act.

The Board argues that the regulatory scheme, N.J.A.C. 6:13-1.13, leaves the full-time determination to the Board as long as the teacher works at least four hours. It cannot be disputed that this regulation was adopted prior to the enactment of the Act or adoption of any regulation related to the Act. (A minor amendment to N.J.A.C. 6:3-1.13 was effective June 20, 1983; the Act was effective and operative on September 9, 1985; N.J.A.C. 6:20—5.6 was effective June 2, 1986). Notwithstanding the distinctive purposes for the promulgation and adoption of N.J.A.C. 6:3-1.13 and N.J.A.C. 6:20-5.6, and giving full credence to the Board's argument, the Board in the instant matter did in fact determine full-time employment for teaching staff members to be 184 days for the year. See, Exhibit "O". It is absurd to accept the Board's contention that classroom teachers employed for 184 days; remedial/supplemental teacners employed for 180 days; and remedial/supplemental teachers employed for 170 days are all to be considered full-time in order to qualify the Board for State aid under the Act. This self-serving position of the Board must be rejected.

A review of the statutory scheme related to the Act, N.J.S.A. 18A:29-5.1 et seq., clearly indicates its applicability to full-time teaching staff members only.

The briefs of the parties are incorporated herein by reference, and the case law cited therein need not be repeated here.

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I **FIND:**

1. State aid in accordance with the Teacher Quality Employment Act is applicable for teaching staff members employed on a full-time basis only.

2. Full-time teachers employed by the West Milford Board work 184 days per year.

3. Teachers employed by the West Milford Board for less than 184 days are part-time teaching staff members.

4. State aid adjustment made by the Division for the 1985-86 school year by excluding the compensation paid to part-time teaching staff members from the provisions of the Act is a proper and lawful exercise of its authority.

I **CONCLUDE**, therefore that the Board's claim for upward adjustment of 1985-86 State aid shall be and is hereby **DISMISSED**.

III.

Concerning the Board's claim for 1986-87 State aid adjustment, the element of compensation is introduced and must therefore be addressed.

It cannot be disputed that the West Milford Superintendent was engaged in good faith efforts to negotiate consideration by the Division to increase State aid determinations made by the latter for both the 1985-86 and 1986-87 school years, and in fact met with Calabrese on May 21, 1987. Calabrese memorialized the meeting in a letter of the same date to Superintendent Koy. See, Exhibit "R", wherein he held to the position "to reduce West Milford's minimum salary State aid payments by $84,859 . . .", for 1985-86 and also said:

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> This office will revise the entitlement amount for the 1986-87 school year once the West Milford Board of Education has passed a resolution which permits the 170-day and 180-day teaching staff members to receive compensation equal to the full salary designated for their step on the salary schedule for the 1986-87 school year and subsequent school years.

On June 2, 1987, the Board adopted a resolution which "adjusted salaries for [18 remedial teachers] for the 1986-87 school year retroactive from September 1, 1986, through June 30, 1987, (184-day assignment)." See, Exhibit "S." This resolution required the Board to increase its expenditure of taxpayer money in the amount of $23,841, presumably to receive a greater amount of taxpayer money in the form of State aid in accordance with the Act.

N.J.A.C. 6:20-5.6(b) states:

> For the purpose of the Teacher Quality Employment Act, full-time employment shall mean the number of hours in a day and the number of days in a week the district board of education prescribes for a teaching staff member to receive the full salary designated for their step on the district board of education's salary schedule.

It is noted that the above regulation makes no reference of the number of days or weeks a teacher is employed during the year to be considered full-time. Nevertheless, having determined the remedial/supplemental teachers employed during 1985-86 for less than 184 days were part-time, I cannot find that the same schedule in 1986-87 shall be deemed to be full-time because the Board made retroactive salary adjustments as if the teachers were employed full-time. An affidavit from a physician or parent indicating a child was born on September 30 at 11:00 p.m., contrary to the recorded 1:00 a.m. birth on October 1, in order to gain a child's admission to kindergarten in accordance with Board policy would not change the fact that the child did not become five years of age prior to October 1.

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Concerning the 1986-87 school year, I **FIND.**

1. Remedial teachers were retroactively compensated as if they were employed on a full-time basis.

2. Remedial teachers who received retroactive salary adjustments were employed for fewer than 184 days.

3. The retroactive compensation of the remedial teachers as if employed on a full-time basis does not alter the fact that they were part-time, and their compensation may not be considered for State aid purposes in accordance with the Act.

4. The Calabrese declaration in paragraph 2 of this May 21, 1987 letter to Koy (Exhibit "S") is ultra vires, as it is contrary to the inntendment of the Legislature in accordance with the Act.

The above findings are troublesome because of a belief that the Board acted in good faith in approving an additional salary expenditure of $23,841 (for services not provided) in anticipation of a greater State aid increase. Since the Board's action was triggered by the Calabrese declaration, the doctrine of fundamental fairness must apply.

I **CONCLUDE** that the Board's claim for State aid adjustment for the 1986-87 school year shall be and is hereby **DISMISSED.**

I **FURTHER CONCLUDE** that the Division shall reimburse the Board in the amount of $23,841 for its non-yielding and additional salary compensation expenditure. **IT IS SO ORDERED.**

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This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

22 January 1988
DATE

WARD R. YOUNG, ALJ

JAN 25 1988
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

Mailed To Parties:
JAN 27 [redacted]
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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BOARD OF EDUCATION OF THE TOWNSHIP OF WEST MILFORD, PASSAIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY ET AL.,	:	DECISION
RESPONDENTS.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Board's exceptions were timely filed pursuant to N.J.A.C. 1:1-18.4 as were the State's reply exceptions thereto.

Petitioner avers the ALJ misconceived the provisions of State law, particularly that portion of N.J.S.A. 18A:29-5 which defines "full-time" as meaning "'the number of days of employment in each week and the period of time in each day required by regulations of the State board to qualify a person as a full-time teaching staff member.'" (emphasis in text) (Exceptions at p. 2, quoting N.J.S.A. 18A:29-5)

The Board also cites N.J.A.C. 6:20-5.6(b) which, it avers, "vests in local district boards of education the number of days in a week and the number of hours in a day for teaching staff members to work in order to be eligible to be placed on the appropriate steps on the district board of education's salary schedule." (Exceptions, at p. 2) The Board avers the ALJ has held there can be but one type of full-time teacher in a school system, but further claims that this is not the law of New Jersey. The Board cites its brief for support of its contention that "[t]he fact that some teachers are not needed for the same number of days as other teachers does not thereby mean that they are not full time within the meaning of the term 'full-time' as that term is used in the Teacher Quality Employment Act." (Exceptions, at p. 2)

The Board also relies on South Orange-Maplewood Education Ass'n., on behalf of Lunchroom Aides and Lunchroom Supervisors v. Board of Education of South Orange-Maplewood, decided by the Commissioner June 3, 1985, for the proposition that "the statute involved in this matter does not say that to be considered 'full-time' a person must work for the entire school year." (emphasis in text) (Exceptions, at p. 2) The Board contends the State Board rules dictate that each local school district is to determine the definition of a full-time teaching staff member. Moreover, the Board avers that the statute and regulations "clearly contemplate that persons may be employed for different period[s] of service and

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still be considered 'full-time' employees. Otherwise, the language in the statute is meaningless." (Exceptions, at p. 3)

The Board sets forth the following additional exceptions:

2. It excepts to Finding No. 2, Slip Opinion, p. 13, upon the grounds that that finding is contrary to the facts. Some teachers employed by the West Milford Board work 184 days per year. Some work less than that but are nevertheless full time teachers.

3. It excepts to Finding No. 3, Slip Opinion, p. 13, holding that teachers employed by the West Milford Board for less than 184 days are part-time teaching staff members and states that such finding is contrary to the facts and the law.

4. It excepts to Finding No. 4, Slip Opinion, p. 13, and states that the facts stipulated to in this matter do not support such a finding.

5. It excepts to the conclusion of the ALJ that the Board's claim for upwards adjustment of 1985-86 State Aid should be dismissed. The Board has established a valid entitlement to an upward adjustment of 1985-86 State Aid.

6. It excepts to Finding No. 3 for the 1986-87 School Year (Slip Opinion, p. 15) holding that the remedial teachers were part-time and that their compensation could not be considered for State Aid purposes in accordance with the Act on the grounds that such finding is not supported by the facts as set forth in the Stipulation filed in this matter.

7. It excepts to Finding No. 4 concerning the Calabrese declaration in paragraph 2 on the May 21 letter to Koy (Exhibit R erroneously referred to as Exhibit S, Slip Opinion, p. 15) on the grounds that the Administrative Law Judge is invading the prerogatives of the Board; is usurping the powers of the Board vested in it by State law and the rules and regulations promulgated pursuant thereto; and is substituting his judgment for that of the Board's in determining what constitutes "full-time" under the statutes and the rules and regulations promulgated thereunder.

8. It excepts to that portion of the paragraph immediately following Finding No. 4 on page 15 of the Slip Opinion in which the ALJ recites that the Board approved an additional salary

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> expenditure for services not provided. That statement is factually incorrect. Services were in fact provided. (Exceptions, at pp. 3-4)

Further, the Board suggests in exceptions that the ALJ ignored the rationale of prorating State aid and further disregarded the holding of the State Board in Kenny v. Board of Education of the Township of East Amwell, decided by the Commissioner January 11, 1985, rev'd State Board July 1, 1987. The Board contends that case held that "even in the case of full time members, the education laws do not mandate that all classifications of full time members be compensated on the basis of the same schedule." (Exceptions, at p. 4) Thus, it avers, the ALJ erred in not concluding that there can be more than one group of full-time teaching staff members, and that auxiliary teachers can be full-time teachers, citing Ball et al. v. Board of Education of the Township of Teaneck, decided by the Commissioner August 31, 1984, rev'd St. Bd. January 7, 1987. The Board submits that the initial decision should be reversed.

The State's reply exceptions incorporate by reference the arguments contained in its brief submitted to the ALJ. Moreover, the State contends petitioner's exceptions failed to set forth specific findings of fact and conclusion of law in lieu of the findings reached by the ALJ and supporting reasons on the basis of the evidence relied upon. It therefore argues that the Board failed to conform with the strictures of N.J.A.C. 1:1-18.4. Further, the State submits that the ALJ's initial decision is accurate and should be adopted by the Commissioner in its entirety. It claims that the facts establish that

> [T]he remedial and supplemental teachers in West Milford were historically treated in a manner separate and apart from all regular teachers in the District. *** As such, the facts of this case clearly warrant the ALJ's conclusions that the West Milford remedial and supplemental teachers were part-time employees for purpose of the Teacher Quality Employment Act.
> (Reply Exceptions, at p. 2)

In reply to the Board's contention that the definition of full-time teachers is left up to each local school board, the State counters that this "is not on point in the instant controversy." (Id.) Rather, the State claims the instant litigation focuses on N.J.S.A. 18A:29-5 et seq. and its implementing regulations pursuant to N.J.A.C. 6:20-5.6(b), the latter of which, the State contends

> is clear on its face that the subject matter regulated is unique and different from other educational controversies where the payment of a full salary step is not at issue. In the instant matter, a line has been drawn by the State Board as to who is full-time teacher for purposes of the Teacher Quality Employment Act." (emphasis in text) (Reply Exceptions, at p. 2)

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Thus, the State finds the Board's reliance on South Orange-Maplewood, supra, inapposite.

The State proffers the following additional reply exceptions:

> 5. Insofar as petitioner's exceptions to the ALJ's findings [Nos.] 2 and 3, petitioner's exceptions are not founded on any evidence in the record. This factual determination by the ALJ should be allowed to stand. See respondents' brief in the proceedings below.
>
> 6. Insofar as petitioner's exception to the ALJ's finding No. 4, this exception is not warranted as the law supports the ALJ's conclusion. See respondents' brief in the proceedings below.
>
> 7. Insofar as petitioner's exceptions to the ALJ's determination concerning the 1986-87 year, the ALJ's determination is amply supported by the record and should be adopted by the Commissioner. The findings that West Milford's remedial and supplemental teachers are part-time employees for purposes of the Teacher Quality Employment Act are in line with the ALJ's similar findings for the 1985-86 year and should be adopted by the Commissioner. (Id., at p. 3)

For the above reasons and those set forth in the State's brief in support of its cross-motion for summary decision, the State urges the Commissioner to adopt the initial decision in its entirety.

Upon his careful and independent review of the record of this matter, the Commissioner adopts in part and rejects in part the initial decision for the reasons set forth below.

As noted by the ALJ, the gravamen of this dispute concerns whether the Board herein is entitled to State aid funding pursuant to N.J.S.A. 18A:29-5.1 et seq. and its implementing regulations, N.J.A.C. 6:20-5.6 et seq., the Teacher Quality Employment Act (Act) for those teachers in the West Milford District who worked less than a 184-day year as supplemental/remedial teachers for the years 1985-86 and 1986-87.

The ALJ also notes the parties have stipulated to the hours worked per day and the days worked per week. The record also makes plain that some supplemental/remedial teachers during the period in question worked 170 days per year while others worked 180 days per year. The Commissioner would couch the specific inquiry in this matter differently, however, from that of the ALJ, who in the initial decision, ante, stated, "[T]he controversy focuses on the number of days worked per year." Instead, the Commissioner relies

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on the language of N.J.A.C. 6:20-5.6(b) in establishing the issue before him:

> For the purpose of the Teacher Quality Employment Act, full-time employment shall mean the number of hours in a day and the number of days in a week the district board of education prescribes for a teaching staff member to receive the full salary designated for their step on the district board of education's salary schedule. (emphasis supplied)

Thus, the issue is properly framed as to whether the teachers in question, for purposes of reimbursement under the Act and notwithstanding whether they worked a 170 or a 180-day year, received the full salary designated for their step on the district Board of Education's salary schedule. Exhibit O, a letter dated February 12, 1987 from Mr. William F. Koy, Superintendent of the West Milford School District, addressed to Mr. Vincent Calabrese, Assistant Commissioner, Department of Finance of the Department of Education of the State of New Jersey, makes it entirely plain that the staff in question received a ratio of the full step designated for their level of experience and training based on the number of days per year they worked:

> It is important to emphasize that these staff members are full time and have been remunerated in a prorata amount of standard salary guide figures. Those staff members working 170 days receive .923 of the guide level (the ratio of 170 days to 184 days), and those staff members that work 180 days receive their prorata portion of the salary guide at .978 (the ratio of 180 days to 184 days). All of these staff members work a full 6¾ hour day as do all staff members. (emphasis supplied) (Exhibit O)

Pursuant to the Act, then, for the 1985-86 school year the Board did not met the criterion for establishing that these teachers are full-time because it prorated the salary guide step said employees received. The Act plainly disallows payment for any person serving less than full- time, pursuant to the State Board regulations defining full-time under the Act. Said State Board regulation, N.J.A.C. 6:20-5.6(b), defines full-time as those persons eligible to receive a "full salary designated for their step on the district board of education's salary schedule." Such language is clear on its face. Districts may not receive State aid for persons who receive less than a full step on the salary guide. See Middlesex County Educational Services Commission Education Association v. Middlesex County Educational Services Commission et al., decided by the Commissioner September 30, 1987.

In so concluding, the Commissioner rejects the Board's contention that N.J.A.C. 6:13-1.13 leaves it to the Board to determine what constitutes full-time, so long as the teacher works at least four hours. As noted by the ALJ, this argument is

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inapposite since N.J.A.C. 6:13-1.13 was adopted before the Act. Further, the latter and its implementing regulation at N.J.A.C. 6:20-5.6(b) makes clear precisely what measurement establishes who qualifies for funding as full-time under the Act. Moreover, the Commissioner finds of no moment the Board's point that without prorating teachers who work some number of days less than regular teaching staff members, those who start or finish earlier would be paid the same as those who start or finish later. For the Commissioner to so hold would unjustly enrich boards which would hire teachers who actually are paid on a prorated basis and thereby a lesser amount than full-time, only to be fully funded by the State at a minimum of $18,500 for each such employee.

Moreover, the Commissioner's conclusion is consistent with the holdings of Frances W. Hyman et al. v. Board of Education of the Township of Teaneck, 1983 S.L.D. 699, rev'd State Board March 6, 1985, aff./rem. N.J. Superior Ct., App. Div., February 26, 1986, cert. den. N.J. Supreme Ct., June 27, 1986 (any entitlement to compensation based on a salary schedule adopted by a board pursuant to N.J.S.A. 18A:29-4.1 turns on status as a full-time teaching staff member) and Eileen Monahan et al. v. Board of Education of the City of Clifton, decided by the Commissioner December 24, 1986 (proration in compensation precludes status as full-time teacher under the Act). In the latter case, as in the instant one, petitioners were found to be part-time employees and thus ineligible for compensation under the Act.

With this clarification, the Commissioner concurs with the finding of the ALJ below that the Board's claim for upward adjustment of its 1985-86 State aid shall be and hereby is dismissed.

However, for the 1986-87 school year, the Commissioner does not concur with the ALJ's conclusions found on page 15 of the initial decision, leading to finding No. 4, that "[t]he Calabrese declaration in paragraph 2 of this May 21, 1987 letter to Koy (Exhibit "S") [sic, Exhibit R] is ultra vires, as it is contrary to the inntendment (sic) of the Legislature in accordance with the Act" and that therefore the only basis upon which the Board was entitled to reimbursement was on an equitable basis. The Commissioner soundly rejects this finding in that any adjustments necessary to establish accurate State aid funding under the Act are made, as a matter of course, following the school year-end report submitted by each district. In the instant matter, during the 1986-87 school year, the Board was in continuous contact with the Department of Education, Division of Finance, in an effort to resolve the status of the employees in question. That Assistant Commissioner Calabrese instructed the Board that it would make no adjustments to its determination concerning what reimbursement was due the West Milford School District until the Board formally resolved to establish said employees retroactive to September 1, 1986 as full-time teaching staff members was entirely consonant with the intendment of the Act and, thus, reimbursement was appropriate since those employees were paid by the Board at a full salary step. The Commissioner concludes, based on the language of the Act, which establishes that a board of education may only be aided for those teaching staff members who are eligible to receive a full step in compensation on

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the salary schedule, that once the Board compensated the employees in question in a manner consistent with the Act which was resolved by Board resolution on June 2, 1987, it was entitled to be reimbursed in the amount of $23,841. Consequently, the Commissioner directs that the Division of Finance reimburse the Board in the amount of $23,841.

Accordingly, the initial decision is adopted in part and rejected in part as stated above.

COMMISSIONER OF EDUCATION

March 7, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7145-86
(EDU 3153-86 ON REMAND)
AGENCY DKT. NO. 108-4/86

FRANK D'ALESSANDRO,
INDIVIDUALLY AND AS REPRESENTATIVE
OF A CLASS OF SIMILARLY SITUATED
INDIVIDUAL EMPLOYEES,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP
OF MIDDLETOWN, MONMOUTH COUNTY,
Respondent.

Mark J. Blunda, Esq., for petitioner (Oxfeld, Cohen, Blunda, Friedman, LeVine and Brooks, attorneys)

Peter P. Kalac, Esq., for respondent (Kalac and Newman, attorneys)

Record Closed: November 23, 1987 Decided: February 2, 1988

BEFORE **LILLARD E. LAW,** ALJ:

STATEMENT OF THE CASE

Petitioner, a tenured teaching staff member in the employ of the Board of Education of the Township of Middletown (Board) alleges that the Board's adopted Affirmative Action Policy and its appointment of Affirmative Action Officers is in violation of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq. and N.J.A.C. 6:4-1 et seq.) Equality in Educational Programs.

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PROCEDURAL ASPECTS

This matter is on remand from the Commissioner of Education whereby this Administrative Law Judge granted the Board's motion to dismiss the Petition of Appeal as untimely, pursuant to N.J.A.C. 6:24-1.2 in an initial decision issued on September 10, 1986. The Commissioner set aside this tribunal's findings and determinations whereby the Commissioner found the possibility of a continuing violation of discrimination as the basis of his retaxation of the 90-day rule (N.J.A.C. 6:24-1.2). The Commissioner therefore remanded the matter to require a plenary hearing on the merits of the Petition of Appeal.

A hearing was held on October 1, 1987, at the Hazlet Township Municipal Court. The parties requested and were granted leave to submit post-hearing memoranda. The last submission was received by the undersigned on November 23, 1987, which constitutes the closing of the record of the herein matter.

ISSUE TO BE DETERMINED

The sole issue now to be detemined by this administrative tribunal was agreed to by the parties at the June 27, 1986 prehearing conference and is as follows:

1. Whether the Board's policy on Affirmative Action and its appointment of Affirmative Action Officers for the school district violate N.J.A.C. 6:4-1 et seq. and the New Jersey Law Against Discrimination N.J.S.A. 10:5-1 et seq.?

STATEMENT OF FACTS

The facts in this matter, which are not in dispute, are hereby adopted as my **FINDINGS OF FACT** as follows:

Petitioner Frank D'Alessandro is a teacher employed by the Board who also serves as Grievance Chairperson of the Middletown Township Education Association (Association), the recognized employee representative organization for the Board's teaching staff members.

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On November 4, 1985, the Board was in receipt of a recommendation from its administrative staff to adopt an affirmative action policy with supplementing rules and regulations for its procedural implementation. The Board was also in receipt of a recommendation to appoint individual school building and district-wide Affirmative Action Officers, duties which include, among others, the necessary monitoring of the Board's Affirmative Action Plan. On November 4, 1985, the Board appointed its Affirmative Action Officers and conducted its first reading of the proposed affirmative action policy.

On December 2, 1985, the Board had its second reading and subsequently adopted the policy at its monthly open public meeting. At the open public meeting, petitioner D'Allesandro protested the Board's policy and the Board's designation of its Affirmative Action Officers.

The policy adopted by the Board contains an Affirmative Action Grievance Procedure which is set forth hereinbelow as follows:

Policy No. 130

AFFIRMATIVE ACTION GRIEVANCE POLICY

It is the policy of the Board that individuals shall have a procedure available for redress of alleged violations of their rights as set forth under Title VI and Title IX.

The Superintendent shall develop procedures for the implementation of this policy.

GRIEVANCE PROCEDURE-TITLE VI AND TITLE IX

The Superintendent shall establish the following Rules and Regulations for grievances that stem from Title VI and Title IX compliance:

LEVEL I-INFORMAL DISCUSSION-BUILDING AFFIRMATIVE ACTION OFFICER

A. Each individual shall attempt to resolve all complaints on an informal basis.

B. The individual initiating the complaint shall discuss the dispute with the building Affirmative Action Officer within ten (10) working days of its alleged occurrence. The Building

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Affirmative Action Officer shall render a decision within five (5) working days.

C. If the grievant is not satisfied with the decision rendered at Level I, he/she has five (5) working days to submit a written grievance to the Assistant Superintendent-Personnel.

LEVEL II - WRITTEN GRIEVANCE:

Assistant Superintendent - Personnel

A. The written grievance shall be submitted to the Assistant Superintendent - Personnel. The written grievance shall set forth:

1. The specific nature of the complaint and a brief statement of the facts giving rise to it.

2. The manner in which it is alleged that the individual has been adversely affected.

3. The relief desired by the grievant.

4. The reason why the grievant believes he/she is entitled to relief desired.

The Assistant Superintendent - Personnel shall hold a conference within ten (10) working days after receipt of the written grievance.

B. All persons involved in the dispute shall be in attendance.

C. The Assistant Superintendent - Personnel shall render a written decision within five (50 working days upon the conclusion of the conference.

D. If the grievant is not satisfied with the decision rendered at Level II, he/she has five (5) working days to submit a written grievance to the designee of the Board of Education, the District Affirmative Action Officer.

LEVEL III - DISTRICT AFFIRMATIVE ACTION OFFICERS

A. The District Affirmative Action Officer has twenty (20) working days from the receipt of the written grievance to:

(1) render a decision in writing based on a review of the materials presented from Levels I and II

or

B. (2) hold a hearing of all persons involved, if it is deemed practical and appropriate, and render a decision in writing based on that hearing.

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> The decision of the District Affirmative Action Officer is final in this District; however, if the grievant is not satisfied with the decision of the Board, he/she may appeal the decision to the appropriate agency.
>
> If the grievant is not satisfied with the decision rendered by the District Affirmative Action Officer, he/she has five (5) working days to petition the Board of Education, in writing, for a review of the dispute.
>
> P-2

Pursuant to the Board's adopted grievance procedure, petitioner filed a grievance on December 8, 1985, challenging the Board's Affirmative Action Policy and its designation of Affirmative Action Officers. By letter, dated December 19, 1985, the Board's District Affirmative Action Officer, William F. Hybbeneth, denied petitioner's grievance. Thereafter, on January 20, 1986, petitioner addressed a letter to the Commissioner of Education complaining of the Board's action together with an appeal to the Commissioner "...to enter and to help resolve the dispute." (Petitioner's Exhibit III). On February 20, 1987, Walter J. McCarroll, Assistant Commissioner, addressed a letter to petitioner D'Alesandro advising petitioner, among other things, that if he wished to file a formal complaint pursuant to N.J.A.C. 6:4-1.9, petitioner could obtain the appropriate forms from the Department's Bureau of Controversies and Disputes. The Assistant Commissioner also advised petitioner to exhaust all internal administrative remedies as outlined in the Board's grievance procedure. Petitioner's Petition of Appeal, dated April 21, 1986, was received by the Bureau of Controversies and Disputes on April 23, 1986.

The Board did not advertise for candidates for the position of Affirmative Action Officer, nor did it post the positions or notify the Association of the positions. All of the Affirmative Action Officers appointed by the Board are school administrators. Seventeen are school principals, with one Assistant Superintendent and one the Director of Labor Relations filling the positions.

There are approximately 892 teaching staff members in the school district with 667 (75%) female and 225 (25%) male. There are 24 (2.7%) members of the teaching staff representing minority races. Of the individuals appointed as Affirmative Action Officers, four are female and fifteen are male. No minority members were appointed.

The average teacher salary in Middletown Township is $29,000. The average clerical employee salary is $12,000. The average salary for administrators was not

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advanced at the hearing, however, it was asserted on the record that administrator salaries exceed $50,000 per year.

At the hearing, petitioner D'Alessandro testified that he believed he was discriminated against because of his economic status as a teaching staff member. His annual earnings from all sources are approximately $35,000. He is the son of a retired railroad worker, does not have a working wife and is not the beneficiary of any trust.

D'Alessandro testified that he never faced a problem when he filed a grievance on behalf of the Association or its members.

Roberta Gaurreau testified that she is a female teaching staff member, who has taught in the District for 21 years and would "definitely" have wanted to be an Affirmative Action Officer.

Edward Mitchell testified that he is a black teaching staff member, who has taught in the District for 14 years and would have been interested in serving as an Affirmative Action Officer.

The Board reappointed the Affirmative Action Officers for the 1986-87 school year.

This concludes a recital of the undisputed facts in this matter.

LEGAL ARGUMENTS

The parties legal arguments are set forth hereinbelow.

PETITIONER'S ARGUMENT

Petitioner contends that the New Jersey Law Against Discrimination prohibits discrimination because of, among other things, race, color and sex. N.J.S.A. 10:5-3. It further declares that it is an unlawful employment practice for an employer, because of race . . . color . . . or sex, "to discriminate against such individual in compensation or in terms, conditions or privileges of employment . . ."

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N.J.S.A. 10:5-12.

The New Jersey Administrative Code defines "discriminatory practices" to mean:

> An action or failure to act based upon race, color, creed, religion, sex, ancestry, national origin or social or economic status. N.J.A.C. 6:4-1.2.

The Administrative Code further mandates that:

> Each school district shall develop two Affirmative Action Programs or Plans, which shall include timetables for corrective action to overcome the effects of any previous patterns of discrimination which may exist and a systematic internal monitoring procedure to ensure continuing compliance:
>
> * * *
>
> 2. Another program or plan shall include, but not limited to, action as required by Section 6 (Employment/Contract Practices) of this sub-chapter. . . .
>
> 3.(c) Each school district shall designate a member of its professional staff as the Affirmative Action Officer to coordinate and implement the district's efforts to comply. N.J.A.C. 6:4-1.3.

The New Jersey Administrative Code further mandates at N.J.A.C. 6:4-1.6 that all persons shall have equal access to all categories of employment in the public educational system of New Jersey and that all New Jersey public school districts shall comply with all State and Federal laws related to equal employment.

The Courts of this State and of the United States have recognized two separate theories of relief in discrimination cases: (1) Disparate treatment and (2) Disparate impact. Peper v. Princeton University Board of Trustees, 77 N.J. 51, 81 (1978); Giammario v. Trenton Bd. of Ed., 203 N.J. Super. 356 (App. Div. 1985); certif. den. 102 N.J. 336; certif. den. 106 S.Ct. 1791; Int'l. Brotherhood of Teamsters v. United States, 421 U.S. 324, 335 (1977). The instant case establishes unlawful discrimination under both theories.

"Disparate impact" cases involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one

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group than another and cannot be justified by business necessity. Id. The Affirmative Action Policy in Middletown Township clearly satisfies those criteria. The Policy, on its face, is neutral. Moreover, there is nothing in the record to indicate that the Board of Education announced that its implementation of the Policy would exclude or discriminate against blacks, women or teaching staff members. Nonetheless, that was the impact of both the Policy and its implementation.

The Courts have made it unmistakably clear that "statistical analyses have served and will continue to serve an important role" in cases in which the existence of discrimination is a disputed one. Int'l. Brotherhood of Teamsters v. United States, supra, at page 339. The statistics in the case at hand are compelling:

	AFFIRMATIVE ACTION OFFICERS	PROFESSIONAL STAFF
Women	21%	75%
Men	79%	25%
Black	0%	2.7%
Teachers	0%	100%
Avg. Salry $29,000	0%	50%

Proof of discriminatory motive is not required under a disparate impact theory. Int'l. Brotherhood of Teamsters v. United States, supra,; Griggs v. Duke Power Co., 401 U.S. 424, 430; Giammarrio v. Trenton Bd. of Ed., supra. at page 362. Consequently, the fact that the Middletown Township Board of Education may not have intended to discriminate against Blacks, women and teaching staff members is irrelevant. The undeniable fact is that the consequence of its actions result in disparate impact upon those groups, each of which are protected by the laws against discrimination. Consequently, there can be no question but that the petitioners have established unlawful discrimination by the respondent Board of Education under the "disparate impact" test.

Moreover, the evidence establishes unlawful discrimination under the "disparate treatment" theory. This latter theory does require intentional discrimination. However, discriminatory intent can be inferred from circumstantial evidence and statistics. Slohoda v. United Parcel Service,Inc., 207 N.J. Super. 145; 154 (App. Div.

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1986); Int'l. Brotherhood of Teamsters v. United States, supra. Under a "disparate treatment" theory once the plaintiff makes a prima facia case of discrimination under the McDonnell Douglas standard, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the burden shifts to the employer to "articulate some legitimate, non-discriminatory reason" for its conduct. Once the plaintiff has established the elements of a prima facia case, a presumption is created that the employer unlawfully discriminated against the employee. In the present case, there can be no question that the petitioners have established a prima facia case under the Mc Donnell Douglas test. The necessary elements are:

1. Petitioner is within a protected class.

2. Petitioner was qualified for the position.

3. Petitioner was not selected for the position.

4. The position was filled with someone not in the protected class.

Obviously, the petitioners have made out a prima facia case. Race, color, sex and economic status are protected categories. The petitioners were qualified for the position, since the only written criterion was that they be members of the "professional staff". Petitioners were not selected for the position. Respondent filled the positions with individuals not within the protected classes.

Since a prima facia case was established, the burden shifts to the employer to establish a legitimate, nondiscriminatory reason for its conduct. In this case, the Middletown Township Board of Education did not present a defense. Consequently, this Court is required to conclude that the employer's actions were unlawfully discriminatory. As the United States Supreme Court stated in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981):

> Establishment of a prima facia case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the Plaintiff's evidence, and if the employer is silent in the face of the presumption, the Court must enter judgment for the Plaintiff because no issue of fact remains in the case.
>
> The same holding is found in Slohoda v. United Parcel Service, Inc., supra at 207 N.J. Super. 153.

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In the present case, the Board of Education did not seek, notify, interview or select members of the protected classes. The employer failed to articulate any legitimate basis for its discriminatory conduct. The obvious reason is that none existed. However, the employer's failure to present a defense forecloses the Court from concluding other than the Board's actions were intentionally discriminatory. Consequently this Court must find that the petitioners have established a case of unlawful discrimination under the "disparate treatment" theory also.

For the foregoing reasons, the petitioners respectfully submit that the Court must find that the Board of Education in the instant case engaged in unlawful discrimination under both the "disparate impact" and "disparate treatment" theories when it adopted and implemented its Affirmative Action Policy.

THE BOARD'S ARGUMENT

POINT I

PETITIONER FAILED TO PROVE DISCRIMINATION WAS UNLAWFUL

The Board contends that all discrimination is not unlawful. What the statute prohibits is unlawful discrimination. In Jones v. College of Medicine, 155 N.J. Super. 232 (App. Div. 1977), cert. den. 77 N.J. 482 (1978), the Court wrote:

> Discrimination involves the making of choices. The statute does not proscribe all discrimination, but only that which is bottomed upon specifically enumerated partialities and prejudices. Thus, we have held that in discrimination cases an intent to discriminate must be proved. Parker v. Dornbierer, 140 N.J. Super. 185, 189 (App. Div. 1976). Obviously, this means an intent to discriminate for the prohibited purpose charged. [at 236].

Here, the Board chose to assign the duties of Affirmative Action Officers to members of its administrative staff. That choice, although it involves discrimination, it is not unlawful or prohibited by statute or administrative rule.

The burden of proving unlawful discrimination falls squarely on the petitioner. The petitioner failed in carrying that burden. In Massarsky v. General Motors, 706 F2d 111 (1983), the United States Court of Appeals for the Third Circuit wrote:

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> The ultimate burden of persuasion remains on the plaintiff at all times; the defendant's burden is only to introduce sufficient evidence to create a general factual issue concerning the existence of a legitimate justification for the action. Croker v. Boeing Co., supra, 662 F2d at 991. See, Texas Department of Community Affairs v. Burdine, supra, 450 U.S. at 253-55, S.Ct. at 1093-94.

In this matter, it was unnecessary for the respondent to produce a witness. The petitioner introduced into evidence as P-1, the respondent's Answers to Interrogatories. Question No. 4 from P-1 reads:

> Set forth the criteria considered by the Board of Education for selection of affirmative action officers?

In other words, what is the "justification for the action" as mentioned in Massarsky, supra? In the clearest of terms, the answer to the above Interrogatory reads:

> They are Building Principals with authority to make decisions to adjust complaints.

This answer, put before the Court by the petitioner, was all the respondent needed to establish a showing of lawful justification for its treatment of the petitioner. It was then encumbent upon the petitioner to ". . . prove that the asserted reason was merely pretext for unlawful discrimination". See, Massarsky, supra, at p. 118.

This the petitioner failed to do. The petitioner, in its Brief, goes to some lengths in an attempt to establish with the use of "statistics" that the Board's action constituted "disparate impact" and "disparate treatment."

Disraeli once claimed, after giving attribution to Mark Twain, there were three kinds of lies — lies, damn lies, and statistics. Even if it is assumed that petitioner's statistics are not standing on mendacious word bridges, they nonetheless miss the mark.

They certainly do not establish that the respondent's action in appointing administrators as Affirmative Action Officers was a pretext for unlawful discrimination. There is the want of a nexus between the statistics and the claimed unlawful discrimination.

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A further word on the extent of the proof needed to establish a legitimate justification for the employer's actions. In Kearny Generating System, Public Service Division v. Roper, 184 N.J. Super. 253 (App. Div. 1982), the Court wrote:

> Defendants articulated reason for selection Velasco over plaintiff was that plaintiff had 'insufficient maintenance experience.' . . . Velasco's qualifications were not developed in detail at the hearing, the hearing examiner expressing the opinion that it was not necessary to compare Velasco's quaalifications with those of plaintiff.
>
> The employer having articulated a lawful reason for the employment decision, the burden of proof shifts back to plaintiff. at p. 259.

This case, in a startingly lucid explanation of what is necessary to sustain a claim of unlawful discrimination reads:

> In order to sustain a claim of unlawful discrimination under our New Jersey statute, N.J.S.A. 10:5-4, N.J.S.A. 10:5-12, there must be proof of an intent to discriminate for an unlawful purpose. For instance, if an employer is presented with a choice between two qualified applicants, selection of the least qualified because of a greater experience or personal attributes which enhance the applicant's value ot the prospective employer is perfectly valid and permissible. Traditional management prerogatives still have validity.
>
> As the court said in Texas Community Affairs Dept. v. Burdine, supra:
>
> Title VII prohibits all discrimination in employment based upon race, sex, and national origin. 'The broad, overriding interest, shared by employer, employee and consumer, is efficient and trustworthy workmanship assured through fair and . . . neutral employment and personnel decisions.' McDonnel [sic] Douglas, supra, [411 U.S.] , at 801, 36 L.Ed.2d 668, 93 S.Ct. 1117 [at 1823]. Title VII, however, does not demand that an employer give preferential treatment to minorities or women. [Citations omitted]. The statute was not intended to 'diminish' traditional management prerogatives.' [Citation omitted]. It does not require the employer to restructure his employment practices to maximize the number of minorities and women hired. [450 U.S. at 259, 101 S.Ct. at 1096, 67 L.Ed.2d at 219.] at p.261

If Title VII was not intended to diminish traditional management prerogatives, and that proposition is cited with approval in a case involving a violation of the New

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Jersey Law Against Discrimination, then a further look at the Board's actions are needed to determine whether it was in fact exercising a "traditional management prerogative" in appointing the Affirmative Action Officers.

As pointed out by the petitioner in his Brief, the Board's actions in naming Affirmative Action Officers, were not voluntary. They were directed specifically by the New Jersey Administrative Code provisions, which read in pertinent part:

> Each school district shall develop two Affirmative Action Programs or Plans, which shall include timetables for corrective action to overcome the effects of any previous patterns of discrimination which may exist and a systematic internal monitoring procedure to ensure continuing compliance:
>
> * * *
>
> 2. Another program or plan shall include, but not be limited to, action as required by Section 6 (Employment/Contract Practices) of this sub-chapter . . .
>
> 3.(c) Each school district shall designate a member of its professional staff as the Affirmative Action Officer to coordinate and implement the district's efforts to comply. N.J.A.C. 6:4-1.3.

Note should be made that the Code does not direct the hiring of an Affirmative Action Officer. It clearly requires that a presently employed member of the staff be designated Affirmative Action Officer. To do what? To implement the district's efforts to comply with the statute and the New Jersey Administrative Code. What then occurred concurrently with the designation? Quite simply, the designee has been given an additional new assignment. Now then, are ASSIGNMENTS "managemant prerogatives"? If so, how "traditional" are they? First, the tradition. N.J.S.A. 18A:11-1, which reads:

> The Board shall—
> a. Adopt an official seal
> b. Enforce the rules of the state board;
> c. Make, amend and repeal rules, not consistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools and public school property of the district and for the employment, regulation of conduct and discharge of its employees, subject, where applicable, to the provisions of Title 11, Civil Service, of the Revised Statutes; and
> d. Perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and

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> proper conduct, equipment and maintenance of the public schools of the district.

has been on the books in one form or another since 1903.

In the same year, the Legislature enacted the first precursor to N.J.S.A. 18A:27-4, which now reads:

> Each board of education may make rules, not inconsistent with the provisions of this title, governing the employment, terms and tenure of employment, promotion and dismissal, and salaries and time and mode of payment thereof of teaching staff members for the district, and may from time to time change, amend or repeal the same, and the employment of any person in any such capacity and his rights and duties with respect to such employment shall be dependent upon and governed by the rules in force with reference thereto.

Certainly, these statutes which permit a wide range of management prerogatives including the designating of assignments, have a long tradition.

The traditional aspect of these statutes could not have been made more clearly than when our Supreme Court held that assignments are to be considered inviolate by the Board — the making of same never to be negotiated away. Ridgefield Park Education Assoc. v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978); Woodstown-Pilesgrove Bd. of Ed. v. Woodstown-Pilesgrove Educ. Assoc., 81 N.J. 582 (1980).

Based on the foregoing analysis of the law and facts, it is respectfully submitted by respondent that the Court find:

1. The New Jersey Law Against Discrimination and the rules and regulations implementing same, similar to Title VII, were not intended to diminish traditional management prerogatives.

2. The designating of an assignment by a public employer is a traditional management prerogative.

3. The Board of Education, in this instance, by naming only administrative personnel as Affirmative Action Officers, was exercising a traditional management prerogative.

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4. The exercise of a traditional management prerogative necessarily involves choice, which by its very definition, is discrimination — but not unlawful discrimination which is prohibited.

Respondent, therefore, requests that the Petition be dismissed.

DISCUSSION AND CONCLUSIONS

There is no question nor doubt that the practice of discrimination in employment is proscribed by the New Jersey Law Against Discrimination (the Act), N.J.S.A. 10:5-1 et seq. More specifically, Section 12a of the Act sets forth the class of individuals protected from unlawful employment practice or an unlawful discrimination on the basis of "race, creed, color, national origin, ancestry, age, marital status, sex or a typical hereditary cellular or blood trait of any individual ..." With respect to the application of the Act to employment practices in the public schools of this State, the State Board of Education had incorporated the Act, among others[1], and codified it at N.J.A.C. 6:4-1.6(a), which states:

> All persons regardless of race, color, creed, religion, sex, or national origin shall have equal access to all categories of employment in the public educational system of New Jersey.

Thus, no person is to be denied access to any category of employment in our public schools based upon the classifications of race, color, creed, etc. Notwithstanding, the State Board has created specific educational and certification requirements for the divers categories of employment in the State's public schools N.J.A.C. 6:11-1.1 et seq.

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[1] N.J.A.C. 6:4-1.6(b) provides that:

> All New Jersey public school districts shall comply with all State and Federal laws related to equal employment, including but not limited to the New Jersey Law Against Discrimination (N.J.S.A. 10:5-1 et seq.), Title Vii of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, Executive Order 11246 as amended, Equal Pay Act of 1963 as amended, and Title IX of the Education Amendments 1972 (Higher Education Act).

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In any event, petitioners here claim that the Board discriminated against them on the basis of race, color, sex and economic status.[2] With regard thereto, the courts have allocated the various shifting burdens of proof to the parties to sustain, or withstand, a claim of unlawful discrimination under N.J.S.A. 10:5-4 and N.J.S.A. 10:5-12. The Supreme Court of New Jersey, in Peper v. Princeton University Board of Trustees, 77 N.J. 55(1979), adopted the four-prong test as articulated by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), as the standards to be applied to employment practices alleged to be unlawfully discriminatory. There, the McDonnell Douglas Court said:

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications (411 U.S. at 802)

By the establishment of a prima facie case, a presumption arises that the employer unlawfully discriminated against the applicant/complainant. International Brotherhood of Teamsters v. United States, 431 U.S. 327 (1977). Consequently, the burden of going forward then shifts to the employer to rebut the presumption to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." McDonnell Douglas, 411 U.S. at 802; See, Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252(1981).

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[2] Economic status is a protected class under the contract provisions of N.J.A.C. 6:4-1.6(c) which provides that:

> No school district shall enter into any contract with a person, agency, or organization if its has knowledge that such person, agency or organization discriminates on the basis of race, color, creed, religion, sex, ancestry, national origin or social or economic status, either in employment practices or in the provision of benefits or services to students or employees.

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In the event the employer articulates a lawful reason for the employment decision, the burden then shifts back to the applicant/complainant to prove, by a preponderance of the credible evidence, that the legitimate nondiscriminatory reasons articulated by the employer were not the true reasons for the employment decisions but, rather, was merely a pretext for discrimination. Burdine. The ultimate burden of persuading the trier of fact that the applicant/complainant has been the victim of intentional unlawful discrimination remains at all times with the applicant/complainant. Burdine, supra. 450 U.S. at 255.

Applying the above standards to the instant matter, it is now necessary to determine whether or not petitioner's have established by a preponderance of the evidence, a prima facie case of unlawful discrimination, pursuant to the McDonnell Douglas test. Petitioner D'Alessandro contends that he belongs to a protected class by virtue of his employment as a "teaching staff member" and by his economic status.

It is noted here that "economic status" is not one of the enumerated classification found in the statute, N.J.S.A. 10:5-12, for which unlawful discrimination may be established in employment practices. Nor is "economic status" enumerated as ground for obtaining employment, accommodations and privileges without discrimination under N.J.S.A. 10:5-4. Moreover, petitioner's status as a "teaching staff member" does not set him apart from other professional employees under the Board's jurisdiction nor does it establish a "protected class" by definition. N.J.S.A. 18A:1-1 defines "Teaching Staff Member":

> [which] means a member of the professional staff of any district or regional board of education, or any board of education of a county vocational school, holding office, position or employment of such character that the qualifications, for such office, position or employment, require him to hold a valid and effective standard, provisional or emergency certificate, appropriate to his office, position or employment, issued by the state board of examiners and includes a school nurse.
>
> See: Spiewak v. Bd. of Ed. of Rutherford, et als., 90 N.J. 63(1982).

Similarly, the State Board of Education has adopted essentially the same language to define "Teaching Staff member" at N.J.A.C. 6:11-3.4.

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Thus, by definition, "teaching staff member" is all inclusive under the statutory and regulatory scheme to incorporate certificated persons who are designated classroom teachers, school nurses, school librarians, guidance counselors, vice principals, principals, directors and superintendents of schools, among others. The distinction between the various positions is dependent upon the certifications acquired by the "teaching staff member" and whether or not a board of education has appointed an individual to perform educational duties and responsibilities under a particular certificate issued by the State Board of Examiners. I **FIND** and **CONCLUDE**, therefore, that a "teaching staff member," as defined by statute and regulation, is not a "protected class" under the McDonnell Douglas tests. Nor is "economic status" an enumerated class which is protected from employment practice or discriminations under N.J.S.A. 10:5-12.

Accordingly, I **CONCLUDE** that petitioner D'Alessandro has failed to carry his burden with regards to the first prong of the McDonnell Douglas standards; i.e., that he, individually, belongs to a protected class.

I do **FIND** and **CONCLUDE** that Roberta Gaurreau and Edwards Mitchell satisfy the McDonnell Douglas test that they each belong to a minority class (sex and race) protected from unlawful employment discrimination by way of N.J.S.A. 10:5-12.

With regard to the second and third prongs at the McDonnell Douglas test, there is no evidence in this record to demonstrate that the Board sought applications or that petitioners applied for the position. The facts demonstrate that the Board neither sought applicants nor interviewed candidates for the positions of Affirmative Action officers. The Board unilaterly appointed its administrators to the positions, to which petitioner D'Alessandro objected at a public meeting of the Board. The Board listened to D'Alessandro and thereafter, adopted its resolutions to provide for an affirmative action program and provide for affirmative action officers to carry out its plan. Petitioner claims, it is assumed, that his objection at the Board's public meeting constitutes his application for the position (McDonnell Douglas 2) and the Board's subsequent unilateral decision to appoint its school administrators to the positions over D'Alessandro's objections, constitutes its rejection of his application (McDonnell Douglas 3).

The fourth prong of the McDonnell Douglas test requires proof that after petitioner's rejection, the position remained open and the Board continued to seek applicants from persons of petitioner's qualificiations. The record is devoid of any facts

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to support a finding that subsequent to petitioner D'Alessandro's objections to the Board at its public meeting that the positions of Affirmative Action officer remained open and that the Board continued to seek applicant's with D'Alessandro's qualifications.

Having carefully considered the weight of the evidence, I **FIND** and **CONCLUDE** that petitioner D'Alessandro and the other petitioners have failed to carry their affirmative burden to establish a prima facie case, pursuant to the McDonnell Douglas test (411 U.S. at 802). In order for petitioners' to have established its prima facie case, it must affirmatively demonstrate, by a preponderance of the credible evidence, all four of the elements of the McDonnell Douglas test. This, petitioners have failed to do. Therefore, petitioners have failed to sustain the threshhold issue at establishing a prima facie case and I so **CONCLUDE.**

Even assuming, arguendo, petitioners had established a prima facie case, which I neither find nor concede; the proofs fail to demonstrate unlawful employment practices or unlawful discrimination against petitioners. Had petitioners put on a prima facie case, the burden then would shift to the Board "to articulate some legitimate, nondiscriminatory reason for "[its] action." Burdine at 253. The Board accomplished this obligation through petitioner's offer into evidence at the hearing of the Board's answers to Interrogatories (Exhibit P-1). Therein the Board asserted that the building principals were selected as the Board's affirmative action officers because they are clothed with the "authority to make decisions to adjust complaints" (Exhibit P-1). This action neither constitutes unlawful employment practice nor unlawful discrimination against petitioners by the Board. Rather, it is an affirmation of the traditional managerial prerogatories of the Board to assign duties to personnel under its direction and control. Roper, supra. at 261.

Petitioner's argument that the Board failed to present a defense and, therefore, forecloses this tribunal from arriving at any conclusion other that the Board's actions were intentionally discriminatory, is without merit. There was no necessity for the Board to put on a defense when in fact, the petitioner did it for respondent. This meets the criteria as set forth in Bodine where the Court held:

> . . .The defendent must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection.

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> The explanation provided must be legally sufficient to justify a judgment for defendant. . .
>
> 450 U.S. at 255.

The Board has carried its burden of production by presenting a legitimate reason for its action, which were non-discriminatory. Roper at 257.

For all the reasons set forth hereinbefore, I **FIND** and **CONCLUDE** that the herein Petition of Appeal is without merit and, accordingly, is hereby **DISMISSED.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

February 2, 1988
DATE

Lillard E. Law /RAS
LILLARD E. LAW, ALJ

FEB - 2 1988
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

FEB 5 1988
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Mailed To Parties:

OFFICE OF ADMINISTRATIVE LAW

bc

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FRANK D'ALESSANDRO, individually and as representative of a class of similarly situated individual employees,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions were timely filed pursuant to N.J.A.C. 1:1-18.4 as were the Board's reply exceptions thereto.

Petitioner's extensive exceptions to the initial decision include five points, which are summarized, in pertinent part, below.

EXCEPTION I

THE ALJ ERRED IN CONCLUDING THAT PETITIONER D'ALESSANDRO DID NOT MAKE A PRIMA FACIE CASE OF DISCRIMINATION.

Petitioner claims that the ALJ's determination that he did not make a prima facie case because "economic status" is not a proscribed form of discrimination under N.J.S.A. 10:5-1 et seq. is erroneous. He cites his post-hearing brief wherein he refers to N.J.A.C. 6:4-1 et seq. for the proposition that economic status is included among those proscribed forms of discrimination in New Jersey.

EXCEPTION II

THE ALJ'S CONCLUSION THAT THE BLACK AND FEMALE PETITIONERS DID NOT MAKE A PRIMA FACIE CASE OF DISCRIMINATION IS INTELLECTUALLY NONSENSICAL.

Although petitioner concedes that the ALJ cites the pertinent case law on the issue of whether racial or other minority discrimination was a factor in the Board's selection of Affirmative Action Officers, in exceptions he recites the ALJ's findings of fact as found in the initial decision, ante, and avers that "[a]ccording to the Administrative Law Judge, since it [the selection process] was fait accompli, it's entirely proper." (Exceptions, at p. 4)

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Relying in particular on Peper v. Princeton University Board of Trustees, 77 N.J. 51 (1978), petitioner claims he has satisfied the requirement of presenting a prima facie case of race and sex discrimination through his proffer of testimony from a black and a female teaching staff member on the matter.

EXCEPTION III

THE ALJ ERRED IN FAILING TO ADDRESS THE DISPARATE IMPACT TEST.

Petitioner claims he also established his case under the disparate impact test of Int'l Brotherhood of Teamsters v. United States, 421 U.S. 324, 335 (1977), whereby discriminatory motive is not required as is the case under a disparate treatment case.

He avers that the facts establish startling statistics demonstrating the disparate impact upon women, blacks and teachers because the Board chose principals and one assistant superintendent, to be Affirmative Action Officers. Petitioner claims the ALJ's failure to address this issue requires the Commissioner to reject the ALJ's decision.

EXCEPTION IV

THE ALJ'S CONCLUSION THAT THE BOARD MET ITS BURDENS THROUGH ANSWERS TO INTERROGATORIES IS PRECLUDED BY THE RESIDUUM RULE.

Petitioner claims that "the Respondent Board of Education did not present a defense in this case." (Exceptions, at p. 7) Moreover, petitioner contends that since he made a prima facie case and the Board failed to defend against it, the ALJ had no choice but to find in his favor. He cites his post-hearing brief for further elaboration of this argument. Petitioner excepts to the ALJ's conclusion that the Board did, in fact, defend its position by way of its answers to interrogatories moved into evidence by petitioner by proffering an alleged bona fide business justification as to why it selected whom it did to serve as Affirmative Action Officers. Petitioner claims that "as a matter of law the Board of Education's Answers to Interrogatories cannot be the basis for an ultimate conclusion of fact as was done by this Administrative Law Judge. Answers to Interrogatories are hearsay.***" (emphasis in text) (Id.) While recognizing that hearsay is admissible in administrative proceedings, petitioner contends the residuum rule precludes the ALJ's having concluded that the Board's Answers to Interrogatories constituted a bona fide business justification for its actions.

EXCEPTION V

THE JUSTIFICATION ASSERTED IN THE BOARD'S ANSWERS TO INTERROGATORIES MUST BE REJECTED.

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Petitioner excepts to the ALJ's conclusion that the Board carried its burden of production by "presenting a legitimate reason for its action, which were (sic) non-discriminatory." (Exceptions at p. 9, quoting the Initial Decision, ante) Contrary to the ALJ's conclusion, he avers that "regular classroom teachers are entitled to the same consideration for selection as Affirmative Action Officers as are Administrators, since both are 'teaching staff members' by statutory definition and both are 'members of the professional staff' pursuant to N.J.A.C. 6:4-1.3." (Exceptions, at p. 9) Petitioner contends, then, that it is not a bona fide justification for the Board to select one segment of the teaching staff/professional staff over another. Moreover, he claims that the ALJ's conclusion that administrators are clothed with the authority to make decisions to adjust complaints is in error. "An Affirmative Action Officer has only the power given to him or her by the Board of Education, statute and the Administrative Code. They can't hire or fire minorities. Only the Board of Education can do that." (Id., at p. 10) Further, petitioner suggests that while it does not question the managerial prerogative of a board of education, "***those prerogatives do not include employment discrimination." (Id.)

Petitioner submits that the Commissioner of Education must reject the ALJ's initial decision in its entirety and find in his favor.

The Board's reply exceptions contend the ALJ's decision should be sustained. The Board also objects to petitioner's counsel's writing style averring that "this tissue of pejorative expression which bears not at all on the issues, is clearly an expression of emotion rather than thought." (Reply Exceptions, at p. 1)

As to petitioner's argument that N.J.A.C. 6:4-1.2 proscribes the sort of economic status discrimination that petitioner avers has taken place in respondent's district as a result of the choice the Board made regarding Affirmative Action Officers, the Board counters by citing N.J.S.A. 18A:36-20, the statutory authority pursuant to which N.J.A.C. 6:4-1.2 was implemented. The Board claims that N.J.S.A. 18A:36-20 was enacted to abolish discrimination against pupils as was its implementing regulation. Thus, the Board contends that the ALJ's conclusion that economic discrimination is not listed in the New Jersey statute on discrimination (N.J.S.A. 10:5-12) as one of the bases for illegal discrimination in hiring or employment contracts was correct. Therefore, the Board avers, petitioner's reliance on same to establish a prima facie case is devoid of merit.

The Board concurs, however, with petitioner's citing Peper, supra. The Board contends that language from this case reaches the core issue in the instant matter. The Board argues:

> Although the appointments in question had nothing to do with hiring or promotion, they were in reality an additional assignment. ***

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> ***The appointees were teaching staff members within the statutory definition, N.J.S.A. 18A:1-1. They were principals within the district. The reason they were appointed as Affirmative Action officers was specifically outlined in the Interrogatories which the petitioner himself placed in evidence, to wit, "they were building principals with authority to make decisions to adjust complaints." Certainly there is nothing invidious about the latter.
> (Reply Exceptions, at p. 3)

Further, the Board avers the burden of proof in a disparate treatment case remains at all times on the petitioner, while the respondent's burden, assuming the petitioner "establishes a prima facie case, '***is only to create a general factual issue concerning the existence of a legitimate justification for the action.' (Massarsky v. General Motors, 706 F2d 111 (1983)." (Reply Exceptions, at p. 3) The Board finds petitioner's now claiming that the interrogatories, which included the Board's justification for hiring the Affirmative Action Officers as contained in its answer to Interrogatory No. 4, were inadmissible hearsay "rings exceptionally hollow." (Id.) The Board finds that the evidence in question falls squarely within the exception to the hearsay rule and cites Evidence Rule 63 (15) in support of its position in this regard. Further, the Board says that petitioner's residuum rule argument misses the mark in that the ALJ "did not, nor was he required to, make an ultimate finding of fact based on the answer to Interrogatory No. 4." (Id., at p. 4) The Board claims, "The real question is whether, within the Massarsky standard, supra, that answer created 'a general factual issue concerning the existence of a legitimate justification for the action'.***" (Id., at p. 4) The Board concurs with the ALJ's conclusion that it did and, thus, that it met its burden of going forward, thereby shifting the ultimate burden of proof back to petitioner.

For the above reasons and those expressed in its post-hearing submission, the Board requests that the initial decision be affirmed.

Upon his careful and independent review of the record of this matter, the Commissioner adopts the initial decision dismissing the instant Petition of Appeal for the reasons stated by the ALJ as clarified herein.

Before launching into an evaluation of the shifting burdens of proof under disparate treatment or adverse impact theories of discrimination law, a threshold determination must be made as to whether in fact there was an available position. See, for example, McDonnell Douglas, supra. See also Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 249 (1981) wherein the Supreme Court of the United States in footnote stated:

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In McDonnell Douglas, supra, we described an appropriate model for a prima facie case of racial discrimination. The plaintiff must show:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. 411 U.S., at 802, 5 FEP Cases, at 969. (emphasis supplied)

Under the instant facts, the Commissioner finds that there was no job available for which the Board might seek applicants. Rather, the Commissioner finds that the Board merely assigned some of its administrators the duties of Affirmative Action Officers in addition to their other functions. The Board's prerogative in so doing, then, was in no way related to either hiring or promotion. See N.J.A.C. 6:4-1.6(a), the implementing regulation promulgated pursuant to N.J.S.A. 10:5-1 et seq., the New Jersey Law Against Discrimination (The Act) which requires that "all persons regardless of race, color, creed, religion, sex, or national origin shall have equal access to all categories of employment in the public education system in New Jersey." The Commissioner finds that the duties of Affirmative Action Officers in the instant case do not constitute a "category of employment." In a district where such duties consumed the full-time services of a single employee, however, the Commissioner might find differently.

In Peper, supra, the Supreme Court of New Jersey applied this McDonnell Douglas principle to an alleged sex discrimination fact pattern. The language of the Court in Peper mirrored that of McDonnell Douglas, supra, and Burdine, supra, to wit:

> The gist of McDonnell-Douglas is that an employee who is a member of a protected group and who is qualified for hiring or promotion may not be rejected for any reason other than the fact that another seemingly qualified individual was selected for some non-invidious reason.*** (emphasis supplied) (77 N.J. at 84)

The same initial inquiry is requisite to establishing a prima facie showing under the adverse impact theory of discrimination law. See Connecticut v. Teal, 457 U.S. 440, 446-447 (1982), a scored test for promotion case, wherein the Supreme Court of the United States stated:

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> Griggs [v. Duke Power Co., 401 U.S. 424 (1971)] and its progeny have established a three-part analysis of disparate impact claims. To establish a prima facie case of discrimination, a plaintiff must show that the facially neutral employment practice had a significantly discriminatory impact. If that showing is made, the employer must then demonstrate that "any given requirement [has] a manifest relationship to the employment in question," in order to avoid a finding of discrimination. Griggs, supra, at 432, 3 FEP Cases, at 178. Even in such a case, however, the plaintiff may prevail, if he shows that employer was using the practice as a mere pretext for discrimination. See Albemarle Paper Co., supra, at 425, 10 FEP Cases, at 1190; Dothard, supra, at 329, 15 FEP Cases, at 14.

Under the instant facts, no employment practice, facially neutral or otherwise, is suspect because neither initial employment nor promotion was available for which application might be made or test taken relative to the Affirmative Action Officer's duties in question. See also, Giammario v. Trenton Bd. of Educ., 203 N.J. Super. 356 (1985).

Accordingly, since petitioner has failed to establish even the most rudimentary aspects of a prima facie case under either theory of discrimination law, the Commissioner need not address the other arguments of counsel. Consequently, the Petition of Appeal is dismissed with prejudice.

COMMISSIONER OF EDUCATION

March 10, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4440-87
AGENCY DKT. NO. 153-5/87

IN THE MATTER OF THE TENURE HEARING OF RALPH M. THOMAS, SCHOOL DISTRICT OF THE TOWNSHIP OF LIVINGSTON, ESSEX COUNTY

Mark A. Baber, Esq., for petitioner, Board of Education of the Township of Livingston, Essex County (Riker, Danzig, Scherer, Hyland & Perretti, attorneys)

Sanford R. Oxfeld, Esq., for respondent, Ralph M. Thomas (Oxfeld, Cohen, Blunda, Friedman, LeVine & Brooks, attorneys)

Record Closed: December 14, 1987 Decided: January 28, 1988

BEFORE **EDITH KLINGER**, ALJ:

This matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. After notice, a prehearing conference was held on July 21, 1987, at which it was agreed, among other things, that the first issue to be resolved was whether respondent can be dismissed on grounds of conduct unbecoming a teacher and other just cause under the tenure employees' hearing law, N.J.S.A. 18A:6-10. The second issue was whether petitioner is seeking sanctions against respondent for inefficiency without following the proper procedural requirements as set forth in N.J.S.A. 18A:6-11.

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Written charges against Ralph Thomas, a teacher with tenure status, were certified to the Commissioner of Education by resolution of the Board of Education of the Township of Livingston. On June 25, 1987, this matter was transferred to the Office of Administrative Law for determination as a contested case.

The hearing was held on October 23, 27, 28 and 30 and November 2 and 4, 1987, but the record was held open until December 14, 1987 to allow the parties to submit briefs.

TESTIMONY OF CHARLES BRYANT

The witness is administrator of student personnel services for the Livingston public school system. He oversees special education for students from kindergarten through twelfth grade. His duties include supervising child study teams, the basic skills program, the English as a Second Language program and district-wide testing. Bryant came to the school system on June 5, 1986. It is stipulated that he is a certified school psychologist with expertise in the area of special education.

In the 1986-1987 school year, Ralph Thomas's assignment was to teach resource room and five periods of small group instruction in reading and mathematics.

The students in his classes were all in the eleventh and twelfth grades and were classified as perceptually impaired, neurologically impaired or emotionally disturbed. According to the witness, children who are perceptually impaired or neurologically impaired have organically-based difficulty in processing and learning information. Emotionally disturbed children have learning difficulty based upon their emotional problems. None of the students assigned to Thomas had severe emotional difficulties; such students would have been placed outside of the school district.

The students in Thomas's classes, whatever their classification, were capable of understanding events occurring around them. Most of the children were of average or below average intelligence. Their handicapping conditions might effect their ability to verbalize, and because of their difficulty in articulating their thoughts, they tend to

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communicate on concrete levels. While admitting that emotionally disturbed and even neurologically impaired children may have occasional flights of fantasy, Bryant rejected the suggestion that this might tend to distort their ability to report events occurring around them.

Bryant was one of those who signed the statement of evidence against Thomas in this proceeding. The documents attached to the statement of evidence are from respondent's files, Bryant's files, the school's official personnel file and the file of Bryant's assistant, Fraida Yavelberg.

Bryant first came to the Livingston public school system in June 1986. His first involvement with Thomas in an official capacity was in September 1986, when he met with Thomas to discuss a scheduled team evaluation of him. Bryant was the leader of the team, which also consisted of Robert L. Grady, the principal of Livingston High School, Fraida Yavelberg, supervisor of special education for grades nine through twelve, and Dr. Arlene Zielinski. The meeting was held at the request of Thomas, who wanted to discuss the issues involved in his team evaluation—there was concern about the learning environment (particularly the discipline in his classroom) and associated academic issues. This meeting lasted approximately 45 minutes.

The witness stated that a regular tenured teacher is observed and evaluated twice during the year. When someone receives special team evaluation, he is typically observed and evaluated eight times during the year. This procedure is followed when a teacher is identified as having special problems. Thomas received six observations and evaluations before his suspension in March. An observation report contains a description of what takes place in the classroom at the time of observation, as well as any commendations or recommendations regarding the observed teacher's performance.

The next time Bryant met with Thomas, it was in regard to an incident involving a student, M.G. The student's mother reported to the principal, Grady, that her son had been struck by Thomas. Bryant received a call from Grady briefly setting out the details, and scheduled a meeting between Bryant, Grady, the Superintendent of Schools, Mrs. G. and M.G. on September 19, 1986. Following this, a meeting was held among between

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Bryant, Grady, Thomas, M.G. and Mrs. G., at which Thomas was informed that M.G. reported that Thomas struck him and knocked him down. Thomas seemed generally quiet and concerned. He did not deny that he made physical contact with M.G., but said that he only tapped or pushed him gently. He said there was no physical attack. Thomas was then instructed that he was to have no physical contact with his students, that he should consider himself on probation because of this incident and his past history, and that, if there were another incident, charges would be filed against him. He was also told that his use of physical exercise as discipline was to stop immediately. A letter confirming these conditions was sent to him subsequent to the meeting.

Bryant was aware that Thomas had a history of using exercise to discipline his students. Meetings had already been held with Thomas on September 17 and 23, 1986, in regard to his use of exercise. Bryant did not believe that the practice was an abuse of his students, however, he considered it inappropriate in an academic setting. Thomas held fast to his belief that it was appropriate. Bryant testified that he was unaware of any further report of Thomas using exercises after the September meeting. There were other discussions but no further formal meetings until March.

In January, Bryant completed his observation of Thomas's class and the summary evaluation report of Thomas by the team. The report is dated January 27, 1987, and focuses on the academic climate of the classroom, noting rigidity and regimentation. The team recommended that nonphysical discipline be emphasized.

On March 11, 1987, Bryant received a phone call in the late afternoon or early evening directing him to attend a meeting the next day. He was told that a situation had occurred between Thomas and a student, A.V.

On March 12, 1987, Bryant attended the meeting with Grady, Yavelberg, Robert S. Kish, superintendent of the Livingston public schools, A.V., and his mother. Bryant interviewed Mrs. V. in regard to a conversation A.V. had with David A. Patterson, his guidance counsellor at the high school. Mrs. V. told those present that A.V. had called her at about 2:00 p.m. on March 11 to tell her that Thomas had grabbed him in his "crotch"

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and asked him to meet him later that day in the school supply closet which Thomas supervised. In addition, A.V. told her that Thomas had reached down his shirt and fondled his chest on an earlier occasion. He said that Thomas had kissed him and said "I love you." At another time, according to Mrs. V., A.V. said that Thomas questioned him about a bulge in his trousers and asked if he had an erection. Thomas then invited A.V. to touch him, saying "he was soft."

When A.V. entered the meeting, he repeated the story his mother had told. He described the events in detail and demonstrated what had occurred. It was at the end of the class, when the other students were leaving, that A.V. went up to speak to Thomas and Thomas grabbed him. A.V. became frightened and ran out of the room, later telling Thomas not to touch him anymore. The boy said that Thomas frequently touched him to demonstrate affection, which made A.V. uncomfortable. There were various occasions when Thomas put his hand on his buttocks. One day in the supply closet, Thomas picked up A.V. and cradled him in his arms like a baby, which upset A.V. He alleged that when Thomas said "goodbye" to him, he licked his lips in a sexually suggestive way which A.V. found disturbing. A.V. also described the incident when Thomas asked him if he had an erection. He said this embarrassed him, and he tried to ignore it. A.V. confirmed the administration of push-ups in class and said it was not uncommon for Thomas to touch students in order to discipline them or for other reasons. He stated that Thomas had slapped a boy, G.C., a few days earlier. A.V. also said that Thomas warned the children not to disclose his physical contact with them to anyone because he had been told not to touch them. The meeting in Grady's office lasted 30 to 45 minutes. On cross-examination, Bryant admitted that A.V.'s story had varied at times in the retelling.

After this meeting was over, a conference was held to decide how to proceed. Thomas was telephoned by Grady that night and told not to come back to school. The required procedures were followed: the school contacted the Division of Youth and Family Services (DYFS) because of the charges of abuse; the school contacted its attorney to begin an investigation; and other students were interviewed by Grady (but not in the witness's presence). Bryant was, however, involved in some student interviews, and believes that the documents attached to the tenure charge accurately reflect the statements of the witnesses.

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Except for one phone call, Bryant has not spoken to Thomas since March 11, 1987. Thomas called to request the opportunity to meet with him to obtain his support. Bryant said that a meeting would be inappropriate since an investigation was in process.

TESTIMONY OF ROBERT L. GRADY

Grady has been the principal of Livingston High School since July 1, 1986. He has known Ralph Thomas for about 17 or 18 years, as long as he has been employed in the Livingston School System. At the time he met Thomas, the witness was supervisor of Social Studies. There were no problems concerning Thomas that he knew of at that time.

During May and June 1985, Thomas came to him to express the feeling that his immediate supervisor, Fraida Yavelberg, was evaluating him unfairly.

The witness became aware of an incident in September 1986 involving Thomas and a student, M.G. Grady was contacted late on a Friday afternoon by M.G.'s mother, who told him that Thomas punched her son in the chest because he failed to complete a chapter of his homework. She and M.G. came to school on Monday morning to complain that Thomas had punched M.G. and had threatened to contact the boy's employer to have him fired from his job. M.G. reported that he and B.C., another student, had to stand through class because they had not finished a homework chapter. When M.G. lost his place, Thomas punched him in the chest and he fell across the room. M.G. also described an incident involving B.C., in which B.C. mispronounced a word and Thomas slapped him and pulled his ear. The ear was cut by Thomas's nail, and it bled.

Grady reported the interview to Thomas, relating the incident as described by M.G. and Mrs. G. Thomas seemed surprised and upset, but he did not deny or explain the allegations against him. Dr. Kish was present, and he advised Thomas that he was on probation and discussed his method of discipline. Thomas was informed that another occurrence would result in disciplinary action against him. Thomas declared that push-ups would no longer be used as discipline in his class.

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After this interview, Grady communicated with Thomas no more than with any other staff member. He formed part of the special team working with Thomas, and had the opportunity to observe him in class. Grady never saw any corporal punishment occur and stated that he was more interested in Thomas's teaching methods.

Until March 1987, no other instances involving Thomas were reported.

On Wednesday, March 11, 1987, David Patterson, a guidance counselor at the high school, came to Grady's office and said that it was imperative that he meet with him immediately. Patterson brought a student, A.V., with him. He asked A.V. to describe the events of that day.

A.V. was a student in two of Thomas's classes: one at 9:30 in the morning and the other at 1:45 in the afternoon. A.V. told Grady that in the morning class, Thomas had grabbed him in his "front," and he demonstrated with his hand what he said had occurred. He said that on other occasions, Thomas had fondled his chest and slapped another student, G.G. A.V. also reported a prior incident, occurring in the class beginning at 1:45 p.m., in which Thomas had grabbed him on the buttocks. A.V. spoke to his mother and father at the time, and they wanted to report the matter to the school, but A.V. convinced them not to do it. After the March 11th incident, A.V. asked his parents to contact the school.

After speaking with Patterson and A.V., Grady called Kish, who set up a meeting with A.V. and his parents for the next day. Kish told Grady to call Thomas and tell him not to come back to school. Grady found Thomas in the supply closet and told him to come to his office, where he explained the charges A.V. had made against him. Thomas seemed overwhelmed: he is an expressive person and the shock was evident.

Grady contacted DYFS immediately. Based upon the charges, DYFS involved the prosecutor's office.

Grady received a call from Patterson to report that Thomas was at A.V.'s house "banging on the door." Patterson said that he had told Mrs. V. that she need not make

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contact with Thomas, but that she had still been intimidated. Eventually, he said, Thomas left.

At the meeting at Grady's office the following morning, A.V. waited outside while Mrs. V. gave her statement. She said that A.V. had called her at about 2:00 p.m. the day before and told her that Thomas was "too much with his hands." A.V. told her that Thomas asked him to stay after school to help in the supply room, but that he refused because earlier in the day, Thomas had grabbed him in the front. Mrs. V. advised A.V. to go to Grady or Patterson and tell them what occurred. When she finished her story, A.V. was brought in. He was nervous when he saw Grady and Dr. Kish, but his mother reassured him and he described the incident of the prior day. He also described other incidents, including one in which Thomas kissed him on the cheek when he left the classroom. A.V. told the group that he had seen Thomas strike three students. One boy, G.G., let Thomas know that he had chalk on the seat of his pants. Thomas put his pants close to the boy's face and asked him to remove the chalk. Another child, E.P., was punched, and a boy, G.C., was also struck.

Later that day or the next, Grady called Thomas to obtain his lesson plan book, and grade book, which he had not left in school. He also warned Thomas against being on the school grounds.

On March 17, 1987, Grady was approached by other students, G.G., B.M., and F.C., who asked to speak to him as a group. B.M. told him that during the seventh period on March 11, while he was bending over a wastebasket, Thomas had inserted his finger down between his pants and his back. He was surprised and jumped away. He also reported that Thomas once held his neck, leaving fingerprints on his skin for about ten minutes afterwards. G.G. described the incident with the chalk on Thomas's pants. He said he cleaned it off because he did not know what else to do. He reported another incident, where Thomas shoved his fist into his back. On another occasion, Thomas hit him hard on the back of his neck because he was tying his shoes while Thomas was teaching. He also said that Thomas rubbed the backs of their necks. G.G. witnessed the incident reported by A.V. in which Thomas fondled his chest. F.C. said that he had been hit by Thomas many times to get him to work. Grady deduced from his manner that the blows had hurt him. According to the boys, after one of these incidents Thomas would tell

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the child involved that he was sorry and not to say anything to Grady or he would "get on his case again."

The boys also stated that some of the students were made to do push-ups. It had been Grady's impression that all discipline of this type had ceased after the warning letter of September 30, 1986.

After hearing their stories. Grady told the three that others would speak to them about Thomas, and a DYFS worker and someone from the prosecutor's office interviewed them on March 17, 1987.

E.P., another of Thomas's students, came alone to speak to Grady. He stated that he had been punched in the chest and hurt seriously by Thomas a week before the incident with A.V. E.P. felt that he was not liked by Thomas, who told him that there were people in class with whom he had close relationships but E.P. was not one of them.

E.P. was interviewed by the prosecutor's office, as was M.G., the student involved in the September 1986 incident.

Someone from the prosecutor's office met with Mr. and Mrs. V. Mrs. V. refused to sign a complaint against Thomas, saying that she did not want to create additional problems for A.V. By March 19, 1987, Grady was aware that the prosecutors had spoken to the V's. There were inconsistencies in A.V.'s story about the incident which needed clarification. On the afternoon of March 11, A.V. referred to being grabbed "in the crotch" in the morning and in the buttocks in the afternoon. It was never clear whether A.V. alleged that Thomas made several attempts to touch him improperly.

In order to be fair, Grady spoke to students of Thomas's who seemed to have no problem in his classes. One of these students, W.D., said that there was a lot of pushing and "grabbing of butts." W.D. had been hit on occasion by Thomas, but he said it was always done in a friendly way and he did not feel that there was anything wrong with it. The same attitude was expressed by other students of Thomas.

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Grady explained that Thomas makes frequent physical contact with others. He is a nurturing, spontaneous person who often hugs those around him, including students and teachers, to give them encouragement. He has even hugged Grady on occasion.

DYFS instructed Grady not to conduct any additional interviews on his own but to wait until the DYFS investigator arrived. This ended his inquiry into the matter. No action was ever taken against Ralph Thomas by DYFS or by the prosecutor's office.

When Grady was asked on cross-examination whether the three boys who came to him complaining about Thomas were aware of the incident involving A.V. and the meeting with A.V. and his parents before speaking to him, Grady said that they were.

TESTIMONY OF M.G.

M.G. has been a student at Livingston since his freshman year. He is presently a 17-year-old junior who is classified as neurologically impaired. The only class he had with Ralph Thomas was sophomore English.

The witness described an incident when he and B.C. had to stand at attention during a class period because they were unprepared. Thomas asked M.G. a question which he could not answer and, according to M.G., Thomas hit him with a fist in the center of the chest hard enough to push him backward over three desks. The other students in the room, B.C., R.J., and B.M., witnessed the occurrence. Thomas hit M.G. in the arm a few times on the same day.

It was not until two days later that M.G. told Grady about being punched in the chest. He wanted to transfer out of the class because he was a little bit afraid of Thomas. In addition, he felt that the class was too hard.

M.G. also described the incident in September or October 1986 in which Thomas pulled the ear of B.C., causing it to bleed.

During his freshman year, M.G. was sent to Thomas by his English teacher for

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not behaving in class. Thomas made him do push-ups and hit him on the arm a few times. M.G. observed Thomas require a student, F.C., to do push-ups one day after school, but he never saw Thomas hit any other student or touch them in an improper manner.

TESTIMONY OF G.G.

G.G. is a 16-year-old sophomore at Livingston who is classified as neurologically impaired. Ralph Thomas was his teacher for mathematics in the 1986-87 school year. A.V., E.P., B.M. and F.C. were also in the class, which consisted of five students.

G.G. testified that he saw Thomas touch students in class only on the arm. Thomas occasionally hit G.G. on the arm when he was not paying attention. He did, however, see Thomas strike E.P.

G.G. described an incident where Thomas leaned against the blackboard, getting chalk on the back of his trousers. When G.G. called this to his attention, he went to G.G. and asked him to brush it off. He did and Thomas thanked him.

G.G. also recalled a day when he was tying his shoelace and Thomas punched him in the back so hard that it hurt. G.G. was surprised, but Thomas did not explain why he struck him. On another day, G.G. was slapped on the face when he answered Thomas rudely.

TESTIMONY OF A.V.

A.V. is a 17-year-old junior at Livingston who is classified as emotionally disturbed.

A.V. has been a student at Livingston since the ninth grade. He first knew Thomas when he had him as a teacher for tenth grade mathematics and English. The English class met at 9:00 a.m. and the math class met during seventh period, at about 1:00 p.m.

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A.V. related several incidents involving the striking of other students. He said that E.P. went to Thomas to hand in his homework and Thomas hit him in the chest. F.C. was hit on the back of the head for not paying attention in class. He also observed Thomas strike G.G. hard on the back with his open hand when G.G. bent down to tie his shoelace.

A.V. described an incident when he was sitting in class wearing white pants. Thomas said that the way the white pants lay on his body made it appear that he had an erection. Thomas then told A.V. that he himself was not erect and asked A.V. if he wanted to feel him. A.V. was shocked and said "no." Thomas remarked that the white pants were "turning him on." A.V. also said that Thomas blew him kisses in class and told him that he loved him, that he was a good student, and that he needed him.

On March 11, 1987, at the end of math class, as the other students were walking out of the room, Thomas told A.V. to come see him after school in the supply room, and rubbed his hand over A.V.'s pants between his legs.

A.V. said he hesitated to report the incident because he was afraid of older students who were friendly with Thomas. He finally went to see Patterson, his advisor, who took him to Grady's office, where Grady called his mother.

Before the incident described above, Thomas had only hugged him or shaken his hand. He never hit A.V. There were taps and pats on the back or buttocks, which Thomas also gave to other students. A.V. did say that Thomas had reached inside his shirt and stroked his chest approximately three weeks earlier. According to A.V., this happened more than once and made him uncomfortable.

A.V. stated that he was not afraid to go to the supply room after school with Thomas to discuss school or homework because somebody else was always present. Thomas often invited students to meet with him in the supply room after school when they did not do their homework or when there was something that he wanted to discuss with them.

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He wanted to be in Thomas's class because his friends were there and Thomas's actions did not bother him. He "never thought it would get this serious."

A.V. described the March 11, 1987 incident in more detail on cross-examination. He said that Thomas had said "come here" and opened his arms, then reached for A.V.'s legs. It was about 2:30 p.m., and he and Thomas were standing behind Thomas's desk as the class was leaving the room. Thomas said that he loved A.V. and wanted him to kiss him on the check. A.V. kissed Thomas on the check because he was frightened, and went to see his guidance counselor immediately after class.

A.V. testified regarding another incident in September which he claimed to have forgotten, when Thomas had also touched him between his legs. A.V. said that he never told anyone at school about the first incident when it happened, but he recalled telling a man from the prosecutor's office about an attempt by Thomas to touch him between his legs in October or November of the prior year, when A.V. had pushed his hand away. A.V. did not tell Patterson that the touching had been going on from the beginning of the school year.

A.V. did not remember seeing Thomas again on the afternoon of March 11, 1987, before speaking to Patterson.

TESTIMONY OF T.V.

T.V. is the mother of A.V.

She became aware before Christmas 1986 that Thomas had put his hand into A.V.'s shirt. She stated that she did not take it seriously at the time.

During the Christmas break she invited Thomas to her house for coffee. He came and they had a "nice chat," during which he "said how good A.V. is" and how he would like to help him increase his self-confidence. During this visit, Thomas put his hand on A.V.'s leg and arm. Mrs. V. did not take this seriously, and she was pleased that Thomas was A.V.'s teacher.

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On March 11, 1987, A.V. called her from school at about 2:00 p.m. and asked her to come there. She could tell that he was close to crying. He said that Thomas had grabbed him between his legs.

As she hung up, the doorbell rang. She saw Thomas at the door, but would not answer his ring because she did not want him to come into the house. When he kept ringing the bell she became nervous and called Grady, who told her not to open the door and to call the police if Thomas didn't leave. Thomas remained for about seven to ten minutes constantly ringing the bell, until he realized that she would not answer the door and left.

Mrs. V. spoke to A.V. when he came home from school. He told her that Thomas had made what she described as "lip gestures" to him and had put his hand down his shirt. He then said that he had been sitting at his desk when Thomas came up behind him, reached down, and grabbed his genitals. He also told of kisses, tongue gestures and hugging.

TESTIMONY OF E.P.

E.P. is a 16-year-old junior at Livingston High School who is classified as neurologically impaired. He was in Thomas's tenth grade mathematics class along with A.V., B.M., F.C. and G.G.

E.P. described an incident where Thomas sat at his desk in the classroom and the other students in the class were gathered around waiting for him to grade their papers. E.P. brought his paper up to the desk and waited with the others. The students began to laugh. Thomas told them to stop. They began to laugh again and E.P. laughed with them. They stopped. E.P. cleared his throat and Thomas hit him in the chest.

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E.P. was surprised. Thomas apologized, saying that he should not have hit him. He also said that "many things were happening to him." He told E.P. to meet him in the supply room after school to explain the situation, and said he would drive him home. E.P. never knew why Thomas struck him.

He recalled a conversation in which Thomas told him that he wanted to be his friend but that he did not feel that he could joke with E.P. as he could with the other boys in the class.

E.P. remembered that G.G. had been punched in the back while tying his shoe. He recalled F.C. being hit on the back of the head and on the arm a few times, because he was not trying to be a good student. He was aware that Thomas made B.M. do push-ups and that he stuck his finger down the back of B.M.'s trousers when he was bending over. He said that B.M. had asked Thomas what he was doing, and Thomas said that he was just fixing something. When asked if he had ever seen Thomas touch any of the students inappropriately, E.P. stated that Thomas was "hitting kids on the rear end."

E.P. testified that he saw Thomas lose his temper with his students twice. Both times Thomas left the room. Once was on the day that he hit E.P. Thomas did not "yell" at his students. Thomas raised his voice, but E.P. would not characterize it as "yelling."

E.P. did not tell Grady about being struck until after the incident with A.V. He knew that the other students in the class spoke to Grady but did not remember if he went to see him with everyone else. He remembered telling Grady that he thought that Thomas did not like him, because he was unable "to joke around with him." E.P. did not believe that Thomas was joking when he hit him in the chest. He said that he did not report the incident earlier because he did not want to get Thomas into trouble.

TESTIMONY OF W.D.

W.D. is an 18-year-old senior at Livingston High School. He has been a student there since his sophomore year. During that year, he transferred into Thomas's

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mathematics class and remained his student through his sophomore and junior years. During W.D.'s junior year, A.V. was also in the class.

W.D. remembered Thomas hitting a student, D.D., during his sophomore year. D.D. was rude to Thomas in front of the whole class. They had words and D.D. got up to leave. Thomas grabbed him and pushed him so that D.D. fell back against a filing cabinet.

During W.D.'s junior year, he observed Thomas hit students to get their attention, grab them by the chest or give them a pat "here and there." He stated that he never saw him strike a student hard. W.D. said that Thomas slapped him on the back just hard enough to attract his attention when he was not concentrating on his classwork and on occasion pushed W.D.'s feet off the desk.

W.D. believed that the hitting that he observed Thomas do was all in fun, and said that occasionally he might hit Thomas on the head and have him do it back. There was no intent to hurt. He might see Thomas grab a student by the chest in the hall. He felt that Thomas wanted more than a teacher-student relationship with his pupils—he wanted their friendship also.

The witness recalled an incident in which he had words with Thomas. According to W.D., he said "something obnoxious" to Thomas and walked out of the room. He remembered being surprised when nothing happened.

During his sophomore year and the beginning of his junior year, W.D. said that Thomas made him do push-ups and jumping jacks. He explained that Thomas had a theory that a stronger body made a stronger mind. W.D. believes that it is true and that he did better work in school because of Thomas. He said that he would rather have done his homework than the push-ups.

There came a time when Thomas stopped ordering push-ups. When W.D. asked why, Thomas explained that he was not allow to do it any longer. W.D. said that he never complained to anybody about doing these exercises or being hit and does not see anything wrong with Thomas's methods. He stated that he only did push-ups when he deserved to

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do them--it was no surprise when they were ordered. He believes that the push-ups were a more worthwhile form of discipline then being sent to detention.

W.D. believes that Thomas is a friend of his to this day and is proud of the work that he accomplished in Thomas's class. W.D.'s brother is also friendly with Thomas and still returns to school to see him.

TESTIMONY OF B.M.

The witness is a 16-year-old junior at Livingston who is classified as neurologically impaired. He was in Thomas's English and mathematics classes in both ninth and tenth grade.

He stated that Thomas required the students to do push-ups if they did not do their homework or forgot their books or a writing implement. Once the push-ups were completed, the student was sent to get the missing item. Push-ups stopped early in his tenth grade year and did not resume.

During B.M.'s freshman year, if he slouched, Thomas hit him on the back and told him to sit up straight. If he was being a "wiseguy," Thomas might hit him and tell him to "settle down." The blows were not hard, and were given with an open hand to attract his attention. The same things occurred during B.M.'s sophomore year. At no time did Thomas ever try to hurt him.

He recalls seeing Thomas strike G.G. in the face when he did not understand the questions being asked. He also remembers seeing Thomas hit E.P. in the chest, and believes that it hurt him because E.P. grabbed his chest. He saw Thomas push D.D. into the filing cabinet.

He also said that once, while talking to F.C., Thomas grabbed F.C.'s ear. It must have hurt because F.C. exclaimed. He also grabbed B.M.'s ear, but released it when B.M. said that he was not a bell.

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B.M. remembers that A.V. came to tell him that Thomas grabbed his genitals. He did not see the incident that A.V. described. A.V. informed him that the other students were going to see Grady to complain about Thomas, and B.M. went with them.

When asked if Thomas had ever touched him in a way that made him feel uncomfortable, B.M. recounted the incident when he bent over to pick up a paper and Thomas tucked his shirt into his pants. He was shocked that Thomas did this. It caught him completely off guard and made him feel uncomfortable.

TESTIMONY OF JOAN ROWLEY

Rowley is a special education teacher at the high school. She shared a classroom with Thomas for several years. Her desk was at the rear of the room, where she was able to observe him in class informally.

Rowley described the relationship between Thomas and his students. Not all of them related to him in the same way. He was very successful with "tough kids." He could hold them in classes and keep them from failing. Other children were intimidated by Thomas's style of teaching.

She stated that Thomas is a very "physical" person, who slaps children across the face or back. According to what she observed, this was simply his style, which she did not find alarming in the context of his classroom. She saw it as a form of behavior modification. The slaps and pats did not seem to trouble the students. They were not violent or forceful. She observed him requiring students to do push-ups and sit-ups. In his mind, these were for the purpose of behavior modification.

Rowley finds Thomas to be a sensitive, caring person. She observed that special education teachers are often "touchy-feely types." Reinforcing their teaching methods with physical contact. Thomas hugs students and rubs their hair. He even hugged Rowley on occasion. She considers him a good friend.

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Rowley stated that the law obliges a teacher who witnesses child abuse to report it to the authorities. She had no occasion to report any of Thomas's acts. In fact, she knew he had permission from some parents to use physical means of discipline on their children.

TESTIMONY OF DR. ROBERT S. KISH

Kish has been superintendent of schools of the Livingston Board of Education since May 1984. He stated that when he came to the Livingston school system, he was made aware of a concern for Thomas's use of corporal punishment and his physical intimidation of his students.

In September 1986, Grady told him that Thomas struck M.G. in the classroom and grabbed another student. Grady interviewed the students and made a report to DYFS.

Kish held a meeting with Bryant, Grady and Thomas, and followed it up with a letter. They discussed Thomas's history, including the incident involving M.G., and placed him on probation. According to Kish, Thomas believed that corporal punishment and physical intimidation were appropriate for a special education classroom, and described his teaching method as the "Thomas experience." When it was impressed upon Thomas that he could not continue with these methods, he resolved to change.

Kish was pleased to hear that Thomas recognized that his practices were inappropriate, illegal and unacceptable behavior in the school. He put Thomas on probation and warned him that if another incident occurred he would be removed from the classroom. Thomas admitted that the incidents with M.G. and B.C. had occurred, but claimed they were not as violent as reported. He admitted using push-ups as discipline.

Kish offered, in the letter following the conference, to make himself available for assistance, but Thomas never took advantage of his offer.

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A special evaluation committee was appointed, consisting of Bryant, Yavelberg, Grady and Zielenski. They observed Thomas during the 1986-1987 school year, but saw no further incidents. To their knowledge all push-ups had ceased.

In March 1987, Kish became aware of the incident involving A.V. A meeting was set up with A.V. and his parents for the following morning. Kish told Grady to contact DYFS, and he called Thomas to clarify his status. He told Thomas that there was serious concern about his behavior and reminded him that he was already on probation. He also informed him that Grady, Bryant and DYFS were investigating the incident, and that the matter had been turned over to the attorney for the Board of Education. Thomas was suspended with pay subject to the outcome of the investigation.

The meeting with held on March 12, 1987, between Bryant, Grady, Kish and Mrs. V. She repeated the story that A.V. had told her prior evening. Mrs. V. said that the end of class, Thomas approached A.V., touched his genitals, and made suggestive expressions with his mouth. A.V. was upset and spoke to another student in the hall who advised him to see Patterson. Mrs. V. was concerned about A.V. returning to Livingston after the incident.

Upon cross-examination, Kish admitted that Thomas has never had an increment withheld in spite of the administration of push-ups. He also stated that at no time did Thomas hide his use of physical methods for behavior modification from the administration, always discussing the "Thomas experience" openly.

It appears that no one interviewed Thomas during the investigation following the A.V. incident. He was notified of the meeting at which it was determined to proceed with the tenure charges but did not appear.

TESTIMONY OF GERARD A. VEGLIA

Veglia retired from the Livingston Board of Education in 1987 after 21 years. He had been assistant director of special services since 1973. His duties included evaluations and observations of special education teachers.

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Veglia recalled a meeting with Dr. Schroder, the director of special services. They reviewed Thomas's personnel file. Schroder told him that Thomas had been "physical" with a student, and he wanted that taken into consideration when Thomas was evaluated. He asked Veglia to review Thomas's teaching techniques.

The witness observed and evaluated Thomas in the classroom. He found the classroom atmosphere to be highly controlled. Most of the presentations were done orally by Thomas with students responding only when directed. He observed a student do five or ten push-ups when he did not have his homework or did not respond to a question, and heard from other students that Thomas continued to use push-ups.

At the post-observation meeting, Thomas admitted using physical means to control his students. He was warned by Veglia not to use those methods with special education students. The observation report was later discussed at a meeting between Veglia, Thomas, and Yavelberg.

The witness related an event in which Thomas did not inform the school and directly contacted the parent of a student who had committed an infraction. He thought this action of Thomas put the school in a peculiar situation. He stated that Thomas felt strongly about the students in his classes and spent a good deal of time with some of them.

Thomas does not equate the use of physical means of discipline with physical force. Veglia expressed his disapproval of Thomas's methods orally and in writing on more than one occasion.

TESTIMONY OF FRAIDA M. YAVELBERG

Yavelberg was supervisor of special education for grades nine through twelve until January 1987. She now supervises grades six through twelve. She has supervised and evaluated Ralph Thomas since 1980.

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Her duty as supervisor is to observe teachers in order to improve the quality of instruction, provide in-service training, implement programs, and help develop the budget.

As early as 1980, she became concerned with Thomas's instructional techniques for learning-disabled students. She personally observed him use physical exercise as punishment many times, since Thomas never tried to conceal it.

She observed the push-ups and the context in which they were administered many times, and said that every time they were used as punishment for an infraction. At least half of the time, she was also able to observe the infraction. Push-ups were ordered for lateness, wrong answers, missing books or supplies, or distraction from a task.

Push-ups and sit-ups were generally restricted to boys. Girls were made to do jumping jacks. There were fewer girls in Thomas's class because there are fewer girls generally in special education. In addition, Thomas said that he was better able to work with boys and requested that his classes contain few girls.

During post-evaluation conferences and other informal conversations, she spoke to Thomas about his methods. Since the 1981-1982 school year, Yavelberg had been observing the discipline imposed by Thomas and had been writing memoranda and notes. In 1984, she discussed her concern about Thomas with Dr. Bornstein, her supervisor. Bornstein told her that he already had a conversation with Thomas in which Thomas explained that his method was designed to instill discipline and modify the students' behavior. Bornstein instructed Yavelberg to write a memo if she observed Thomas using push-ups as discipline.

Veglia also came to the building at least once a week and walked around to observe the classrooms. During the 1984-85 school year, he saw push-ups taking place in Thomas's class. When he described what he had seen, Yavelberg instructed him to write a memorandum. She did not discuss this memorandum with Thomas, but merely sent it to him. For the remainder of the year, she continued to observe the use of jumping jacks and push-ups as a means of maintaining discipline in Thomas's class.

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Yavelberg believes that this form of discipline stopped sometime during the 1986-87 school year, probably in the spring. She remembers students saying that Thomas no longer made them do push-ups.

Yavelberg was questioned on an evaluation report which she wrote for Thomas for the 1985-86 school year. In the report, she noted the use of push-ups. In her testimony, she explained that she used push-ups as a generalization for the various forms of exercise imposed by Thomas, including jumping jacks. At the evaluation conference, she and Thomas discussed her observations, and she recalled encouraging him to feel confident enough in his good relationship with his students not to resort to the imposition of physical exercise as discipline. Thomas did not respond. Yavelberg believes that he is afraid to use more traditional methods of discipline in his classroom for fear of losing the "control, respect, and admiration that many of the children had for him." He did not deny the administration of exercise as discipline and, in fact, practiced it openly.

Since 1980, at least six or seven students have come to Yavelberg asking to be removed from Thomas's class. She said they appeared to be frightened although they did not say that. A few of them told her that they were hit by Thomas. The first of these students that she recalls was J.D., who came in crying. He stated that Thomas hurt him by throwing him against a bank of lockers and choking him. The boy subsequently told her that he did not want to press charges against Thomas or have him reprimanded in any way, although he did not retract his request to be withdrawn from the class. Other children asked to be removed because they found the class "too hard," and referred to being punished for not doing homework. They also stated they could not understand the material and had difficulty with the presentation. B.M. requested to be removed from Thomas's English class and seemed upset when it was explained to him that the schedule could not be changed.

Yavelberg was present at the interview in Dr. Kish's office involving A.V. Her description of the interview coincides with that of prior witnesses.

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Yavelberg is aware, through parents' complaints and statements of students, that children were struck by Thomas. However, she never witnessed any such occurrence. She did, however, observe what she considered inappropriate conduct between Thomas and his students. She described it as a "lot of patting and swatting of kids' behinds in school." She saw him bumping buttocks with young male students at their lockers and grabbing them affectionately from behind. She never mentioned the contact with the students in the hallways, nor did she include it in her formal observations. She explained that these observations were restricted to what she saw in the classroom.

Yavelberg testified that she warned Thomas at least two or three times not to remain in the supply room with students with the door closed, telling him that he might arouse suspicion or create trouble for himself.

TESTIMONY OF DAVID A. PATTERSON

The witness is a guidance counselor at the high school. At the time of the incident involving A.V., he had been A.V.'s guidance counselor for three years.

He recalled that on March 11, 1987, A.V. came to his office at about 2:35 p.m. very upset and asked if he could speak to him. A.V. told Patterson that he was upset because of something that had happened in Thomas's class. He said that while they were doing work and "fooling around," Thomas started to rub his back, his buttocks, and the inside of his leg, and put his hand on "you know." Patterson understood this to be a reference to the boy's genitals. He demonstrated what Thomas had done to him. He also claimed that Thomas was making gestures at the same time. He told Patterson that there had been a prior incident which he had discussed with his family but decided not to pursue. Patterson brought A.V. to Grady's office and had him repeat his description of the incident to Grady.

The witness did not recall in which class period A.V. said the incident on March 11, 1987 occurred.

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Patterson's only other involvement in the matter was a telephone conversation with Mrs. V. when she called to say that Thomas was outside her house ringing her doorbell. He told her that she did not have to answer the door and that there should be no other problems.

Patterson was the last witness appearing for petitioner.

TESTIMONY OF J. R.

The witness is the mother of a learning disabled student, D.R., taught by Thomas in the tenth, eleventh and twelfth grades, beginning with the 1981-1982 school term. She came to know Thomas when he took an interest in her son after the death of her husband. She felt that he was able to speak to Thomas at times when he could not talk to her. Thomas also provided guidance for her other two children even though he was never their teacher. She described him as a caring person who was there for her children, day or night.

J.R. attributes her son's present level of success to Thomas; she believes that D.R. would be in serious trouble if not for him.

She testified that D.R. never complained that Thomas hit him and never mentioned push-ups, and she was not disturbed by the fact that they were required.

TESTIMONY OF D.R.

D.R. is the son of J.R. He graduated from Livingston High School in 1984 and is presently employed. D.R. feels that he would probably not have the motivation he has today were it not for Thomas.

D.R. believes Thomas was a caring person who took an interest in his students and supported them in whatever they did. He also let them know when they were wrong.

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He stated that Thomas never hit him with the intent of hurting him. He only administered light taps on the back of his head and required him to do occasional push-ups. He was never touched in an improper manner by Thomas.

D.R.'s father died when he was in tenth grade and Thomas was his teacher. He said Thomas helped him through a difficult time in his life and also "kept an eye on" D.R.'s brother and sister. Their relationship has continued to the present and he still considers Thomas a good friend.

TESTIMONY OF THOMAS SHIELDS

Shields was a teacher at Livingston High School while Thomas was there. He retired in December 1986 after 25 years of teaching and is presently teaching English composition on a part-time basis at Morris Community College. While at Livingston High School, he taught American, English and Russian History.

He stated that for ten to fifteen years he rode back and forth to school with Thomas everyday and knew him as a friend. He finds him sensitive and caring. Shields's wife describes Thomas as a "touching" person, since he tends to grasp a person's whole arm while shaking hands. He also puts his arm around people as a gesture of warmth. According to Shields, Thomas is friendly, and rarely loses his temper.

The witness offered no testimony as to Thomas's classroom demeanor, since he had little experience with him in that context. He did, however, describe the relationship between Thomas and his students in the halls. He observed pats on the back and arms and general camaraderie. Shields stated that he had a few of Thomas's students in his homeroom and never heard them say anything bad about him.

According to the witness, Thomas had a large number of certain types of students in his classes. For the most part they were slow learners who were difficult to control. Thomas's class was known as a "dumping ground" and substitute teachers were

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reluctant to take over in his absence. He never complained about the students in his classes.

TESTIMONY OF M.C.

M.C. graduated from Livingston High School in 1986. He never had Thomas as a teacher, but met him through friends and was supervised by him for one year in a study class. He stated that Thomas would help him with his schoolwork when necessary and they became good friends. He described Thomas as "inspirational" and "encouraging," and said that Thomas acted as his mentor, helping him to choose a career. Thomas came to M.C.'s house to speak to his parents when he became aware that M.C. was having difficulty in his English class, even though M.C. was not his student.

TESTIMONY OF D.M.

D.M. is the mother of three children who attended Livingston High School. One child, J.M., was in Thomas's class for three years, beginning in 1983.

J.M. was stubborn and difficult to handle, but a loving child. He loved Thomas as a teacher and used him as a confidant. According to his mother, Thomas gave J.M. what she was unable to give him.

She thought that Thomas was an excellent teacher who really cared about his students and developed a "wonderful rapport" with them. She entertained Thomas at her house when J.M. invited him to his birthday party. She believed that Thomas brought out the best in her son. She brought to the hearing the 1985 Livingston High School yearbook to show a quote by her son thanking Thomas and saying that he could never have made it without him. In fact, in the 1987 Livingston High School yearbook, Thomas is mentioned in many children's quotations even though he did not teach the entire year.

D.M. was not aware that Thomas required the students to do push-ups. However, she felt the push-ups were not inappropriate, since the children were difficult and the

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exercise released their tensions. J.M. never complained of having to do push-ups or of being struck. On cross-examination, she stated that Thomas had asked her what she thought of his instituting push-ups for his students, and that she told him that it was an excellent idea.

TESTIMONY OF J.M.

J.M. is the son of D.M. He is presently employed as a laborer for a construction company. J.M. graduated from Livingston High School in 1985. According to the witness, he had an "attitude problem" in 1983, especially with authority figures like teachers.

Thomas was his teacher for his first and possibly his second year of high school, and J.M. participated in Thomas's supply room detail in his senior year. He described Thomas as a caring person, and stated that he would like to have him as his best friend if he could. He mentioned Thomas in his yearbook because he has a special feeling for him and believes that he would have dropped out of high school if not for Thomas.

J.M. stated that he saw students patted on the shoulder or the back of the head but never saw Thomas strike anyone. He observed push-ups administered as discipline for students who used foul language or created a disturbance in class. In fact, he often did them himself. The maximum number he was made to do was 20.

TESTIMONY OF W.O.

The witness is the father of four children who attended Livingston High School, three of whom had Thomas as a teacher.

His oldest child, J.O., was difficult: he had no respect for authority, he was defiant, he wanted to drop out of high school. Thomas changed his attitude in many ways, and his son is presently attending college. W.O. believes that if it were not for Thomas, his son would not have completed high school.

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W.O. was positive about Thomas's use of push-ups as discipline, stating that he himself had been made to do push-ups in gym classes and football practice if he came in late. He did not even mind that his daughter might have been asked to them.

TESTIMONY OF V.S.

V.S. is the mother of three children who attended Livingston High School, two of whom had Thomas as a teacher. Her oldest son, B.T., had trouble learning and Thomas gave him hope. She described B.T. as "cocky, angry" with no father figure. Thomas exerted great influence on him, convincing him that he was capable of learning and encouraging him to stay in high school and finish. B.T. presently has a job in the commodities market. Her son K.T., who graduated in 1984, was shy and had difficulty learning but was able to learn in Thomas's class. K.T. is presently "a bit of a comic." He has confidence and is a "terrific kid." V.S. attributes this change to Thomas. K.T. is also employed in the commodities market. V.S.'s daughter left Livingston High School to go to a private school, but she still confides in Thomas even though he was never her teacher.

V.S. testified that Thomas came to her house many times, both professionally and socially. She found him a "savior," a "loving, caring, devoted man."

She was aware that Thomas required his students to do push-ups. She said that K.T. told her that he had been made to do them, but he spoke laughingly of it and seemed proud that he was "one of the guys." When asked if she had ever discussed the push-ups with Thomas, she replied that she was pleased with him whatever method he was using.

TESTIMONY OF K.T.

The witness is the son of V.S. He graduated from Livingston High School in 1984 and is presently employed in the commodities exchange. His brother B.T. was also a student of Thomas.

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K.T. admitted that before he met Thomas he got into trouble and would not go to school or do his homework. Thomas "turned him around" right away and gave him more self-respect. He came to school every day and stayed out of trouble.

K.T. was never struck by Thomas. He saw light taps administered to other students but no forceful hitting. K.T. himself was required to do push-ups a few times but did not mind.

According to the witness, his brother had and still has a very strong relationship with Thomas. He believes that no other teacher could have had the same impact on them.

TESTIMONY OF C.M.

C.M. graduated in 1987 from Livingston High School. He did not have Thomas as a teacher but knew him through his brother as a friend and often went to him if he needed help. He always found Thomas available if needed. He believes that Thomas cared about all of the students in the high school and would do as much as he could to help any of them. C.M. still considers Thomas his friend.

TESTIMONY OF WILLIAM HERBERT

Herbert was the principal of the Harrison Elementary School in Livingston between 1955 and December 1978, when he retired. Herbert often spoke to Thomas when he was teaching at Harrison School. Thomas taught special education to students from age ten to about age 14.

He found Thomas to be an excellent teacher in many areas, who had a special feeling for children. Thomas got along with parents well and was often invited to their homes. He believed that it was an excellent idea that Thomas went to his students' homes to speak to their parents, since it led to better communication and understanding between school and home.

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Herbert and Thomas worked together for five or six years and had a good rapport. He knew that Thomas had his own ideas on discipline, and they discussed them and came to an understanding. Thomas dealt with exceptionally difficult children and had a good insight into them. According to the witness, these were children with greater than average needs. He never saw or heard of Thomas striking a child. When asked if he received any complaints by students or parents concerning Thomas, he recalled none; however, he did remember parents writing in to praise Thomas.

Thomas left the Harrison Avenue School when he was transferred with his class to the junior high school. As principal, Herbert did not think that the transfer had anything to do with an incident with a student.

TESTIMONY OF VILMA AYARS

Ayars was vice-principal of Harrison Elementary School for 15 years before she retired in 1976. She knew Thomas well and was amazed at the accomplishments of the children in his special education class. She felt that he handled the children well and saw no physical force being used to discipline them. She believes that Thomas is an excellent teacher and wishes that there were more teachers like him.

TESTIMONY OF J.M.

J.M. graduated from Livingston High School in 1985. He had Thomas as a teacher for three years in History, English and Mathematics. He and Thomas are still good friends. He found Thomas to be honest and helpful, and said "he always looked out for the kids there."

Thomas tapped him, but never hard enough to hurt him. He struck him with an open hand on the shoulder when he "did something bad" like cutting class or staying out of school. Thomas never slapped him across the face causing him to fall backwards, as someone alleged. He did argue with Thomas about things affecting his academic achievements, like failing a class, but Thomas never raised his voice or hit him. J.M. was

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required to do push-ups for misbehavior but never more than ten or fifteen. Students were required to do push-ups when they "got out of hand."

TESTIMONY OF MRS. J.M.

The witness is the mother of J.M. Both of her children were students of Thomas and neither complained about him. Her son D.M. had him as a teacher in 1984 or 1985. She got to know him when Thomas came to the house for a family conference with D.M.'s father and discussed J.M. at the same time. Her children describe Thomas as a "teacher that commands respect."

According to the witness, her sons hated school. Thomas managed to communicate to them the importance of a high school education. He had a good influence on her sons and she wished that her second son could have had more classes with him; she believes that he would have graduated high school by this time if he had. J.M. does not recall her boys mentioning any discipline administered by Thomas.

TESTIMONY OF M.P.

M.P. graduated from Livingston High School in 1984. She did not have Thomas as a teacher but knew him through several of her friends who were in his classes. She developed a friendship with him because he was easy to talk to. She found him understanding and helpful, even for non-school related problems.

When the present tenure charges were brought against Thomas, M.P. started a petition which she circulated for signatures. According to the witness, the petition shows the overwhelming support which Thomas has in the school community.

TESTIMONY OF P.D.

P.D. is the mother of four children who attended Livingston High School. Her son G.D., who graduated in 1981, had Thomas as a teacher in the tenth grade when he was

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16 years old. G.D. was perceptually impaired, rebellious, and hyperactive. He had problems in school: he could not sit still and he did not do his homework. According to P.D., G.D. was transferred to Thomas's class because he wanted to leave school.

When G.D. was placed in Thomas's class, P.D. was concerned. She spoke to Yavelberg, Thomas and the school psychologist to express her misgivings. However, once in the class, her son began to feel better about himself and showed more concern for others. Thomas also got him to do homework.

She found Thomas to be a caring person, coming to her house at 11:00 p.m. to talk to G.D. Thomas has also been involved with her other children who still call him if they have a problem. Her daughter is severely dyslexic and was told by Livingston High School that she would not be able to do anything. She was advised to learn a trade. Since meeting Thomas, her daughter has passed a real estate course. Her son graduated from high school and spent four years in the Marine Corps. He is presently working and going to school at night to learn to be a mechanic.

When asked about the discipline imposed by Thomas, she said that he administered push-ups if G.D. "got uptight," and that "he could use it." G.D. never complained. She felt that he always tried to push a teacher as far as he could, but knew that if he wanted to stay in Thomas's class, he had to "shape up."

She knew that one of Thomas's goals was to mainstream his students as quickly as possible, and G.D. was in mainstream English class when he graduated.

TESTIMONY OF G.D.

G.D. is the son of P.D. He graduated from Livingston High School in 1981. Thomas was his teacher in the tenth, eleventh and twelfth grades.

In the tenth grade, he could not read well or do basic mathematics and wanted to leave school. One day, when asked to leave the class by his teacher, he met Thomas in the hall, spoke to him, and transferred to his class, where he began to learn.

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At this time, G.D.'s father was dying. He found Thomas to be one of the most caring people he knows, a man of high integrity who was always there "even when you didn't want him to be there." Thomas taught him to set goals for himself. "He taught me what self-respect was all about."

When asked if he was required to do push-ups, G.D. responded with the following example: Thomas would ask students to do mathematics problems at the blackboard. If they got the wrong answer and became frustrated, Thomas would say "give me ten," and the student would do ten push-ups and try the problem again with success. J.D. said "I guess it saved a lot of lip service."

TESTIMONY OF JULIE A. JOHNSTON

Johnston worked as a secretary and then as an attendance officer in Livingston High School until 1985. She is familiar with Ralph Thomas as a co-worker. Her office was located around the corner from his classroom.

Her position as an attendance officer placed her in charge of attendance, tardiness and truancy. Some of the children with truancy or tardiness problems were Thomas's students. Johnston found that Thomas went out of his way to see that these children came to school and sometimes conferred with her on problem students. She found him to be a caring person with the best interest of the students at heart including those that were not even in his classes. Students spoke to him because they knew he would listen and do whatever he could to help them.

TESTIMONY OF M.P.

M.P. is the mother of M.M., a student at Livingston High School until he graduated in 1985. He was a student in Thomas's class for two or three years.

Before he met Thomas, M.M. was having trouble in school. He was classified as hyperactive, but when he was placed into Thomas's class he began to do his homework and

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improve. She feels that Thomas is the first teacher that ever took an interest in her son. She admires Thomas because of his high regard for children. Whenever she had a problem with M.M., she knew that she could call Thomas on the phone and talk it over with him. She believes that if it were not for Ralph Thomas, her son would have never graduated. M.M. is presently employed and is planning to start his own business.

In fact, M.P. believes that her son might not be alive today if not for Thomas. There was a time when M.M. was suicidal and Thomas referred him to East Orange General Hospital, where he was admitted. This occurred after he graduated from high school. M.M. still calls Thomas to speak to him.

When asked if M.M. ever complained to her about being forced to do push-ups, she said no.

TESTIMONY OF J.F.

J.F. is the father of two children who attended Livingston High School, K.F. and D.F. Both of them were students of Ralph Thomas. K.F. graduated in 1982 and D.F. in 1985.

Only D.F. had Thomas as a teacher. D.F. has a learning disability and Thomas gave him a feeling of self-worth, fostering his commitment to continuing his education. D.F. looked up to and respected Thomas very much. He consulted with him if he had problems at school, and J.F. believes that there was a "tremendous camaraderie" between the two.

Neither D.F. nor K.F. complained that Thomas forced them to do push-ups or that he hit them. On cross-examination, J.F. stated that D.F. was ordered to do push-ups by Thomas several times because he failed to do his homework, but that it did not trouble him as D.F.'s father. He felt that Thomas was forcing his son to live up to his responsibilities and was comfortable with Thomas as his son's teacher.

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TESTIMONY OF A.H.

A.H. was a student at Livingston High School who graduated in 1980. He had Ralph Thomas as a teacher all through his high school years. The witness believes that he was placed in Thomas's class because he was "a trouble-maker kid "who" always got thrown out of the classrooms." In his senior year he dropped out of school. Thomas convinced him to return and graduate. He also considers Thomas a friend to whom he can turn with his problems at any time.

When asked if Thomas had made him do push-ups, he replied that "Ralph was smart enough to realize instead of throwing you out of the class, he would just tell you to do ten, fifteen push-ups and to sit down." Thomas did not send him to the office as they did in other classes if he came in late. As A.H. explained, he did not want to be in school in the first place and did not mind being sent to the office.

A.H. testified that he never saw Thomas strike or improperly touch anyone.

TESTIMONY OF J.H.

J.H. is the mother of A.H. She expressed her appreciation for Ralph Thomas because of the impact he had on her son's behavior and decision to finish high school. She was aware that A.H. had been made to do push-ups, but said that A.H. never complained because those were the rules that Thomas made and he agreed to follow them.

TESTIMONY OF RALPH M. THOMAS

Respondent holds certificates as a teacher of special education for neurologically impaired, emotionally disturbed, perceptually handicapped and socially maladjusted students. He is also certified as a general elementary teacher. He graduated from Jersey City College and went on to receive a master's degree in dance education with a minor in special education from New York University and a Bachelor of Arts in Psychology from Bloomfield College.

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His teaching career began at Harrison Elementary School in Livingston in September 1966. He taught neurologically impaired students for five years, and in his sixth year he taught a class with neurologically impaired, emotionally disturbed and socially maladjusted students.

According to Thomas, he transferred from the Harrison school to the Mt. Pleasant school with his students as the special education program developed and enlarged in Livingston. As a staff member, he had a priority in the choice of moving to the new situation with his students. His evaluations at Harrison were at the very least satisfactory and showed that he worked closely with the principal of that school.

He remained at Mt. Pleasant school for the next five or six years. His classes at Mt. Pleasant consisted of socially maladjusted and emotionally disturbed students. His final evaluation at Mt. Pleasant, prepared by Alexander McBride, principal of the junior high school, rates him between outstanding and satisfactory and comments that he functioned as an advocate for the students of Mt. Pleasant. There were discussions between Thomas and the administration concerning his role as an advocate because of the rapport and relationship that he had with his students, from which the administration was excluded.

When his class graduated from Mt. Pleasant, he chose to follow them to the high school where the classes for emotionally disturbed and socially maladjusted students were being developed. At that time, classes were just beginning to be available for neurologically impaired and perceptually handicapped students at the high school.

At Livingston High School, concern about his student advocacy was expressed by the administration and, in addition, they believed that his allegiance was to the students and not to the department heads or themselves.

At no time during his teaching career was Thomas's increment ever withheld, and prior to the 1986-87 school year, he had never been put on temporary review.

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Thomas admits that the students in his classes during the 1976-77 school year were made to do push-ups, sit-ups and jumping jacks, and that he occasionally joined them. The purpose of the activity, as he described it, was to provide a calming distraction and release of tension for the students. At other times, exercise followed as a consequence of students' behavior or attitude. Occasionally, it was used as discipline. He saw it as a means of developing the students' minds and bodies to enable them to control themselves in order to function in the "real world." Physical exercises were also used to develop the students' understanding of human anatomy and give them a measure of self-respect.

He encouraged his students to mix with mainstream students so that they would begin to feel comfortable and take part in extracurricular activities. According to Thomas, his method motivated some of his students to engage in sports and take part in school leadership functions like student council. At that time, it was unusual for special education students to be involved in these areas.

He used his training in dance education to urge his students to express themselves and release their tensions. In fact, some of his students eventually performed "theatre art" before the school.

Thomas referred to his students as a family. He wanted them to understand that he was there to help, that he cared about them and was interested in helping them to do their best. He wanted to teach them discipline, self-respect and respect for their parents. He felt that he had to work with the parents in order to make his students succeed. According to Thomas, his students learned what conduct was unacceptable and would result in the discipline of push-ups or sit-ups. He refers to his system of education as the "Thomas experience."

Thomas had ongoing differences with the administrations in Livingston High School and Mt. Pleasant school concerning his use of exercise as discipline and the Administration's characterization of it as corporal punishment. He sought a conference

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with one principal of Livingston High School to explain to him what his method of behavior modification actually was. Another Livingston principal objected to Thomas's students addressing him by his first name, as well as to his teaching techniques.

Thomas described the incident involving the student, J.D. J.D. and Thomas had a dispute on a Friday afternoon. On the following Monday afternoon, Thomas met J.D. in the school hall. He greeted him, but J.D. did not respond and Thomas was puzzled when J.D. became "boisterous" and used "a lot of profanity." Thomas turned and went back to speak to J.D., who tried to walk away. Thomas held him, putting one hand against the lockers to block his way. J.D. again tried to leave, and Thomas grabbed him so that he could not go and believes that he shook him.

J.D. reported the incident and a meeting followed between Thomas, the superintendent of schools, Mr. Berlin (then principal of Livingston High School) and Dr. Bornstein. At this meeting, the specific incident involving J.D. was discussed, as well as the general question of physically restraining students. J.D. was removed from Thomas's class by the administration as a result of the incident. Thomas does not believe that J.D. wanted to change teachers.

He received a memo from Bornstein on May 28, 1981, in which Bornstein told Thomas that he expected push-ups in his classes to cease. Thomas responded that push-ups were not corporal punishment, but said he would no longer employ physical exercise as part of his teaching method.

When asked about the observation of push-ups in his class approximately one year later, Thomas explained that the student came into class and did the push-ups of his own accord, not by instruction.

Thomas recalled conversations with Veglia where Veglia warned him that his teaching techniques would get him into trouble with the administration. He expressed his belief that the administration, particularly Yavelberg and Veglia, characterized all

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incidents of exercise in his class as punishment of students, whether or not that was the correct explanation.

Thomas admits assigning push-ups to students in his class during the 1981-82 school year. However, even after he ceased ordering push-ups, students did them on their own because they believed it was expected of them. For example, if they came in late for class, they would automatically do five or ten push-ups without his direction. He believed that his toleration of push-ups done without his direct order satisfied his commitment to Bornstein to discontinue their use. Thomas had not explained the administrative prohibition to the students at this time. He did not comment on a report of Veglia that a student was doing jumping jacks in his class on October 4, 1984.

Thomas wrote the memo describing his method, the "Thomas experience," in response to changes going on in the special education department at Livingston High School. On October 19, 1984, he sent a letter to the executive director of the Counsel for Exceptional Children explaining his method and seeking support, because he had been warned that an expected change of administration in Livingston High School would have an adverse impact upon him and that a careful study of his classroom methods and techniques was planned, with more direct administrative control over his classroom activities. He received no response to this letter except an invitation to attend a meeting of one of the group branches to raise his issues and get guidance and direction.

Thomas was questioned about a classroom observation report made by Veglia on May 1, 1986. The report states that Thomas had a student do push-ups "for some infraction, which was never clarified." Thomas did not recall the reason, but believes it might have been because the boy "needed some stimulation." He was a new student unable to sit through the class, who sometimes stood in the back working or doing push-ups.

In March or April 1986, Thomas told his students that the administration had prohibited exercise in the classroom and that they thus had to stop.

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He said that from that time on, he was "going to have to send them to the vice-principal or to the office."

When asked about an evaluation report by Yavelberg dated May 30, 1986, which recommended that push-ups, jumping jacks and standing at attention stop immediately and advised Thomas that the school district's policy forbade the use of exercise as a punitive measure, Thomas denied that any exercise was used in a punitive manner. The report contains no indication that exercise was observed at the time of the evaluation.

Thomas believes that many of his students wanted to do the exercises and used them to release their tensions without creating a disturbance in the class.

Thomas described the incident involving M.G., saying that M.G. was not paying attention to classwork, and was instead watching cars moving outside the window. Thomas felt that his concentration would improve if he were asked to stand and read. As Thomas circulated around the room, he passed M.G. on the left and noticed that there was "something going on" between M.G. and B.C. Thomas swung out his left arm, catching M.G. in the left chest/shoulder area. He made the contact to recall M.G.'s attention to his reading. After contact was made, M.G. "spun around and went toward the front of the room and clasped himself up against the chalkboard." He did not seem to be hurt in any way and Thomas thought at the time that M.G. was just making a joke out of the situation. Because of this incident, a meeting was called between Grady, M.G., and his mother. At this meeting, M.G. told Grady that Thomas had slapped B.C. in the face, twisted both of his ears and pulled his earlobes because he mispronounced a word. Thomas explained that he only pats his students on the side of their face or head to gain their attention and direct it to the task.

After the incident described above with M.G., B.C. had begun to make jokes. Thomas was close to him, with his right hand on B.C.'s left ear encouraging him to read better. When he walked away, B.C. told him that his ear was bleeding. Thomas gave B.C. a tissue, apologized for drawing blood, and told him that he could

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wash his ear in the men's room if he wished. B.C. did not leave the room. Grady admonished Thomas about the B.C. incident. Thomas also denied accusations by M.G. that he punched a student, R.J., and slapped another student, B.M.

Thomas said he never punched or slapped a student, and he believes that M.G. made the accusation because he was trying to manipulate the administration into transferring him from Thomas's class where he had little freedom to act as he pleased.

Thomas reviewed the incident in which he was accused of grabbing a student, D.D., by the shirt under the throat. D.D. had come to math class very upset. When Thomas told him to be quiet and sit down, D.D. became angry and attempted to leave the classroom. Thomas said that he could go to the office once he got himself under control. D.D. again tried to leave and Thomas blocked the door. He was not angry, but he told D.D. that he could not go. Thomas put his arms around D.D. and held him and until he quieted down. When the boy said that he was going to see Grady, Thomas allowed him to leave, following him just long enough to make sure that he was going toward Grady's office.

As a result of his conferences with the school administration, Thomas resolved to change his method of behavior modification and avoid making physical contact with students.

When questioned about A.V.'s allegations of sexual assault, Thomas stated that A.V. was a student in his mathematics and English classes during the 1986-87 school year. The English class was held early in the morning and the mathematics class after lunch. According to Thomas, on March 11, 1987, the mathematics class was "horrendous." Thomas was trying to prepare the class for a year-end review when he discovered that a few of the students had not done their their assignments. A.V. told him that he didn't do them, and that he didn't care. Thomas told A.V. that if he didn't fulfill his requirements, he wasn't going to pass the course, but that he was sure that A.V. could do it. He planned to contact A.V.'s mother, but A.V. told him that his mother wouldn't care if he failed.

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Thomas said that he and A.V. usually had a good relationship, but when A.V. told him that he was not going to do his assignments and that his mother didn't care, Thomas ostracized him from the class proceedings. This made A.V. angry. Thomas discussed each student's work in the class during that period except for A.V.'s and as a result, A.V. became angrier and began to fool around. The other students soon began to join A.V. At the time, Thomas was trying to correct papers to return them, and students were supposed to be coming up to his desk individually. Instead, they were all walking around the room and coming up to his desk making a lot of noise. Finally, Thomas told A.V. to sit down, and said he would see him after school. A.V. did not obey, and the general disruption continued.

Thomas said that at that point he became upset, shouted "sit down," and threw his arms out to the side. As he swung his arms, he unintentionally struck E.P., another student in the class, who was standing to the left of the desk. Because he was too upset to continue, Thomas walked out of the classroom, and the class returned to its seats. Another teacher calmed him down and he returned to the room, where he told E.P. and A.V. that he wanted to see them after school. The math class ended at approximately 1:15 p.m.

When he finished teaching his afternoon classes, Thomas went down to work in the supply room. A.V. knocked on the door. Thomas asked him why he was not in class and said that he was not to see him until after school. A.V. replied that he wanted to come down and see him then. Thomas again told A.V. that he would see him after school and did not want to talk to anyone at that moment. A.V. turned and said, "you will never touch me again," and left.

Thomas did not understand what he meant and went back to work. When the dismissal bell rang, E.P. came to the supply room. Thomas explained to him that he was upset with the class in the afternoon and did not mean to hit him. He asked E.P. to get his books because he planned to take him home to explain to his mother what had occurred. Thomas said that it is his practice when anything unusual happens in his classroom to speak to the parents of the child involved.

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Before they could leave, Grady entered and told Thomas to come to his office immediately and allow E.P. to go home. Thomas asked E.P. to inform his parents of what had taken place and say to them that he would meet with them in the morning if they wished.

When he entered Grady's office, he was informed that A.V. had made an allegation of sexual assault against him. Thomas was shocked and denied the allegation, telling Grady what had occurred in the classroom and his belief that A.V. was merely angry at him.

Grady told him to leave school immediately and not return until the matter was straightened out. Thomas went over to A.V.'s house to speak to A.V.'s mother. When he rang the doorbell, he saw Mrs. V. look out from behind her curtains but heard the telephone ring at the same time. He thought that she did not come to the door because she was on the telephone, so he waited and then rang the bell again. When there was still no response, he waited a few more minutes and left. Thomas believes that he might have knocked on the door to get Mrs. V.'s attention, but claims he did not "bang" on the door at any time.

Respondent denies touching A.V. or any other student on the genitals. Specifically, in the math class, he touched no one except for inadvertently striking E.P. Thomas denies ever inserting his hand inside A.V.'s shirt and touching his breast area. He did recall an incident in early September when A.V. came into the class wearing a shirt mostly unbuttoned with no T-shirt under it. He touched A.V.'s chest with his finger, making a joke about the amount of hair on it. There was done in full view of the class, some of whom laughed at the joke. He denies grabbing A.V.'s buttocks during the math class, whispering in A.V.'s ear or making sexually suggestive expressions to A.V. with his mouth.

Thomas admits telling A.V. that he loved him, and says this is something he frequently tells students in order to show them that he cares and wants to be supportive.

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This is always said audibly. Occasionally, he might hug a student or give a small kiss on the forehead or top of the head if they were extremely upset. This was always done openly, in full view of anyone present.

Thomas doubted that A.V. complained to his mother about his conduct before the Christmas recess, since he visited A.V.'s home during the vacation.

Thomas commented on the testimony of Yavelberg that he rubbed buttocks with students, stating that she did not understand that there is "horseplay that goes on with males and what you do is when you see a student coming down the hall, you pretend that you're going to tackle them, and you hit hips or the side of the buttocks. I have never restricted my students from horseplay with me, as long as it was at the appropriate time and in an appropriate way."

Thomas denied ever having asked A.V. if he had an erection and inviting him to feel Thomas's genitals. He did state that he has had conversations with his male students concerning their developing sexual interest in girls, but only in response to the students' expressed concerns and only to put them in their proper perspective.

When asked whether he put his hand down the back of B.M.'s pants, Thomas said that he had tucked in B.M.'s shirt, told him to pull up his trousers and reprimanded him for not wearing a belt.

He admitted that G.G. brushed chalk off his pants, but explained that the situation was no more than that. G.G. noticed chalk on his pants and told him. When Thomas asked where, G.G. answered. Thomas asked him to brush it off, which he did, and Thomas thanked him and asked him to make sure that he got it all off.

He denies hitting G.G. when G.G. bent over to tie his shoelace. He did pat him on the back of his head with his open hand because G.G. was distracting himself from work by tying his shoes. At the same time, he told him not to tie his shoes and to go back to work.

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DISCUSSION AND FINDINGS OF FACT

ALLEGATIONS OF IMPROPER PHYSICAL CONTACT

Incidents Involving A.V.

Respondent has alleged that Ralph Thomas behaved in a sexually seductive manner towards A.V., fondling him and finally touching him on the genitals on March 11, 1987. These allegations are based entirely on statements made by A.V., and those statements must therefore be examined closely since their implications for Ralph Thomas are so serious.

The stories told by A.V. are inconsistent. Robert Grady testified that on the afternoon of March 11, 1987, the same day as the alleged incident, A.V. reported to him that the incident occurred in his morning class. At the hearing, A.V. testified that the incident occurred as he was leaving his afternoon class. Some time after 2:35 p.m. on March 11, A.V. went to David Patterson and described Thomas caressing him, rubbing his buttocks, the inside of his leg, and touching his genitals. At the meeting held on March 12 with his mother and members of the school administration, A.V. said that Thomas "grabbed him" in the classroom as the other students were leaving. In his testimony at the hearing, A.V. said that he and Thomas were standing behind Thomas's desk as the class was leaving when Thomas beckoned him, opened his arms, and reached for A.V.'s legs. He then added another incident of the September before, which he "forgot," when Thomas touched him on his genitals. This prior incident was never reported. A.V.'s mother, Mrs. V., testified that when A.V. came home from school on March 11 he told her that, as he sat at his desk, Thomas came up behind him, reached down, and grabbed his genitals. There are discrepancies in almost every aspect of the boy's story story as to how, when and where the alleged incident occurred.

A.V. also described lip gestures, tongue gestures, invitations and caresses, all of which apparently occurred during class. Yet none of his classmates, many of whom

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testified, were aware of any such behavior on the part of Thomas. It is clear from their testimony that they were not otherwise oblivious to what was occurring in the classroom around them since they knew precisely whom Thomas had tapped, patted, pushed, or whose ear he pulled and for what reason. It is further inconceivable that, if Ralph Thomas were intent on behaving seductively toward A.V., he would have done so in the classroom in full view of his other students when he had available to him the supply room with a door that he could close where he would not be seen. According to the testimony, Thomas was occasionally alone in the supply room with students, but none of them complained of improper conduct.

It also appears that, after investigation, neither DYFS nor the prosecutor's office took any action against Thomas for this or any other incident.

I therefore **FIND** that the statements of A.V. are not credible and are insufficient to prove the allegations of improper conduct against Ralph Thomas in regard to the alleged incidents involving A.V.

Incidents Involving G.G. and B.M.

G.G. saw chalk on the back of Thomas's pants, was asked to brush it off by Thomas, and did so. He did not seem to be disturbed by the incident, even in his testimony at the hearing, and did not report it at the time it occurred. It would have been appropriate for Thomas to remove the chalk himself.

B.M. testified that Thomas pushed his finger down between B.M.'s back and pants while he was bending over the wastebasket. Both he and Thomas agreed that the gesture was for the purpose of tucking his shirt into his pants. However, he found the touching unpleasant and it made him uncomfortable. He did not report the incident at the time.

Unlike A.V.'s incident, there is no question that the events involving G.G. and B.M. occurred. They were observed by other students in the classroom and were supported by testimony at the hearing.

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However, it is significant that the two incidents above were only reported to the school administration by the boys after A.V. had made his complaint, giving them a sexual aspect which, by themselves, they do not have.

I **FIND** that the incident between Ralph Thomas and G.G., in which G.G. brushed chalk off Thomas's pants, occurred. However, examining it in context, without the prejudice created by the alleged incident involving A.V., I **FIND** that there is nothing in the event that rises to the level of improper conduct by Ralph Thomas.

The incident involving B.M., taken out of the context of A.V.'s accusations, is somewhat different. Although it has not been demonstrated that there was any sexual content to the act, it was still a touching of B.M. by Thomas which B.M. did not consent to and which he found unpleasant. There was no reason for Thomas to tuck B.M.'s shirt into his pants. If the boy's shirttail was of concern to Thomas, he should have requested that B.M. tuck it in himself. I therefore **FIND** that Ralph Thomas had unnecessary and inappropriate physical contact with B.M. in the manner described above.

Other Incidents

I **FIND** that the "horseplay" engaged in by Thomas with his students outside of the classroom does not constitute improper physical contact. The same contact is acceptable in the gymnasium or on the playing field. The fact that it occurred in the locker area does not change its meaning.

ALLEGATIONS OF CORPORAL PUNISHMENT
Imposition of Push-Ups and Other Exercises

The administration of Livingston High School and the Livingston Board of Education take the position that the imposition of exercises as discipline constitutes corporal punishment, and they have repeatedly prohibited Ralph Thomas from incorporating it into his teaching methods.

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Insofar as the exercise itself is concerned, I **FIND** that it is not corporal punishment. There was no intent to cause bodily pain and suffering. The exercises involve no physical contact between Thomas and the students, they were not imposed in excessive amounts, and there is no evidence that they created any physical or mental distress for the students. On the contrary, many students who testified believed that the exercises were not only a more effective form of discipline than the traditional methods, but that they also served to relieve stress, allowing them to concentrate on schoolwork. Others did not even mention them in their testimony. Thomas, on occasion, even participated with his students in the exercises.

As a father who testified on behalf of Thomas pointed out, the use of exercise as discipline is acceptable in the context of a gymnasium class. While it may be considered by some to be inappropriate in the academic classroom, it is no more corporal punishment there than it would be in the gymnasium.

The major problem with Thomas's use of exercise as it appears in the record is not that he imposed it as a form of behavior modification, but that this method of behavior modification had been clearly and strictly prohibited by the school administration over a period of time. The evidence, however, shows that Thomas had ceased the use of exercise in his teaching by May 1986, more than a year before the tenure charges were filed. It is hard to credit the petitioner's present alarm over Thomas's use of exercise when no disciplinary action was taken against him at the time it was in use.

Incident Involving E.P.

It is alleged that Thomas struck E.P. across the chest. However, Thomas's undisputed statement is that the blow accidentally landed on E.P.'s chest when Thomas threw his arms out to the side in a gesture of frustration with the behavior of his class. E.P., in his testimony, could only state that he had been the recipient of a blow but could not give any reason why Thomas might strike him. The record contains numerous incidents of students being handled by Thomas in a manner not always gentle, however, all

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of them could give explanations for Thomas's actions. I therefore **FIND** that the striking of E.P., while unfortunate, was inadvertent and did not occur while Ralph Thomas was performing any other act which was in itself improper. Thus, it does not constitute corporal punishment.

Other Incidents

I **FIND** the following:

Ralph Thomas intentionally struck M.G. Whether he did it with a closed fist or an open hand, the blow landed on M.G.'s chest with sufficient force to hurt him. Thomas denied any intent to hurt; however, he admits that the blow was intentional and was meant to restore M.G.'s attention to classwork.

Thomas slapped G.G. with some force across the back when G.G. bent to tie his shoelace during class and, on another occasion, slapped him across the face.

Thomas pulled B.M.'s ear, causing it to bleed.

Thomas grabbed D.D. and pushed him into a filing cabinet to prevent him from leaving the classroom. Another student, J.D., was also restrained in the hall against his will by Thomas.

Thomas incorporated striking and other physical contact into his teaching method. Although not intended to cause injury or suffering, these acts occasionally resulted in the infliction of pain on students, as in the incidents reviewed above.

Other alleged incidents involving students were supported solely by hearsay evidence and cannot be considered. There is no residuum of credible evidence on which a finding may be based. N.J.A.C. 1:1-15.5(b).

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Thomas was repeatedly warned by the school administration about incorporating physical contact with students into his teaching method and, in fact, had been put on probation following the incident involving M.G.

DISCUSSION OF LAW AND CONCLUSIONS

Improper Physical Contact

Based upon the testimony and evidence presented, I **CONCLUDE** that the Board has failed to demonstrate by a preponderance of the credible evidence that Ralph Thomas was guilty of touching A.V. or G.G. in a manner constituting improper conduct.

Corporal Punishment

Attempts to construe the precise meaning of the term "corporal punishment" have occupied numerous forums, even though the behavior has been prohibited in New Jersey for over 80 years. See, L. 1903, 2d Sp. Sess., c. 1, §112, p. 44.

A case decided before the establishment of the Office of Administrative Law which deals with this question is In the Matter of the Tenure Hearing of David Fulcomer, 1962 S.L.D. 160 (Comm. of Ed., June 11, 1962) (unreported); remanded as to penalty, 1963 S.L.D. 251 (State Bd. of Ed., Dec. 4, 1963) (unreported); modified, 1964 S.L.D. 142 (Comm. of Ed., Nov. 13, 1964) (unreported); affirmed, 1966 S.L.D. 225 (State Bd. of Ed., March 2, 1966) (unreported); remanded as to procedure, 93 N.J. Super. 404 (App. Div. 1967); modified, 1967 S.L.D. 215 (Comm. of Ed., Aug. 9, 1967) (unreported); affirmed, 1967 S.L.D. 220 (N.J. App. Div., Dec. 13, 1967) (unreported). Fulcomer involved a teacher who reacted with physical measures (laying on of hands, pursuit and tackle) to the insubordinate behavior of a student. The student's actions were not a threat to any person or property, and thus did not create a situation which would have immunized the teacher's conduct. 1962 S.L.D. at 162. In the Fulcomer analysis, the Commissioner agreed with the National Education Association, which wrote that:

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> "[A]n individual has a right to freedom from bodily harm or any impairment whatever of the physical integrity of his person by the infliction of physical pain by another. There is also a right to freedom from offensive bodily touching by another although no actual physical harm be done." Id. at 162.

Furthermore, the Commissioner noted alternatives available for competent teachers to use in maintaining discipline or punishing students. He also emphasized that teachers bear a "special responsibility for exemplary restraint and mature self-control." Ibid.

In the 25 years since Fulcomer, numerous decisions have attempted to identify when teacher behavior becomes corporal punishment. See, In the Matter of the Tenure Hearing of Frederick Ostergren, 1966 S.L.D. 185, 186 (Comm. of Ed., Oct. 25, 1966) (unreported), where the Fulcomer language was repeated (corporal punishment when teacher lost control and punched student in response to obscene remark after teacher's aggressive action in baseball game); School District of Red Bank v. Portia Williams, 3 N.J.A.R. 237 (1981), modified, State Bd. of Ed. (March 25, 1982); aff'd. (N.J. App. Div., Dec. 15, 1982, A-4036-81) (unreported) (discipline in the form of hitting students' hands lightly with a ruler); School District of New Milford v. Douglas Nogaki, OAL DKT. EDU 1942-82 (Aug. 8, 1983), reversed other gds., Comm. of Ed. (Sept. 26, 1983), reversed Comm. and aff'd. ALJ, State Bd. of Ed. (Apr. 6, 1984) (use of physical force to obtain compliance of defiant students); BOE of West New York v. Charles Apkarian, OAL DKT. EDU 2896-85 (June 6, 1986), aff'd., Comm. of Ed. (July 16, 1986), aff'd., State Bd. of Ed. (Sept. 5, 1986) (physical responses to students' misbehavior).

The cases stress the statutory goal of protection of students from offensive physical contact by teachers, notwithstanding the absence of concomitant physical harm to the student even where the prohibited conduct is in the context of disciplining or punishing students.

N.J.S.A. 18A:6-1 expressly prohibits corporal punishment of students. It provides:

> No person employed or engaged in a school or educational institution, whether public or private, shall inflict or cause to be

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> inflicted corporal punishment upon a pupil attending such school or institution; but any such person may, within the scope of his employment, use and apply such amounts of force as is reasonable and necessary:
>
> (1) to quell a disturbance, threatening physical injury to others;
>
> (2) to obtain possession of weapons or other dangerous objects upon the person or within the control of a pupil;
>
> (3) for the purpose of self-defense; and
>
> (4) for the protection of persons or property;
>
> and such acts, or any of them, shall not be construed to constitute corporal punishment within the meaning and intendment of this section. Every resolution, bylaw, rule, ordinance, or other act or authority permitting or authorizing corporal punishment to be inflicted upon a pupil attending a school or educational institution shall be void.

There has been no law discovered equating the administration of moderate amounts of exercise as discipline, punishment or behavior modification with corporal punishment.

Applying the law to the present case, I **CONCLUDE** that Ralph Thomas is guilty of inflicting corporal punishment upon M.G., G.G., B.M. and D.D. There is no doubt that these students were struck by Thomas without justification as set forth in N.J.S.A. 18A:6-1.

I **CONCLUDE** that Ralph Thomas is guilty of inflicting corporal punishment on J.D. Restraint of a student against his will is corporal punishment even where there is no harm or intent to punish. BOE of Twp. of Pemberton v. Robert Doyle, OAL DKT. EDU 4171-83 (Jan. 26, 1984), reversed in part, Comm. of Ed. (March 15, 1984), reinstated ALJ's decision, State Bd. of Ed. (Nov. 7, 1984), remanded as to procedure, 201 N.J. Super. 347 (App. Div. 1985), aff'd Comm. in part, State Bd. of Ed. (June 6, 1986), remanded as to penalty (N.J. App. Div., Nov. 13. 1986, A-4885-85T5) (unreported), modified, State Bd. of Ed. (Jan. 7, 1987), affirmed (N.J. App. Div., June 3. 1987, A-4885-85T5).

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I **CONCLUDE** that Ralph Thomas is guilty of inflicting corporal punishment on B.M. by touching his back. I further **CONCLUDE** that Ralph Thomas is guilty of inflicting corporal punishment on other students by patting, tapping and otherwise touching them as part of his method of teaching even though no physical pain resulted and even though there is no evidence of lack of self-control on his part. School District of Red Bank v. Portia Williams; BOE of West New York v. Charles Apkarian.

I **CONCLUDE** that Ralph Thomas is not guilty of inflicting corporal punishment in his imposition of exercise as part of his teaching method. I further **CONCLUDE** that Ralph Thomas is not guilty of inflicting corporal punishment for inadvertently striking E.P.

Insubordination

I **CONCLUDE** that Ralph Thomas is guilty of insubordination for failure to discontinue his use of exercise and physical contact with students as part of his teaching method. No matter what the merit of his theories, he may not substitute his discretion for that of the school board.

School boards (and their administrators) have been given broad statutory powers. N.J.S.A. 18A:11-1 confers general powers on local boards of education including the power to:

> Peform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district. N.J.S.A. 18A:11-1d.

The scope of a local board's power was addressed by the Appellate Division in Parsippany-Troy Hills Ed. Assn. v. Parsippany Bd. of Ed., 188 N.J. Super. 161 (App. Div. 1983), certif. denied, 94 N.J. 527 (1983). In a dispute concerning a local board's power to change a behind-the-wheel training program and the relationship of that program to the thorough and efficient mandates of N.J.S.A. 18A:7A-1 et seq., the Parsippany panel noted

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that, although N.J.S.A. 18A:7A-1 was enacted to assure statewide adherence to uniform educational standards, local boards retained broad discretionary powers within that framework (188 N.J. Super. at 166). Appellate Judge Matthews reported that the statutory and regulatory environment left "little doubt that the choice of which courses to offer and, necessarily, the content of those courses, is a discretionary decision" for the local boards to make (Id. at 166-67). There is clear confirmation of a school board's discretionary powers over the content and conduct of classroom activities.

Incompetency or Inefficiency

Petitioner has alleged that respondent has, in effect, charged him with inefficiency without following the proper procedures, by accusing him of incompetency. I **CONCLUDE** that Ralph Thomas has not been charged with either incompetency or inefficiency, nor do the proofs offered by respondent support either charge.

CONCLUSION

Accordingly, I **CONCLUDE** that Ralph Thomas is guilty of conduct unbecoming a teacher for inflicting corporal punishment on students and for insubordination regarding the direct orders of the school administration. He is therefore subject to disciplinary action under N.J.S.A. 18A:6-10.

PENALTY

Once there is a determination of prohibited behavior, the matter must be analyzed in order to discover an appropriate penalty. The basic question is whether Thomas's behavior was of such a nature that it requires his dismissal.

The evidence shows, and I **FIND**, that Ralph Thomas was for many years an effective, caring teacher, who was able to succeed in educating students other teachers refused to deal with or avoided. From his experience and training, he formulated a teaching method which was effective for many of the children who passed through his

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classes. His method—drawn partly from his training in dance therapy and partly from his own nurturing personality—involves frequent physical contact with his pupils.

Thomas is a demonstrative person who expresses himself freely, both verbally and physically. His feelings of warmth toward his students, fellow teachers, and even members of the school administration are demonstrated by words, touches, embraces and the generous way he gives his time and energy to assist those in need of help. His classroom manner with his students, as described in the testimony, suggests the relationship between a mother cat and her kittens: cuffing them, grooming them, comforting them and encouraging them.

This physical contact with students is not permitted. The circumstances under which a teacher may legitimately lay hands on a pupil are strictly circumscribed by the provisions of N.J.S.A. 18A:6-1, as cited above.

In addition to being inappropriate, the touches were subject to misinterpretation, as demonstrated by the type of charges brought against Ralph Thomas, whether or not they were founded in fact.

Although warned by the administration that he was continually placing himself in a bad position, Thomas persisted in his method. He did discontinue the use of exercise over a year before the charges were brought; however, in spite of his attempts to refrain, he continued to touch his students.

The record shows that Ralph Thomas has been a good teacher with a long record of success with difficult students. He has also provided comfort and guidance to many children not in his classes. His past record reveals that he has been warned but never disciplined, and that he has never been denied an increment in salary.

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All of this must be taken into account to determine an appropriate penalty. The decision, as noted in Fulcomer,

> should be based upon. . .findings as to the nature and gravity of the offenses under all the circumstances involved, any evidence as to provocation, extenuation or aggravation, and should take into consideration any harm or injurious effect which the teacher's conduct may have had on the maintenance of discipline and the proper administration of the school system. (93 N.J. Super. at 422.)

Fulcomer additionally reveals that it is an important part of the process to consider the individual's entire record as a teacher, including longevity and prior disciplinary incidents. It further emphasizes that the impact of the penalty on the teacher's future must be considered along with the other facts. Id. at 421-22.

There are certainly grounds for mitigation of penalty in this case.

In the language of Fulcomer,

> We hold no brief for the teacher's conduct in this case. Other proper means were available to him to maintain discipline or compel obedience. Nor have we any doubt that unfitness to remain a teacher may be demonstrated by a single incident if sufficiently flagrant. See Redcay v. State Board of Education, 130 N.J.L. 369 (Sup. Ct. 1943), affirmed o. b. 131 N.J.L. 326 (E.&A. 1944).
>
> Here, however, there is no indication in the record that the teacher's acts were premediated, cruel or vicious, or done with intent to punish or to inflict corporal punishment. Rather, they bespeak a hasty and misguided effort to restrain the pupil in order to maintain discipline.
>
> Although such conduct certainly warrants disciplinary action, the forfeiture of the teacher's rights after serving for a great many years in the New Jersey school system is, in our view, an unduly harsh penalty to be imposed under the circumstances. (93 N.J. Super. at 421.)

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The court observed that Fulcomer's tracking record was good, he had not been disciplined in any manner by the school board prior to the incidents involved in the charges, and he had consistently received salary increments each year. Id. at 422.

In BOE of Twp. of Pemberton v. Robert Doyle, the administrative law judge (ALJ) recommended dismissal based on a pattern of incidents in which respondent showed a code of control and failure to respond to warnings to desist. OAL DKT. EDU 4171-83 (Jan. 26, 1984) at 25-26.

The Commissioner considered other factors, including the teacher's age and prior record, and reversed the judge's determination of penalty, imposing a forfeiture of 120 days' salary, an additional month's salary, and one year's salary increment. The Commissioner's determination was reversed by the State Board of Education, which reinstated the ALJ's decision. The Appellate Division remanded the matter back to the State Board for reconsideration of penalty "in light of the Fulcomer standards." 201 N.J. Super. at 351. After applying the standards to the facts, the State Board agreed with the Commissioner that dismissal was too harsh a penalty, but increased the penalty imposed to loss of a full year's salary plus loss of one year's increment.

Thus, according to Doyle, the rationale of Fulcomer should be applied to the present matter even where a pattern of incidents exists and the teacher has received prior warning.

None of Thomas's acts was premediated, cruel or vicious. There was no intent to inflict corporal punishment or cause injury. All of the acts were committed in his misguided effort to implement his method of teaching which had, in fact, met with a great deal of success over the course of his teaching career. He was attempting to change his habits when the events leading to these tenure charges occurred or were alleged to have occurred.

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Thomas has had a 22-year career teaching in the Livingston public school system. He has received much praise from within the system, as well as from students and parents, for his contributions over the course of his career.

He has also received criticism and warning because of his physical methods.

Applying Fulcomer to the present case, I **FIND** that dismissal is too harsh a penalty to impose. While Thomas's actions are not to be tolerated, "in light of respondent's prior record, length of service and the sincere concern" that he has shown for the pupils in his classes, I **CONCLUDE** that the charges of which respondent is guilty are not sufficiently flagrant to warrant his summary dismissal. Williams, 3 N.J.A.R. at 248.

ORDER

Therefore I **ORDER** that respondent be continued in his tenured status as an employee of petitioner. However, in order to impress upon respondent that his actions are not to be condoned, I **ORDER** that respondent be denied his salary increment for the 1987-88 school year, and

I further **ORDER** that respondent's salary be reduced for the 1987-88 school year by the forfeiture of six months' salary.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

January 28, 1988
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

Feb. 1, 1988
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

FEB 2 [redacted]
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

PAR/e

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IN THE MATTER OF THE TENURE	:	
HEARING OF RALPH M. THOMAS,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF LIVINGSTON, ESSEX COUNTY.	:	
	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law.

It is observed that the Board's exceptions to the initial decision were filed with the Commissioner in accordance with the applicable provisions of N.J.A.C. 1:1-18.4.

In its exceptions the Board takes issue with the ALJ's recommendation to the Commissioner that a penalty of less than respondent's dismissal from his tenured teaching position is appropriate notwithstanding the fact that respondent has been found guilty of six specific incidents of striking pupils, as well as a number of unspecified incidents of striking other pupils, placing his hands inside a pupil's pants, forcing a pupil to brush chalk dust from respondent's pants and ten years of insubordination. The Board further rejects that finding and conclusion of the ALJ which holds that the physical exercises of forced push-ups that respondent imposed upon certain of his pupils as a method of disciplining them is not to be construed as corporal punishment and can properly be used as a disciplinary tool in special education classes.

Finally, the Board points out its dilemma and frustration occasioned by the ALJ's refusal to allow the DYFS report, on which it relied in part, to be placed in evidence in support of its charge that respondent behaved in a sexually seductive manner toward A.V., one of his pupils, on March 11, 1987.

The arguments advanced by the Board, which are set forth in detail in its exceptions, are incorporated fully by reference herein and summarized below.

I. THE COMMISSIONER MUST APPLY HIS EDUCATIONAL EXPERTISE TO THE FACTUAL FINDINGS CONTAINED IN THE INITIAL DECISION AND CORRECT THE ERRONEOUS RECOMMENDATION OF THE ALJ AS TO PENALTY (Board's Exceptions, at p. 2)

The Board argues that the Commissioner must examine the initial decision and the record generated at the OAL hearing to evaluate the legal conclusions reached by the ALJ by applying his

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experience and expertise and specialized knowledge in determining the appropriateness of the penalty to be imposed upon respondent in the instant matter. In this regard, the Board relies upon the Appellate Division's decision in In re Caporaso (Slip Opinion at p. 4) (decided by the Commissioner October 15, 1985, aff'd State Board May 7, 1986, rev/rem Superior Court March 19, 1987, decision on remand July 17, 1987, aff'd State Board December 2, 1987) and In re Morrison, 216 N.J. Super. 143, 157-159.

II. THE FACTUAL FINDINGS OF THE ALJ MANDATE MR. THOMAS' DISMISSAL, NOT MERELY A REDUCTION OF HIS SALARY.
(Board's Exceptions, at p. 4)

The Board has quoted portions of the initial decision at pages 51 and 54 and has relied extensively upon the transcripts of portions of the testimony of those pupil witnesses, B.C. (10/27, Tr. 18:14-17); M.G. (10/27, Tr. 17:5-16, 16:16-18); F.C. (10/27, Tr. 62:12 to 63:6, 76:6-14) and (10/23, Tr. 32:12-18); G.G. (10/27, Tr. 40:16 to 41:4, 33:14 to 34:1 and 42:12, 43:3); B.M. (10/27, Tr. 153:25 to 154:16) and W.D. (10/27, Tr. 139:16) to argue that respondent had repeatedly and constantly administered corporal punishment to his pupils in the face of numerous explicit warnings from his superiors, with which he failed to comply.

III. THE ALJ INCORRECTLY APPROVED OF THE USE OF PUSHUPS AS A DISCIPLINARY TOOL IN AN ACADEMIC CLASSROOM; THEY ARE, INSTEAD, ILLEGAL CORPORAL PUNISHMENT

The Board rejects the ALJ's finding and conclusion in this regard and argues that the term "push-ups" also includes other types of activities imposed by respondent to discipline his pupils such as "sit-ups" and "jumping jacks." The Board points out that respondent, by way of his own testimony contained in the transcripts and summarized by the ALJ in the initial decision, had admitted to such disciplinary measures notwithstanding the fact that he had been repeatedly admonished by the school administration to cease this behavior. Although respondent stated that he had ceased to use this form of discipline during the spring of 1986, the Board maintains that the testimony of other pupils and the Supervisor of Special Education proves otherwise and that such testimony was ignored by the ALJ. See B.M. (10/27, Tr. 158:3-10), M.G. (10/27, Tr. 19:10-19) and Fraida Yavelberg, Supervisor of Special Education (10/28, Tr. 103:7 to 104:6). (Board's Exceptions, at p. 13)

In refuting the ALJ's findings and conclusions regarding Point III of its exceptions, the Board argues that N.J.S.A. 18A:6-1 clearly prohibits all corporal punishment and, inasmuch as this case involves the use of pushups in a traditional classroom setting to maintain discipline, rather than a gym situation which might permit more latitude in physical contact between a teacher and his/her

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pupils, it cannot and must not be tolerated. In reaching this conclusion the Board relies on the definition of corporal punishment contained in Black's Law Dictionary, 5th Ed. (West, 1979) as supplemented by its footnotes Nos. 7 and 8 to its exceptions on page 15.

IV. THE ALJ'S RELIANCE ON A PURPORTED LACK OF ACTION BY DYFS IS IMPERMISSIBLE, SINCE THE ALJ REFUSED TO ALLOW THE CONCLUSIONS OF THE DYFS INVESTIGATOR TO BE RECEIVED IN EVIDENCE

With regard to its exceptions pertaining to the ALJ's refusal to accept the DYFS report in evidence and to include such findings of fact in the initial decision as they relate to its charge of sexual molestation of A.V., the Board maintains that:

> The ALJ, in rendering her initial decision, made a point of stating, at two separate places in the initial decision, that while the DYFS and the prosecutor's office had been called in to investigate some of the allegations that form the basis of the Board's charge,
>
> > [i]t also appears that, after investigation, neither DYFS nor the prosecutor's office took any action against Thomas for this or any other incidents.
>
> Initial Decision at 47; see also Initial Decision at 10. This "fact" apparently weighed heavily in the ALJ's decision to recommend a lenient penalty. However, a careful examination of the transcripts of the hearings and the course of the hearings themselves reveals that the ALJ could make this statement only because she refused to admit into evidence the conclusions of DYFS.
>
> As set forth by the ALJ, DYFS was called in by the Board because of the charges of abuse (Initial Decision, at p. 5) and DYFS thereafter contacted the prosecutor's office. (Id. at 7) What is not set forth in the Initial Decision is that DYFS issued a report, which concludes as follows:
>
> > IT IS RECOMMENDED BY THE INSTITUTIONAL ABUSE INVESTIGATION UNIT THAT BASED UPON THIS AND PAST ALLEGATIONS AGAINST MR. THOMAS THAT HE BE TERMINATED FROM THE POSITION OF RESOURCE TEACHER AT LIVINGSTON HIGH SCHOOL.

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The reason why the report of DYFS, with its conclusion and recommendation, is not in the ALJ's Initial Decision is reflected in the transcript of the October 28, 1987 hearing:

> THE COURT: I agree that the conclusions of DYFS investigator are irrelevant here. It's up to the Commissioner to decide tenure charges, not an investigator from DYFS. So those [the DYFS reports] are not admissible. As far as the investigation, it's true it's hearsay. I can take it in subject to the [residuum rule], and anything that's not supported by credible evidence, of course, will be excluded.
>
> ***
>
> MR. OXFELD: Am I also correct that the conclusions reached by DYFS are totally inadmissible?
>
> THE COURT: Total[ly].

(10/28, Tr. 9:12 to 10:8 and 11:11-14.)

Thus, the DYFS report was offered at the hearing before the ALJ. It was solely as a result of the ALJ's ruling that the conclusions of DYFS' investigation would not be admissible that the ALJ was able to conclude that DYFS did not see fit to "take any action."[9]

---

9 We note here that the conclusion expressed in the DYFS report (which the ALJ deemed to be irrelevant) was that:

> The statements given by the individuals who were interviewed clearly point out that Mr. Thomas utilized inappropriate teaching techniques. The students indicated that Mr. Thomas fondled, hit, and subjected them to a poor methodology of teaching, in which he used corporal punishment as a means of discipline. It is also clear that given Mr. Thomas' history of physical contact, and the corroboration of the statements given by the students, he committed an act of sexual abuse under N.J.S.A. 9:6-8 et seq. Therefore, it has been determined by the Institutional Abuse Investigation Unit that the allegation of sexual abuse of [AV] against Mr. Ralph Thomas is substantiated.

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> The Board here is silent on the issue of the admissibility of the DYFS report, including its conclusions and recommendations. It does, however, take issue with the ALJ's "finding," based upon her own refusal to accept the conclusion and recommendations of the DYFS report, that "neither DYFS nor the prosecutor's office took any action against Thomas," and her use of that finding to support the lenient penalty imposed by the initial decision.
>
> It has been our experience as school district attorneys that this type of merry-go-round treatment is to be expected in situations which involve both DYFS and a potential tenure charge. DYFS' routine direction to Board personnel is that the Board should not investigate any aspect of any incident in which DYFS is involved (see Initial Decision at 10), thereby hampering the Board in fulfilling its obligation to bring tenure charges if warranted. DYFS then issues a report which recommends that the Board do exactly what the Board here sought to do, i.e., terminate the teacher's employment. Further, DYFS suggests to the Board that it share the report with the Commissioner or ALJ at the time of hearing. The ALJ, rightly or wrongly, refuses to accept the report into evidence, and then uses the resultant absence of proof of any "action" by DYFS to support either a finding that the teacher is not guilty of the matters raised in the tenure charge or (as here) to justify a lenient penalty.
>
> (Board's Exceptions, at pp. 16-19)

The Commissioner has reviewed the record of this matter including the transcripts and those exceptions filed by the Board.

The Commissioner observes that the instant proceedings represent the second time the Commissioner has been called upon to determine whether the results of a DYFS investigation were admissible in evidence in connection with tenure charges against a teaching staff member.

The first time this issue was raised was in In the Matter of the Tenure Hearing of Lynn Jenisch Tyler, School District of the Sussex-Wantage Regional School District, Sussex County, decided by the Commissioner September 2, 1987. In that matter, the initial decision held that in light of the testimony of pupil witnesses, the Board did not meet its burden of proving the truthfulness of many of the tenure charges. The testimony of the DYFS investigator was not permitted. The Commissioner remanded the matter for a limited hearing and finding of fact pertaining to the information the DYFS

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investigator obtained from pupil witnesses with regard to certain of the tenure charges. In doing so, the Commissioner concluded that said testimony could serve to satisfy the residuum rule. More specifically, the Commissioner in Tyler stated in pertinent part as follows:

> In reviewing the specific nature and circumstances arising in these proceedings, the Commissioner does not agree with the ALJ's underlying reasons with regard to his decision to disallow the testimony of the DYFS investigator, notwithstanding the fact that such testimony does, in fact, constitute hearsay testimony of the pupil witnesses in question. The provisions of N.J.A.C. 1:1-15.5(a), (b) pertaining to hearsay evidence, residuum rule, permit hearsay evidence to be admitted in the trial of contested cases. In the instant matter the Commissioner does not agree with the position taken by the ALJ that the admission of the hearsay testimony of the DYFS investigator would necessitate an undue consumption of time (N.J.A.C. 1:1-15.1(c)) or burden the record of these proceedings. What is at issue here is whether the hearsay testimony of the DYFS investigator with regard to the earlier statements made to him by those pupil witnesses would be of assistance in the assessment of the credibility and reliability of their direct testimony adduced approximately one year later at the tenure hearing.
>
> The Commissioner is fully cognizant of the difficulties with which the ALJ is confronted in assessing the reliability of youthful witnesses. (State v. R.W., 104 N.J. 14 at p. 29).
>
> However, the Commissioner finds and determines that he cannot reach an informed decision in this matter without taking into consideration the statements obtained from those pupil witnesses concerning the incidents that occurred during the 1985-86 school year which are related to the Board's tenure charges of unbecoming conduct (corporal punishment) against respondent
>
> (Tyler, Slip Opinion, at pp. 18-19)

Similarly, the Commissioner finds and determines herein that he cannot reach an informed decision with respect to those charges of pupil abuse against respondent without first having had the opportunity to review those findings resulting from the investigation by the DYFS investigator which culminated in the issuance of his/her report to that effect. More specifically, the

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serious allegation of respondent's sexual molestation of A.V. is also the subject matter of the report of the DYFS investigator. Consequently, the Commissioner finds and determines that in order to fully avail himself of all of the circumstances surrounding the Board's tenure charges against respondent, it is essential that the direct testimony of the DYFS investigator related to those findings contained in his/her report be placed into the record with respondent having an opportunity to cross-examine the DYFS investigator with regard to such testimony.

Accordingly, the ALJ's determination to exclude any evidence with respect to the tenure charges against respondent obtained through the DYFS investigator is hereby set aside. The Commissioner remands this matter to the Office of Administrative Law for a limited hearing and findings of fact pertaining to the findings and recommendations of the DYFS investigator.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

March 14, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1784-88
(EDU 4440-87 ON REMAND)
AGENCY DKT. NO. 153-5/87

IN THE MATTER OF THE TENURE HEARING OF RALPH M. THOMAS, SCHOOL DISTRICT OF THE TOWNSHIP OF LIVINGSTON, ESSEX COUNTY

Mark A. Baber, Esq., for petitioner
(Riker, Danzig, Scherer, Hyland & Perretti, attorneys)

Sanford R. Oxfeld, Esq., for Ralph M. Thomas, respondent
(Oxfeld, Cohen, Blunda, Friedman, LeVine & Brooks, attorneys)

Record Closed: May 3, 1988 Decided: June 15, 1988

BEFORE **EDITH KLINGER**, ALJ:

STATEMENT OF THE CASE

This is a remand of a teacher tenure case for limited hearing in order to adduce testimony from the investigator for the Division of Youth and Family Services (DYFS) regarding his report related to certain of the tenure charges. At the prior hearing, the report of the DYFS investigation was offered into evidence without the testimony of the

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investigator. On this basis, the report was rejected as evidence by the administrative law judge (ALJ). The Commissioner determined that in order to complete the record, it was essential that the report along with the direct testimony of the DYFS investigator related to the findings in his report should be placed into the record with respondent given an opportunity to cross-examine the DYFS investigator. The Commissioner remanded the matter to the Office of Administrative Law (OAL) with instructions to supplement the record as directed.

PROCEDURAL HISTORY

Written charges against Ralph Thomas, a teacher with tenure status, were certified to the Commissioner of Education by resolution of the Board of Education of the Township of Livingston. On June 25, 1987, the matter was transferred to the OAL for determination as a contested case. The OAL held tenure hearings on October 23, 27, 28, and 30 and November 2 and 4, 1987. On December 14, 1987, the undersigned issued an initial decision sustaining the charges in part and recommending that respondent's salary be reduced for the 1987-1988 school year by the forfeiture of six months' salary and that his salary increment for 1987-1988 school year be denied. On March 14, 1988, the Commissioner remanded the matter to the OAL to develop a more complete record regarding the findings of the DYFS investigation into the events which formed the basis of the tenure charges.

The remand hearing was held on April 21, 1988. Upon receipt of posthearing briefs, the record closed on May 3, 1988.

FINDINGS OF FACT

THE ALLEGATIONS OF IMPROPER PHYSICAL CONTACT:

Incidents involving A.V.:

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The Board alleged that Ralph Thomas behaved in a sexually seductive manner towards A.V., fondling him and finally on March 11, 1987 touching him on the genitals. Based upon the multiple versions of the incidents described by the witnesses, all purportedly originating with A.V. and for the most part inconsistent with each other, the undersigned did not find sufficient credible evidence in the record to prove the allegations of improper touching against Ralph Thomas in regard to A.V.

Christopher M. Wirth, an investigator with the Institutional Abuse Investigation Unit of DYFS interviewed students A.V., B.M., G.G., F.C., G.C., W.D., and E.P. and David Patterson, A.V.'s guidance counselor, in regard to the incident of March 11, 1987. His report consisted of a statement taken from Thomas on April 16, 1987, a statement taken from A.V. on March 13, 1987, and the statements from the students interviewed in the presence of the principal, Robert L. Grady, and the students' parents on March 17, 1987 at Livingston High School.

According to Wirth's report, when he interviewed A.V. on March 13, 1987, A.V. provided the following information.

> A.V. stated that during English Class, "Mr. Thomas was acting strange. He began to pinch my ears, lick his lips, and stated that he wanted to see me after school. The other children walked out of the class, the period had ended and Mr. Thomas stopped me, opened his arms and stated "I love you, I need you, you are a good student." Mr. Thomas approached A., hugged him and stated "Lets go." At that time, A. stated that, Mr. Thomas "felt my genitals and butt with his full hand for about two to three seconds." A. proceeded to his next class. At aproximately 2:30, A. informed his guidance counselor, Mr. David Patterson of the incident.

This version of the incident is different from the one testified to by A.V. at the prior hearing in this matter. At that time, A.V. asserted that the incident occurred in the afternoon at the end of math class rather than in the morning at the end of English class as he told Wirth. His description of the touching itself differs from the versions testified to by A.V. and other witnesses at the hearing.

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The next witness Wirth interviewed was B.M., who reported an incident in which Thomas tucked B.M.'s T-shirt into his pants as B.M. bent over to throw his gum in the wastebasket. B.M. also told Wirth that Thomas punched G.G. and E.P. and made students do push-ups if they did not do their homework. Nothing in the DYFS investigator's report differs from the testimony given by B.M. at the time of the first hearing.

The statement from G.G. reports an incident in which Thomas asked G.G. to wipe chalk off the seat of Thomas' pants. It adds nothing to G.G.'s testimony at the hearing other than that he felt intimidated by Thomas and that Thomas apologized to him after school for the chalk incident.

The next statement in Wirth's report was taken from F.C. F.C. did not testify at the prior hearing. However, the incident in which Thomas grabbed his ear was observed by B.M. and appears in evidence in the testimony of B.M. Other relevant matters described by F.C. are also dealt with by the testimony of others.

G.C., another student, was not called as a witness at the hearing. He reported to Wirth that Thomas made him do push-ups as punishment. Robert Grady in his testimony reported that G.C. was struck by Thomas; G.C. in the DYFS interview did not confirm this. G.C.'s information to Wirth that Thomas pinched and patted the buttocks of students appears in evidence in the testimony W.D. and Fraida Yavelberg among others.

The next student interviewed by Wirth, E.P., testified at the hearing. His statement to Wirth is consistent with his hearing testimony and supports Thomas' assertion that he struck E.P. accidentally as he swung his arms in frustration. "Mr. Thomas got angry and hit me with his fist. Then he turned to me and asked me why I made him hit me." In regard to the incident where Thomas inserted his finger into the pants of B.M., E.P. saw it happen but did not notice any sexual content in the gesture. The only additional information provided by the DYFS report is that Thomas made E.P. do push-ups as punishment. This adds nothing to the prior testimony of the witnesses as a

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whole and Thomas himself readily admits the administration of exercises as part of his method of teaching.

The summary of Wirth's interview with David Patterson, guidance counselor, discloses no new information and is consistent with the testimony of David Patterson at the hearing.

Wirth also interviewed Robert Grady and received the same information as Grady provided in his appearance at the hearing.

Based upon these interviews, Wirth made the following evaluation:

> The statements given by the individuals who were interviewed clearly point out that Mr. Thomas utilized inappropriate teaching techniques. The students indicated that Mr. Thomas fondled, hit, and subjected them to a poor methodology of teaching, in which he used corporal punishment as a means of discipline. It is also clear that given Mr. Thomas' history of physical contact, and the corroboration of the statements given by the students, he committed an act of sexual abuse under N.J.S.A. 9:6-8 et seq. Therefore, it has been determined by the Institutional Abuse Investigation Unit that the allegation of sexual abuse of A.V. against Mr. Ralph Thomas is substantiated.

Nothing in the testimony of Wirth differs from or adds anything to the information found in his investigation report. His investigation substantiates some but not all of the conclusions he drew in his evaluation. There is no question that Thomas utilized inappropriate teaching techniques—fondling, hitting the students and subjecting them to corporal punishment as a means of discipline. However, an examination of the statements Wirth obtained from the witnesses Wirth reveals no corroboration of sexual abuse. Nothing in his investigation supports Wirth's determination that the allegation against Thomas of sexual abuse of A.V. was substantiated. Wirth relies only upon the uncorroborated statements of A.V. without benefit of the multiform versions of the incident in evidence at the hearing through the testimony of other witnesses and even of A.V. himself. All of these versions purportedly were obtained from A.V., making Wirth's

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no more persuasive than the others.

Nothing in the report of the DYFS investigation changes the finding made in the prior opinion that the statements of A.V. are not credible and are insufficient to prove the allegations of improper conduct against Ralph Thomas in regard to the alleged incidents involving A.V., and I again **FIND** that that Board has not proved by a preponderance of the credible evidence the allegations of sexual abuse of A.V. by Ralph Thomas. The existence of still another version of the incident in the DYFS report reinforces the prior finding.

The only amendment to the prior initial decision is to the statement, not finding of fact, that neither DYFS nor the prosecutor's office took any action against Thomas in regard to this matter. It appears that in its report approved by the Statewide Supervisor of the Institutional Abuse Investigation Unit on May 18, 1987, DYFS recommended that Thomas be terminated from the position of "Resource Teacher" at Livingston High School. The prosecutor's office took no action, since no parent was willing to sign a complaint against Thomas.

Incidents Involving G.G. and B.M.:

The report of the DYFS investigator does not change any of the findings of the undersigned in the prior opinion in regard to these incidents.

Thomas' conduct in requesting that G.G. brush chalk off Thomas' pants was inappropriate, and it appears from the statement that G.G. gave to Wirth that Thomas himself believed this to be true since he apologized to G.G. later on the day the incident occurred. The investigator's report, however, attributes to G.G. a degree of intimidation by Thomas which G.G. did not verbally express or in any other way manifest at the hearing. Taking into consideration the DYFS investigation report in addition to the other evidence, I still **FIND** that nothing in this incident with G.G. rises to the level of improper conduct by Ralph Thomas.

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In regard to the incident involving B.M. where Thomas tucked B.M.'s shirt into his pants while the boy was bending over the wastebasket, there is only one relevant statement in the DYFS investigative report. E.P. observed the incident and found no sexual content in it. This additional testimony is consistent with the prior findings, and I therefore again **FIND** that Ralph Thomas had unnecessary and inappropriate physical contact with B.M.; however, there was no sexual aspect to the act. In the prior decision, I concluded that this act of offensive physical contact constituted corporal punishment.

Other Incidents:

In his report, the investigator includes statements, referred to above, by F.C. and G.C. who were not witnesses at the hearing. The statements describe Thomas smacking students on the buttocks as they walked by or patting or pinching their buttocks. These statements are consistent with testimony already in the record from the prior hearing. Taken in the context of all of the prior testimony, I **FIND** that where this behavior may be included in the "horseplay" engaged in by Thomas with his students, it does not constitute improper physical contact. I further **FIND** that where these instances constitute offensive physical contact they are already included in the discussion of corporal punishment in the prior opinion.

ALLEGATIONS OF CORPORAL PUNISHMENT:

Imposition of Push-ups and Other Exercises:

Nothing in Wirth's report is inconsistent or adds to any of the testimony concerning Thomas' use of push-ups and sit-ups as part of his teaching methods. The exercises involved no physical contact between Thomas and the students. They were not imposed in excessive amounts and there is no evidence that they created any physical or mental distress for the students. In fact, many students believed that the exercises were effective in encouraging them to perform better in school. Therefore, I **FIND** that the imposition of these exercises was not corporal punishment. I **FIND** that the major problem with Thomas' use of exercise as it appeared in the record was not that he imposed

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it as a form of behavior modification but that this method of behavior modification had been clearly prohibited by the school administration over a period of time.

The Incident Involving E.P.:

The report of the DYFS investigator is consistent with the finding in the prior hearing that E.P. was struck in the chest inadvertently when Thomas threw his arms out in frustration. E.P.'s statement to the investigator in regard to the incident is set forth above. E.P. "made" Thomas hit him by placing himself out of the range of Thomas' vision but in the path of his swinging arms. I **FIND** that the striking of E.P. does not constitute corporal punishment.

Other Incidents:

Wirth's conclusion in the Institutional Abuse and Neglect Report that Thomas used "inappropriate teaching techniques", including corporal punishment, fondling and hitting students, is consistent with the evidence presented at the prior hearing; and it was found by the undersigned that that Ralph Thomas intentionally struck students, restrained a student against his will and patted, tapped or otherwise touched students without justification. The prior findings are adopted by reference.

POSITIONS OF THE PARTIES

The Board has taken the position that the Commissioner remanded this matter to the OAL for limited hearing and findings of fact and, therefore, the administrative law judge has no power to make any conclusions of law "as to the propriety or impropriety of the consideration of the DYFS report and Mr. Wirth's testimony or even to make any conclusions as to how that report and testimony can be utilized by the Commissioner."

Respondent urges that the testimony and report of the DYFS investigator add nothing whatsoever to the Board's case and can have no effect on the prior initial decision in the matter.

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DISCUSSION AND CONCLUSIONS

The assertion by the Board that the ALJ can make no findings or conclusions in regard to the testimony and report of the DYFS investigator is rejected. Action by the ALJ in accord with this position of the Board would be in violation of N.J.A.C. 1:1-18.7(b) mandating that the judge hear the remanded matter and render an initial decision. The Legislature in creating the OAL had no intention of altering the regulatory authority or basic decisional powers of administrative agencies. Nonetheless, ALJ's do have responsibilities which they are to exercise with independence. ALJ's are to conduct hearings, make factual findings and recommend decisions in contested cases for the various State agencies. In re Uniform Adm' v. Procedure Rules, 90 N.J. 85, 94 (1982).

An initial decision is based upon testimony, documents and arguments accepted by the ALJ for consideration in rendering a decision. N.J.A.C. 1:1-18.1(a)1. The choice of accepting or rejecting testimony rests with the trier and finder of fact, in this case the ALJ. Hornauer v. Division of Alcoholic Beverage Control, 40 N.J. Super. 501, 506 (App. Div. 1956).

It is implicit in the position of the Board that the DYFS investigator has some special expertise to which the administrative law judge and perhaps the Commissioner should defer in reaching a determination of the matter. Even if Wirth may be considered an expert, his opinion, if without basis, may be found not to be worthy of consideration by a trier and finder of fact. As stated in Polyard v. Terry, 160 N.J. Super. 497 (App. Div. 1978), aff'd 79 N.J. 547 (1979),

> The opinion of an expert is undoubtedly admissible.... And it is "within the special function of a jury to decide if the facts on which the answer of an expert is based actually exists, and the value or the weight of the testimony of the expert is dependent upon and no stronger than the facts on which it is predicated. (Emphasis Added).

It has been determined above, in light of the total evidence and the opportunity to cross-examine witnesses, neither of which was available to Wirth when

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making his investigation, that his conclusion that Ralph Thomas was guilty of incidents of sexual abuse involving A.V., G.G. and B.M. is unsupported by the record as a whole. Under Polyard, Wirth's testimony and conclusions as to these allegations may be and are **FOUND** by the finder of fact, the ALJ, to have no more value or weight than the evidence of any other witness in this matter. I therefore **CONCLUDE** that the position of the Board as to the scope of the ALJ's power with regard to the testimony and report of the DYFS investigator is incorrect.

Having discussed the legal principles in the initial decision dated January 28, 1988, with respect to all issues presented, I adopt them by reference here and there is no need to recite them again. Nothing in the additional evidence requires any change in the previous decision. Consequently, I **CONCLUDE** that the Board failed to demonstrate by a preponderance of the credible evidence that Ralph Thomas was guilty of touching A.V. or G.G. in a manner constituting improper conduct. I **CONCLUDE** that Ralph Thomas is guilty of inflicting corporal punishment upon M.G., G.G., B.M., D.D. and J.D. I **CONCLUDE** that Ralph Thomas is not guilty of inflicting corporal punishment in his imposition of exercise as part of his teaching method. I **CONCLUDE** that Ralph Thomas is not guilty of inflicting corporal punishment for inadvertently striking E.P. I further **CONCLUDE** that Ralph Thomas was guilty of insubordination for failure to discontinue his use of exercise and physical contact with students as part of his teaching method. Finally, I **CONCLUDE** that Ralph Thomas has not properly been charged with either incompetency or inefficiency, nor do the proofs offered by the Board support either charge.

CONCLUSION

Accordingly, I **CONCLUDE** that Ralph Thomas is guilty of conduct unbecoming a teacher for inflicting corporal punishment on students and for insubordination regarding the direct orders of the school administration and, therefore, he is subject to disciplinary action under N.J.S.A. 18A:6-10.

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There being nothing in the testimony or in the DYFS to alter the previous opinion for all the reasons discussed in the initial decision of January 28, 1988, I **CONCLUDE** that the charges of which respondent is guilty are not sufficiently flagrant to warrant his summary dismissal.

ORDER

Accordingly, for the reasons set forth in the prior initial decision, I **ORDER** that respondent be continued in his tenure status as an employee of petitioner; however, in order to impress upon respondent that his actions are not to be condoned, I **ORDER** that respondent be **DENIED** his salary increment for the 1987-1988 school year, and I **FURTHER ORDER** that respondent's salary be reduced for the 1987-1988 school year by the forfeiture of six months' salary.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

June 15, 1988
DATE

Edith Klinger
EDITH KLINGER, ALJ

6/17/88.
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

JUN 20 1988
DATE

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IN THE MATTER OF THE TENURE	:	
HEARING OF RALPH M. THOMAS,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION ON REMAND
OF LIVINGSTON, ESSEX COUNTY.	:	
	:	

The record of this matter on remand has been reviewed by the Commissioner. It is observed that timely exceptions to the initial decision, rendered by the Office of Administrative Law have been filed by the Board pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

In its exceptions to the initial decision on remand the Board incorporates by reference those exceptions to the initial decision rendered in this matter on January 28, 1988, as well as the arguments raised before in its post-hearing brief prior to the issuance of that initial decision. These earlier exceptions and legal arguments advanced by the Board are noted by the Commissioner and incorporated by reference herein for the purpose of reaching a final determination on the remand of this matter.

In further support of its position that respondent should be dismissed from his tenured teaching position, the Board in its exceptions to the initial decision on remand argues in pertinent part:

> At page 5 of the remand decision, the Administrative Law Judge (ALJ) herself demonstrates why this is so:
>
> > There is no question that Thomas utilized inappropriate teaching techniques - fondling, hitting the students and subjecting them to corporal punishment as a means of discipline. (Emphases added.)
>
> This conclusion is amply supported by the record generated in the Office of Administrative Law. As pointed out at pages 4 through 7 of the Board's exceptions to the original decision (which exceptions are incorporated here by reference), the ALJ expressly found that Mr. Thomas committed corporal punishment against five identified students (M.G., G.G., B.M., D.D. and J.D.) as well as an unspecified number of "other students," whom the evidence at trial demonstrates are B.C., M.G. (again), F.C., G.G. (again), B.M. (again) and W.D. It is also clear

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> that the striking of E.P. was not, as the Administrative Law Judge found, an accident, but was a deliberate use of physical force by Mr. Thomas to discipline an unruly class.***
>
> ***In addition to the corporal punishment by striking and hitting students, the ALJ found as a fact that Mr. Thomas required G.G. to brush chalk dust from Mr. Thomas' buttocks (an act which the ALJ, at page 6 of the remand decision, termed "inappropriate" but not "improper") and that he placed his hand inside B.M.'s pants, which is described by the ALJ (at page 7 of the remand decision) as "unnecessary and inappropriate". These incidents, too, should in and of themselves require Mr. Thomas' dismissal.
>
> In addition, of course, there is the "pushup" method of discipline employed by Mr. Thomas in complete disregard of unambiguous directives from his superiors. In the remand decision (at pages 7-8), the ALJ finds that "the major problem with Thomas' use of exercise ... was not that he imposed it ... but that this method of behavior modification had been clearly prohibited by the school administration over a period of years." The Board's earlier exceptions (at pages 10-16) amply demonstrate that the use of pushups was not only insubordination (as found by the ALJ), but that [it] was also illegal corporal punishment (which the ALJ refused to recognize).
>
> (Board's Exceptions, at pp. 2-4)

The Commissioner has independently reviewed the record of this matter in considering those exceptions filed by the Board to the original initial decision and the initial decision on remand. In the Commissioner's judgment, the arguments advanced therein do not warrant a reversal of those findings of fact reached by the ALJ with respect to the tenure charges certified against respondent. To that extent the Commissioner adopts as his own those findings of fact in reaching the following determinations with respect to the tenure charges against respondent:

> The Board has failed to demonstrate by a preponderance of credible evidence that Ralph Thomas was guilty of touching A.V. or G.G. in a manner constituting improper conduct.
>
> Ralph Thomas is guilty as charged of inflicting corporal punishment upon M.G., G.G., B.M., D.D. and J.D.
>
> Ralph Thomas is not guilty of inflicting corporal punishment for inadvertently striking E.P.

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> Ralph Thomas is guilty of gross insubordination for failure to discontinue his use of physical exercise and physical contact with students as part of his self-styled teaching methods he employed with his pupils.
>
> Ralph Thomas has not been properly charged with either incompetency or inefficiency by the Board as evidenced by the proofs advanced in support of such charges.
>
> (See Initial Decision on Remand, ante)

What remains for the Commissioner to determine is the penalty to be imposed upon respondent in connection with those tenure charges of corporal punishment and insubordination recited above and which have been proven to be true.

The Commissioner has reviewed the transcripts of testimony of the witnesses contained in the record of this matter. He notes specifically from a review of the transcripts of respondent's testimony (November 2, 1987, pp. 25-67; November 4, 1987, pp. 2-117) that the circumstances giving rise to the Board's tenure charges herein commenced as early as the 1976-77 school year, at which time his supervisor admonished him about the use of unacceptable physical force as part of his teaching techniques. (P-2) From that time until the Board certified tenure charges against respondent, the record is replete with documentation which establishes that the school administration had repeatedly expressed its concern and dissatisfaction with respondent's teaching techniques which incorporated the use of unacceptable physical exercises used as a means by respondent for the discipline of his pupils.

Also during this period there is adequate documentation in the record which establishes that respondent was engaging in inappropriate physical contact with certain of his pupils which was unacceptable to his superiors and on occasion to the parents of the affected pupils. Various attempts were made by respondent's superiors to cause him to refrain from his unacceptable conduct insofar as it had been determined that the use of physical exercises such as push-up and the incidents of physical contact which respondent had with his pupils were considered to be negative rather than positive means to modify pupil behavior.

Respondent, however, resisted or ignored the admonitions of his superiors and continued to employ what he considered to be the "Thomas Experience" with his pupils with full knowledge that the implementation of such teaching methods with his pupils was totally unacceptable to the school administration. (See P-2 through P-22.)

In the Commissioner's judgment the task of assessing a teaching staff member's fitness for continued employment is best expressed in the court's ruling in Redcay v. State Board of Ed., 130 N.J.L. 369 (Sup. Ct. 1943), aff'd 131 N.J.L. 326 (E. & A. 1944) in which the court adopted the following language of the Commissioner:

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> Unfitness for a task is best shown by numerous incidents. Unfitness for a position under a school system is best evidenced by a series of incidents. Unfitness to hold a post might be shown by one incident, if sufficiently flagrant, but it might also be shown by many incidents.
> (130 N.J.L. at 371)

The Commissioner concludes that the cumulative effect of the charges of corporal punishment and insubordination against respondent in the instant matter goes far beyond Redcay, supra.

More specifically, the Commissioner observes that each of the incidents of corporal punishment and insubordination which have been proven true against respondent herein can be attributed to those teaching techniques employed by respondent which he steadfastly maintains is the "Thomas Experience." The record establishes that the school administration had rejected respondent's method which utilized physical exercises and physical contact with pupils as a means of teaching discipline and self-control in the classroom. Moreover, it is evident from the record that respondent's failure to adhere to the admonitions and directives of the responsible school administrators to cease and desist from such negative teaching practices has also resulted in his being found guilty of the use of corporal punishment upon certain of his pupils.

The Commissioner has consistently held in the past that:

> The public schools were not created, nor are they supported, for the benefit of the teachers therein, *** but for the benefit of the pupils and the resulting benefit to their parents and the community at large. (See Clinton Smith et al. v. Board of Education of the Borough of Paramus et. al., 1968 S.L.D. 62, 67)

In reviewing the nature of respondent's acts of misconduct proven true herein, the Commissioner is convinced that these acts taken as a whole clearly demonstrate respondent's unsuitability to continue in the tenured employ of the Board. This finding and determination is grounded upon the evidence presented in the record of this matter, especially respondent's own testimony which fails to provide any assurance to the Commissioner that he has made any sincere attempt to comply with the directives of the school administration in the past or that there is reason to believe that respondent will cease and desist from such insubordinate acts of misconduct in the future.

Accordingly, the Commissioner hereby reverses the penalty of less than respondent's dismissal from his tenured employment as recommended herein by the ALJ.

It is hereby ordered that Ralph Thomas, having been found guilty of corporal punishment and insubordination, shall be dismissed as a tenured teaching staff member in the employ of the

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Livingston Township Board of Education effective as of the date of this decision. It is further ordered that a copy of the final decision in this matter be forwarded to the State Board of Examiners for its review and, in its discretion, further appropriate action.

COMMISSIONER OF EDUCATION

July 26, 1988

Pending State Board

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2723-87
AGENCY DKT. NO. 60-4/87

BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE,

Petitioner,

v.

RICHARD M. PAPPA,

Respondent.

Steven J. Tripp, Esq., for petitioner (Wilentz, Goldman & Spitzer, attorneys)

Sanford R. Oxfeld, Esq., for respondent (Oxfeld, Cohen, Blunda, Friedman, LeVine & Brooks, attorneys)

Record Closed: December 21, 1987 Decided: February 4, 1988

BEFORE **RICHARD J. MURPHY**, ALJ:

Respondent, Richard M. Pappa, is a tenured teacher and stands accused of conduct unbecoming in the form of open public lewdness, to which he pled guilty in November 1986. The petitioner, Board of Education of the Township of Old Bridge (Board), has suspended Pappa and now seeks his dismissal because of that incident under N.J.S.A. 18A:6-10 et seq. Pappa denies the incident, despite his guilty plea, and cites his otherwise exemplary teaching record. The case was heard on August 24, 1987, in Newark, and the record was closed on December 21, after the submission of medical evaluations and briefs. The question presented is whether the Board has proved that Pappa engaged in conduct unbecoming under the statute and whether he should be dismissed because of it. This opinion finds conduct unbecoming, but recommends suspension with continued therapy in lieu of dismissal for the reasons discussed below.

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The procedural history of this case began when the Board passed a resolution on March 30, 1987, certifying tenure charges against the respondent Pappa, which were then filed with the Department of Education and forwarded to the Office of Administrative Law for hearing as a contested case on April 23, 1987. A prehearing conference was held to settle the issues on May 26, 1987, and the case was heard on August 24, 1987, in Newark. After the hearing, the respondent voluntarily underwent a psychiatric and psychological evaluation with reports submitted by October 23, 1987. The Board filed a post-hearing brief on December 11, 1987, and Pappa responded on December 21, when the record closed.

Respondent Richard Pappa is 38 years old, married, and the father of three children. At the time of his suspension, he was a tenured teacher of special and gifted children and his record of performance was free from blemish and full of praise. The three school principals who had supervised and worked with Pappa since 1970[1] all found him to be an excellent and creative teacher. His innovative programs with special and gifted children had received national notice in The New York Times and The Wall Street Journal. There is no dispute as to the above facts, and I so **FIND.**

There is dispute as to the facts of the open public lewdness charge against Pappa which was covered by the local papers and led him into this forum. Respondent does not dispute that he pled guilty to the charge of open public lewdness under N.J.S.A. 2C:14-4 following his arrest in the Tall Oaks Rest Area on the Garden State Parkway by undercover agents operating a sting in the area on September 25, 1986. Though Pappa admitted pleading guilty to that charge on November 6, 1986, he claimed that he did so on advice of counsel, and denies having engaged in the conduct specified by the charge: namely, sitting on a picnic table bench with his pants open, exposing his genitals and masturbating in the presence of an undercover officer. He claims that he stopped at the rest area to make a phone call and then had to urinate, whereupon he was arrested by plainclothes police.

---

[1] Dorothy Engebretson, Dr. Joan George, and Harry Romeo

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The undercover sting in which Pappa was caught up was a joint operation mounted by the Cranford police and the New Jersey State police intended to investigate and interdict open and flagrant sexual activity between homosexuals gathering at the rest area. There had been complaints from adjoining homeowners, and reports of burglaries which were thought to be related to the sexual activity at the Tall Oaks Rest Area. Captain Harry Wild of the Cranford police testified as to the purpose of the investigation and stated that Cranford and State police officers had been briefed on procedures and advised to make no arrests for any behavior short of overt acts of lewdness: The officers were to ignore propositions made orally, as well as acts of urination. See, T13 to T15. Officer Francis Hanley had been so briefed and on September 26, 1986, was undercover with the other officers at the rest area at approximately 4:44 p.m. He saw the respondent, whom he recognized at the hearing, sitting on a rest area picnic table in a clearing in the woods. Hanley stated that Pappa's legs were spread apart and he was resting back on the palm of his hands, with his pants undone and unzippered. T27. Pappa was initially just sitting on the bench but, according to Hanley, after approximately two minutes during which they made continuous eye contact, he reached into his pants, removed his penis and began to masturbate by moving his hand up and down on his erect penis. According to Hanley, this went on for about 30 seconds to a minute, at which point the officer gestured to his fellow undercover officer indicating that he intended to make an arrest. The other officer did not observe the masturbation. Hanley approached Pappa, who quickly sat up, looked about, jumped up and stepped off the bench to the cover of a small tree. Hanley then approached Pappa and showed him his shield, at which time Pappa, who was pulling up his pants, attempted to flee for several feet and then stopped. Hanley claimed that he did not see Pappa urinating. Once under arrest, Hanley claims, Pappa asked whether the arrest would be a matter of public record and indicated that, if not, he wished to pay the fine as soon as possible. Prior to the arrest, no words were exchanged between Hanley and Pappa. In completing the arrest report, Hanley noted that Pappa stated that he was self-employed with Rich Craft of East Brunswick, at 755 Route 18, and did not mention his employment as a tenured teacher in Old Bridge.

After his arrest, Pappa was charged with public lewdness under N.J.S.A. 2C:14-4 for masturbating on top of a picnic table in the Tall Oaks Rest Area, and on November 6, 1986, he chose, on advise of counsel, to plead guilty to this disorderly person's offense with a protective order in Cranford Municipal Court. Respondent's recollection of his arrest in the rest area differs substantially, though he acknowledges his guilty plea of

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public lewdness. He claims that he was proceeding north on the Garden State Parkway on September 26, 1986, on the way to a 5:00 p.m. appointment with a chiropractor in Cranford. He stopped at the Tall Oaks Rest Area, as he claimed he usually does, to make a phone call back to his shop to ensure that everything was okay at his gift and flower business, Rich Craft. On this particular occasion, he stated that he also needed to urinate and, seeing no restrooms for this purpose, went into the back wooded area. He states that he initially tried to urinate behind a large tree in the back, but was approached by an individual whom he avoided. He then went over to the picnic table and sat down without urinating. When the individual (who was Officer Hanley) approached the picnic table, Pappa claimed that he turned around to avoid him and then moved away from the table behind another tree, where he intended to urinate without being watched. He stated that the individual approached him and asked to speak with him, at which time he tried to get into his car and was arrested. He denies masturbating in the rest area. He states that he pled guilty to the public lewdness charge, on advice of counsel, because he could have been found guilty merely on the basis of his admission that he was trying to urinate at the rest area. He acknowledges that he gave his gift and flower shop as employment when asked by the arresting officers.

Having heard the testimony of the arresting officer and the respondent, I **FIND**, as a matter of **FACT**, that Richard Pappa committed the act of public lewdness as charged at the Tall Oaks Rest Area of the Garden State Parkway on the afternoon of September 26, 1986. I found the testimony of Office Hanley to be more credible and note that the respondent pled guilty to the charge.

There is no dispute that in the period after his arrest and before the suspension resulting from it, Mr. Pappa functioned very satisfactorily in the classroom, as was observed on at least two occasions by his superiors (see, R-2, R-3). Despite adverse local publicity engendered by the charge and guilty plea, no parents complained and Pappa had no reported difficulties with students or staff.

After the hearing, it was agreed that Pappa would undergo a psychiatric evaluation, and he was seen by a licensed psychologist, Ronald Cannella, EdD., and a psychistrist, Charles D. Semel, M.D. The psychologist administered a number of standardized tests and described Mr. Pappa as a person who has had "a rather stable history, and loving family and has a deep respect for authority and rules of society" (R-4

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at 2). He notes that in the winter of 1986, Pappa experienced some difficulties due to the hospitalization of his son and father, the latter of whom eventually died in March 1987. Cannella noted the absence of any psychiatric history and concluded that Pappa did not reveal any psychiatric disorders. The test results indicated that Pappa functioned in the very superior range of intelligence, but that when emotionally frustrated he tends to become impulsive and may even sabotage his own efforts until he recovers and regains his superior productivity. Projective techniques indicated to Cannella that Pappa was a complex and sophisticated man with diverse interests who, "[D]espite his obvious brilliance and creativity, . . . seemed fearful of appearing helpless and inadequate and had some problems of admitting to minor shortcomings" (R-4 at 3). Although Cannella found Pappa to be concerned with presenting a good public front, he further found him to be "generally self-controlled" and noted that:

> Failure to evoke the approval of those in authority or violate rules, ordinarily leads to intense anxiety in him. Tests indicate Mr. Pappa is a righteous person about ethical matters; is moral; and has behaviors which are motivated by strong religious beliefs and good social adjustment. Sexual deviations and sexual preoccupations are not among matters that concern him or are reflected in test results. . . . (R-4 at 5.)

Although Cannella feels that respondent harbors feelings of inadequacy which may lead to outbursts of irrational anger, he feels that these will be quickly dissipated with expressions of guilt, contrition and problem solving. In conclusion, Cannella recommends the following:

> [T]he picture presented here is that of a rather stable man who has been destabilized by recent events. Although he may have some interpersonal weaknesses that he keeps mainly to himself, they have been exacerbated by recent events. On the whole, tests tend to indicate that this is a very socially minded, moral person who finds recent events to be very overwhelming indeed. For him to violate his own personality characteristics and defensive mechanisms as described earlier, in a way that would lead to public ridicule (i.e., act as charged) is contrary to the basic fiber of who he is. To do any different would result in the emergence of a tremendous amount of anxiety and symptoms that would be relected in test reults. Results reveal the contrary and suggest that he is still the master of his own destiny without the incumbrance [sic] of dysfunctional symptomatology which could interfere with his plans.

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> As for psychotherapy, he could probably benefit from some short-term treatment inorder to help him overcome the presence of mild to moderate depression that stems from the many traumas and overwhelming events that have accosted him. However, he may be resistant to insight oriented therapy but possibly accepting of more cognitive behavioral approaches that would help him cope with is current state of distress. (R-4 at 6.)

The psychiatrist, Dr. Charles Semel, also finds no demonstrable psychiatric illness and comments that:

> It is clear that this gentleman appears intelligent and in good emotional control. There is no evidence of deviant behavior of a sexual nature or any other nature evident in this examination. Certainly it is possible for such behavior not to be apparent when examined in formal setting. In spite of this, the patient does appear to be a well-qualified teacher without blemish on his teaching record. He should certainly be observed over the years ahead but my personal feeling would that it would be safe for him to return to the classroom setting. (P-3 at 2.)

The issue oposed by the above facts is whether Richard Pappa committed conduct unbecoming as charged and, if so, whether he should be dismissed because of it.

The Board argues that the respondent exhibited conduct unbecoming sufficient to warrant dismissal. It notes that unfitness to hold a teaching position may be shown by one incident, if sufficiently flagrant, and emphasizes that the respondent has not acknowledged any wrongdoing on his part nor offered any mitigating circumstances. Pappa responds that his case is similar to that of In the Matter of the Tenure Hearing of Martin Lieb, School District of the Town of West Orange, decided by Comm. (July 1, 1985), where a tenured teacher was susupended but not dismissed for a public lewdness violation which he acknowledged and explained. Pappa also denies the underlying charge, cites his exemplary record, and relies on the above medical opinions.

The respondent, Richard Pappa, does not argue that the lewd public behavior with which he was charged and to which he pled guilty does not constitute conduct unbecoming within the meaning of N.J.S.A. 18A:6-10. Prior decisions of the Commissioner, as well the common sense of the situation reveal that such openly lewd public behavior, even if not involving students or school time, can constitute conduct unbecoming sufficient to warrant dismissal or suspension. See, In the Matter of the

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Tenure Hearing of Jude Martin, decided by Comm. (Dec. 20, 1985), aff'd State Bd of Ed. (Dec. 1, 1986). On the basis of the facts found above in this case, I **CONCLUDE** that the conduct to which Pappa pled guilty constitutes conduct unbecoming under N.J.S.A. 18A:6-10 et seq.

The more difficult question here is whether that conduct unbecoming warrants the dismissal of this tenured teacher, whose 16-year teaching record is otherwise exemplary and unblemished. In choosing to suspend a teacher who pled guilty to a public lewdness charge after admitting that he touched an undercover agent's private parts, the Commissioner of Education in Lieb relied on several factors, including the respondent's outstanding teaching career, the factual circumstances underlying the charge, the fact that the offense was a single, isolated incident on an otherwise unblemished record, and the positive findings of the Board's psychiatrist. The respondent argues that the Lieb case is on all fours with his and should govern the result. The petitioner Board distinguishes Lieb in that there the respondent acknowledged and explained his offending conduct and offered mitigating circumstances, while here, Pappa denies the charge to which he pled guilty and offers no compelling scenario of stress or confusion to which sympathy might attach.

I am disturbed, as is the Board, by the respondent's apparent unwillingness to acknowledge at the hearing the underlying facts which he effectively admitted by his plea. I am also troubled by his failure to disclose his employment as a teacher to the arresting officers, but can understand how this might have been a result of the severe stress and shock of the arrest, as well as the respondent's enormous apprehension of possible adverse consequences to his teaching career. But despite these concerns, I am persuaded that, under the factors set forth in Lieb, dismissal is not warranted under these circumstances. Pappa's teaching career has been outstanding and his innovative and creative methods have brought him some national attention and acclaim. Even after his arrest, his supervisors advised that his performance was quite satisfactory. The factual circumstances underlining the tenure charge stem from a single and isolated incident which might be fairly described on this record as a momentary lapse and aberration in Pappa's personal life. His conduct was less unbecoming than that of the teacher in Lieb, who was suspended and not dismissed, because it did not involve physical contact. Nor did Pappa's conduct include the kind of crude sexual suggestion to a stranger that was found in the Martin case to violate the standards of circumspection, self-control and sensitivity

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the community rightly expects of its teachers. Pappa's conduct at the Tall Oaks Rest Area was no way related to the discharge of his duties as a tenured teacher and there is no evidence that he has been impaired as a teacher capacity because of it. The findings of the medical evaluators, (the final factor under Lieb,) do not reveal any psychiatric illness, and both the psychiatrist and psychologist (representing two professionals not known to always agree) conclude that Richard Pappa is fit to resume his duties as a tenured teacher.

Having considered the circumstances of this case under the guidance of the Lieb decision and other authority, I **CONCLUDE** that the respondent should be reinstated, but that his unbecoming conduct should be penalized by the loss of pay for the statutory 120-day period as provided under N.J.S.A. 18A:6-14. I further recommend that the respondent be directed as a condition of reinstatement, to continue some form of therapy, as suggested by the psychologist in this instance.

Accordingly, it is **ORDERED** that the respondent shall forfeit in salary for the 120 days provided by law and that he shall be reinstated to his position forthwith, subject to the condition that he continue in therapy as discussed.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

FEB. 4, 1988
DATE

RICHARD J. MURPHY, ALJ

Receipt Acknowledged:

FEB - 4 1988
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

FEB 8 1988
DATE

OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE TENURE	:	
HEARING OF RICHARD PAPPA, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE TOWNSHIP OF OLD	:	DECISION
BRIDGE, MIDDLESEX COUNTY.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Board's exceptions were timely filed pursuant to N.J.A.C. 1:1-18.4.

The Board argues that dismissal is the appropriate penalty in this matter, averring that the ALJ erred in recommending the lesser penalty of 120 days salary forfeiture for the statutory period. N.J.S.A. 18A:6-14 The Board relies on its post-hearing brief in support of its position, the arguments of which have been addressed by the ALJ in the initial decision.

In addition, the Board brings to the Commissioner's attention the fact that subsequent to the record closing in this matter, an arbitrator's award adverse to the Board was handed down. It was determined therein that, given the collective bargaining agreement in effect between the Board and the Old Bridge Education Association, the Board must pay respondent for the 120 days statutory period, plus interest. This determination conflicts with the ALJ's recommended penalty.

Upon independent review of the record in this matter including the transcript of the hearing, documentary evidence, post-hearing briefs and the Board's exceptions, the Commissioner agrees with the ALJ's determination that respondent is guilty of conduct unbecoming a teacher. He likewise agrees with the determination that dismissal is not warranted given:

1. Respondent's offense appears to be a single isolated incident which may be considered aberrant behavior;

2. Psychological and psychiatric evaluations (P-3,R-4) do not indicate respondent to be a threat to the pupils entrusted to his care; and

3. Respondent's previously unblemished career as a teacher which appears to have been above average.

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As to the penalty to be imposed, the Commissioner agrees with the ALJ that In re Lieb, supra,[1] is instructive but he disagrees with the ALJ's conclusion that respondent's behavior herein is conduct "less unbecoming" than Lieb's because it did not involve physical contact. While the behaviors are admittedly different, each is nonetheless sufficiently egregious to warrant severe financial penalty. Consequently, the Commissioner determines that an increment withholding for 1988-89 is warranted as well as a salary forfeiture for 120 days.

As to the Board's exceptions with respect to the arbitrator's award, it is noted for the record that the Commissioner is empowered to assess whatever penalty he deems appropriate in a tenure hearing matter, be it dismissal or some form of reduction in compensation. N.J.S.A. 18A:6-10 et seq. Therefore, it is unnecessary for him to deal with the question as to whether or not the contract limited the right of the Board to suspend without pay. The decision herein deals solely with the rights of the Commissioner to levy whatever penalty he deems fit given the facts of the case.

Accordingly, the Commissioner determines that respondent shall forfeit 120 days salary and he shall have any and all salary increments withheld for the 1988-89 school year. Moreover, as per the recommendation of the psychologist (R-4) and the ALJ, respondent shall participate in therapy.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

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[1] The Commissioner notes the ALJ's reliance on the case In the Matter of the Tenure Hearing of Jude Martin, supra, in weighing a penalty. Such reliance is premature, however, in that the Commissioner has not issued a final determination in that matter, having twice remanded it to OAL where it still awaits final disposition.

March 14, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5776-87
AGENCY DKT. NO. 248-7/87

MILTON SCHAEFFER,

Petitioner,

v.

BOARD OF EDUCATION OF SOUTH ORANGE-MAPLEWOOD,

Respondent.

Wayne J. Oppito, Esq., for petitioner

Sidney Sayovitz, Esq., for respondent
(Greenwood, Young, Tarshis, Diniero & Sayovitz, attorneys)

Record Closed: January 11, 1988 Decided: January 15, 1988

BEFORE **WARD R. YOUNG, ALJ:**

Petitioner, a tenured junior high school and middle school supervisor of English, alleged the Board of Education of South Orange-Maplewood (Board) violated his tenure and seniority rights when it abolished the middle school supervisory position and employed a nontenured district-wide Director of Language Arts/English (K-8), and reassigned him to a classroom teaching position.

The Board denied the allegation and asserted its action was a lawful exercise of its discretionary authority.

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The matter was transmitted to the Office of Administrative Law as a contested case on August 25, 1987 pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on October 19, 1987 at which the parties agreed to submit the matter for summary decision upon a stipulation of all material facts. The parties filed briefs and the record closed with final filing on January 11, 1988.

The following stipulated facts are adopted herein as **FINDINGS OF FACT:**

1. Petitioner was initially employed by the Board of Education of South Orange-Maplewood for the 1968-69 school year as the English department head and teacher assigned to Maplewood Junior High School (grades 7-9). The position of English department head requires a New Jersey Department of Education supervisory certification and petitioner, at all times, possessed said certificate. (Job description attached as J-1).

2. Petitioner continued his duties as the English department head and teacher at the Maplewood Junior High School until September 1, 1980. Throughout the period from 1968-1980, petitioner had no regular supervisory or teaching duties at the South Orange Junior High School, or at any elementary school or high school.

3. Petitioner was transferred to South Orange Middle School (grades 6-8) effective September 1, 1980, to serve as English department head and teacher. Petitioner continued in this position until June 1987. Throughout the period from September 1980 through June 1987, petitioner had no regular supervisory or teaching duties at the Maplewood Junior High School or Maplewood Middle School. The junior high schools in the district had been transformed into middle schools in a reorganization effective in the 1980-1981 school year.

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4. In 1987, the Board of Education created the position of Director of Language Arts/English, Kindergarten-Grade 8. The Director of Language Arts/English position had district-wide responsibilities and served the middle schools (South Orange and Maplewood) and the elementary schools. On June 27, 1987, without waiving his rights, petitioner applied for the aforementioned position. Petitioner possesses all Department of Education certificates and endorsements required for the position of Director of Language Arts/English (K-8). (Job description attached as J-2).

5. Petitioner was not selected for the Director of Language Arts/English position for the 1987-1988 school year. Said position was filled by Abalin Green whose current salary is $54,457. Abalin Green is newly hired in the school district and has not acquired tenure in any position.

6. Petitioner is currently assigned as an English teacher at South Orange Middle School and is earning $44,314 per school year.

7. Petitioner possesses a teaching certificate for grades 7-12, English and History, elementary grades 3-12. He also possesses a supervisory certificate and secondary school principal certificate. The position of Director of Language Arts/English, grades K-8, requires a supervisor's certificate. During the period that petitioner served as a department head for English and as a teacher, the majority of his time was spent as a department head.

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I.

It is undisputed that the district-wide supervisory position for K-8 was newly created and petitioner only served in the supervisory position at the junior high school (7-9) and the middle school (6-8). Since the current seniority regulations, N.J.A.C. 6:3-1.10, provides for the attainment of seniority only on accrual of actual experience in a category, I **FIND** that petitioner has no seniority in the district-wide position of Director of Language Arts/English (K-8). I **CONCLUDE**, therefore, that petitioner's claim that his seniority rights were violated shall be and is hereby **DISMISSED**.

II.

Concerning petitioner's claim of a violation of his tenure rights, he relies on Capodilupo v. West Orange Bd. of Ed., 218 N.J. Super. 510 (App. Div. 1987) as controlling, wherein the court stated at 514-515:

> A tenured teacher, however, is entitled to retention as against a nontenured teacher under the tenure law. To hold otherwise would be to defeat the purpose of tenure which was to give a measure of security to teachers after the prescribed number of years of service. See, Viemeister v. Bd. of Education of Prospect Park, 5 N.J. Super. 215, 218 (App. Div. 1949).

The Board also relies on Capodilupo and argues that the State Board held that a Board's obligation to recognize the tenure rights of a teacher must take the form of "consideration of the reassignment of the affected teacher to assignments filled by nontenured teachers for which he is qualified, but which are in categories in which he has no seniority." The Board argues that petitioner has been neither dismissed nor reduced in compensation, and that it considered petitioner's application for the newly-created district-wide supervisory position but simply chose to employ another it believed was better suited for the position.

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The Board also cites Miller v. Bd. of Ed. of the Borough of New Providence, 1987 S.L.D. _____ (decided by the Commissioner on January 8, 1987), wherein the Commissioner held that Miller may not rely on Capodilupo "inasmuch as he had never previously performed any of the major duties of vice-principal in his former title, nor had he previously acquired tenure in the position of vice-principal."

The distinction must be noted between Miller and the instant matter as the petitioner herein performed the duties of supervisor, albeit for grades 6-9, and is in fact tenured in that category.

A review of the job descriptions of the supervisory position previously held by petitioner and the district-wide position currently held by nontenured Abalin Green indeed reveals the latter to be broader but with no significant variations of responsibilities. It is noted that both appear to be district-wide. See, J-1 and J-2. **I SO FIND.**

III.

The matter of Charles Bednar v. Westwood Board of Education, A-2419-86T7, decided by the Appellate Division of Superior Court on November 24, 1987, and approved for publication on December 11, 1987; appears to be on point and dispositive of the instant matter.

Bednar, a tenured full-time elementary art teacher with a comprehensive subject field endorsement in art, had no secondary experience. His employment was reduced to part-time while the Board retained a nontenured teacher of secondary art, and he therefore petitioned a claim of a violation of his tenure rights.

The Appellate Division panel held that the tenure statute, N.J.S.A. 18A:28-13, "authorizes the creation of seniority regulations to rank the job rights of tenured teaching staff . . ." but "does not create or authorize the Commissioner to create competing rights for nontenured teachers." (slip opinion at 4).

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The court further stated at 5:

> The State Board of Education attempted to fairly resolve a tension it perceived between tenure and seniority. The State Board's solution was to rule that tenure does not permit a teacher to claim an assignment in a job category in which he has no seniority against a nontenured teacher with experience in the category. The Board cited N.J.S.A. 18A:28-10 which invokes seniority to determine job rights in a RIF, and reasoned that since Bednar had no seniority teaching art on a secondary level, his rights were not violated by reducing his hours while retaininag a full-time nontenured secondary art teacher.
>
> The defect in the Board's approach is this. N.J.S.A. 18A:28-10 declares only the rights inter sese of tenured teachers in a RIF. Among them, seniority is determiniative. But, the statute does not authorize regulatory dilution of tenure rights by affording a nontenured teacher "seniority." The tension perceived by the State Board between tenure and seniority is one the Board created. Its only proper resolution is to rule that the rights conferred by the tenure statute may not be dissolved by implementing regulations.
>
> The State Board's approach may or may not represent sound educational policy. However, it erodes tenure rights which appear plain on the face of the statute, which we are bound to recognize and which can be removed only by the Legislature. See, In re Jamesburg High School Closing, 83 N.J. 540, 547 (1980).
>
> The judgment of the State Board of Education is reversed. The matter is remanded for appropriate further proceedings.

IV.

I FIND that the Board eroded and violated the tenure rights of Milton Schaeffer when it reassigned him to classroom teaching and employed nontenured Abalin Green to the district-wide position of Director of Language Arts/English (K-8). I **CONCLUDE**, therefore, that the Board shall reassign Schaeffer to the supervisory position at issue. **IT IS SO ORDERED.**

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It is recognized that the salaries of Schaeffer and Green for the 1987-88 school year are $44,314 and $54,357, respectively. Since salary is not at issue in the instant matter it shall be left to the parties as a negotiable item to be determined.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

15 January 1988
DATE

WARD R. YOUNG, ALJ

JAN 20 1988
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

JAN 21 1988
DATE

Mailed To Parties:
FOR OFFICE OF ADMINISTRATIVE LAW

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MILTON SCHAEFFER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF SOUTH ORANGE-MAPLEWOOD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law.

It is observed that the Board's exceptions to the initial decision, as well as petitioner's reply to those exceptions, were filed with the Commissioner in accordance with the applicable provisions of N.J.A.C. 1:1-18.4.

In its exceptions to the initial decision the Board argues that the ALJ misinterpreted both Capodilupo, supra, and Bednar, supra, in the applications of the rulings handed down in these cases to the factual circumstances presented in the instant matter. The Board maintains that both of the above-cited cases may be contrasted with the facts related to petitioner's claim herein as follows:

> 1. Petitioner has not suffered any loss in his tenure status because he continues to be employed in a teaching position and has suffered no loss in pay;
>
> 2. Neither Capodilupo, nor Bednar, gives a tenured employee the right to a promotion to a new position of which petitioner had only performed a small part of the duties; and
>
> 3. A tenured employee has no automatic right to a position but must only be considered by the Board of Education who may select a non-tenured employee if there are sound educational reasons. (emphasis in text)
>
> (Board's Exceptions, at p. 2)

In rejecting the ALJ's findings of fact contained in the initial decision, ante, the Board maintains that petitioner's seniority in his previous position at the South Orange Middle School was never one that conferred upon him district-wide seniority. Consequently, the Board avers that petitioner may not now lay a seniority claim to the newly created district-wide posi-

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tion of Director of Language Arts/English, K-8, now occupied by a fully certified nontenured employee.

Petitioner in his reply to the Board's exceptions maintains they are totally without merit. Petitioner maintains that there are numerous decisions of the Commissioner, the State Board and the courts which hold that the removal of a teaching staff member from his/her tenured position and the reassignment to some other position is, in fact, a dismissal pursuant to the tenure statutes, N.J.S.A. 18A:28-5 and 6. In this regard, petitioner relies on Philip Howley and Dewey Bookholdt v. Board of Education of the Township of Ewing, 1982 S.L.D. 1328, aff'd State Board 1983 S.L.D. 1554; Wilma Colella v. Board of Education of Borough of Elmwood Park, 1983 S.L.D. 149, aff'd State Board 172, aff'd N.J. Superior Court, Appellate Division, DKT. NO. A-6090-82T3, July 9, 1984.

Petitioner further maintains that he acquired his tenure status under the certificate that the Board required him to hold as supervisor notwithstanding the fact that some of his duties were as a teacher. Consequently, petitioner argues that the Board removed him from his tenured position as Supervisor of English, replaced him with a nontenured person in the newly created position of Director of Language Arts/English, K-8, and required that the person in such position possess a supervisor's certificate. Petitioner further argues that the Board violated his tenure rights to such position according to Capodilupo, supra, and Bednar, supra. Petitioner claims the Board gave no educational reasons why he was replaced by a nontenured person (Capodilupo) or why he, as a tenured teaching staff member who held the same supervisor's certification as the nontenured person newly employed as the Director of Language Arts/English, K-8, was not selected. In support of his tenure claim to the Board's newly created position of Director of Language Arts/English, K-8, petitioner relies on the specific language used by the court in Bednar, 221 N.J. Super. 239, wherein in reversing the State Board of Education it held:

> The defect in the Board's approach is this. N.J.S.A. 18A:28-10 declares only the rights inter sese of tenured teachers in a RIF. Among them, seniority is determinative. But, the statute does not authorize regulatory dilution of tenure rights by affording a non-tenured teacher "seniority." The tension perceived by the State Board between tenure and seniority is one the Board created. Its only proper resolution is to rule that the rights conferred by the tenure statute may not be dissolved by implementing regulations.
>
> The State Board's approach may or may not represent sound educational policy. However, it erodes tenure rights which appear plain on the face of the statute, which we are bound to recognize and which can be removed only by the Legislature. See In re Jamesburg High School

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Closing, 83 N.J. 540, 547 (1980). [at 243]
(Petitioner's Reply to Exceptions, at p. 3)

Finally, for the reasons stated in his reply to exceptions, petitioner urges the Commissioner to adopt those findings, conclusions and recommendations reached by the ALJ in the initial decision in this matter.

The Commissioner has reviewed the respective arguments advanced by the parties in support of their positions related to the findings and conclusions contained in the initial decision herein.

In the Commissioner's judgment it is unnecessary to arrive at a seniority determination with regard to the matter herein controverted, namely because the undisputed facts of this matter support the ALJ's conclusion that petitioner has no seniority claim to the district-wide position created by the Board. Moreover, inasmuch as the person currently employed in this position has not acquired a tenure status pursuant to law, he/she has no lawful claim to seniority protection in that position.

Consequently, what remains to be determined is whether petitioner may lay claim to the controverted position by virtue of having acquired a tenure status under the endorsement of supervisor which he was required to hold as a condition for his employment by the Board in the position of District Director, Department Head (English). (J-1)

The Commissioner has reviewed the Board's job description for Director of Language Arts/English, K-8 (J-2) to which petitioner lays a tenure claim and finds that, although the title of this position is more expansive, many of the qualifications and responsibilities enumerated therein are similar in many respects, if not identical, to petitioner's prior job description (J-1) for the position since abolished by the Board. The only significant difference between job descriptions J-1 and J-2 is that the Board has added more qualifications to the latter job description for Director of Language Arts/English, K-8. Nevertheless, one of those qualifications requires that the person to be employed in such position possess a New Jersey Supervisor's Certificate. (J-2)

In the Commissioner's judgment the arguments advanced by the Board regarding petitioner's tenure claim to the position of Director of Language Arts/English, K-8, as described in (J-2) are totally without merit.

The court in Bednar, supra, expressly rejected the contention that State regulatory policy pertaining to seniority can be implemented in a manner which "***erodes the tenure rights which appear plain on the face of the statute, which we are bound to recognize and which can only be removed by the Legislature.***" (at 243)

The Commissioner finds the language in Bednar directly on point with regard to petitioner's tenure claim herein. The Commis-

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sioner further finds that certain of the additional qualifications and duties included by the Board within the written job description for the position of Director of Language Arts/English, K-8, do not warrant a different conclusion. Were the Commissioner to consent to such additional requirements for the newly created position it would then, in effect, erode petitioner's tenure rights accorded to him by the tenure statutes. The Commissioner so holds.

Accordingly, the Commissioner adopts as his own those findings and conclusion in the initial decision as modified and supplemented herein.

The Board is hereby directed to reassign petitioner to the position of Director of Language Arts/English, K-8, as of the date of the Commissioner's decision. It is recognized that the differential in petitioner's salary upon reassignment to this position for the remainder of the 1987-88 school year will be determined through good faith negotiations between the parties.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

March 14, 1988

Pending State Board

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7794-85
AGENCY DKT. NO. 398-11/85

HELEN YORKE,
Petitioner,
v.
BOARD OF EDUCATION
OF THE TOWNSHIP OF
PISCATAWAY, MIDDLESEX COUNTY,
Respondent.

Stephen E. Klausner, Esq., for petitioner (Klausner, Hunter & Oxfeld, attorneys)
David B. Rubin, Esq., for respondent (Rubin, Rubin & Malgran, attorneys)

Record Closed: January 4, 1988 Decided: February 8, 1988

BEFORE LILLARD E. LAW, ALJ:

STATEMENT OF THE CASE

Petitioner, a tenured teaching staff member in the employ of the Board of Education of the Township of Piscataway (Board) filed a Petition of Appeal before the Commissioner of Education (Commissioner) by which she alleges the Board violated N.J.S.A. 18A:29-14 with regard to its determination to withhold her salary increment for the 1985-86 school year. The Board denies the allegation and seeks to have the petition dismissed.

PROCEDURAL ASPECTS

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Subsequent to issue having been joined, the Commissioner, on December 9, 1985, transmitted the matter to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. On February 6, 1986, a prehearing conference was conducted by the Honorable Daniel B. McKeown, Administrative Law Judge (ALJ). Counsel for the parties agreed to the issues to be determined and established the date of March 20, 1986 for the conduct of the hearing.

Thereafter, counsel for petitioner requested of Judge McKeown that the instant matter be placed on OAL's inactive list upon advice that the Board contemplated certifying tenure charges against petitioner with the Commissioner on or about April 10, 1986. By way of Order dated March 24, 1986, and issued by Judge McKeown, the matter was placed on the inactive list pending the Board's determination in regard to the tenure charges. By letter dated May 5, 1986, Judge McKeown informed counsel of his understanding that the Board did in fact certify charges against petitioner and, further, requested the parties to advise him as to whether or not they believed the two cases should be consolidated.

Subsequently, the tenure matter was assigned to the undersigned with the instant matter transferred from Judge McKeown for the purpose of consolidation. (In the Matter of the Tenure Hearing of Helen Yorke, School District of the Township of Piscataway, Middlesex County, OAL DKT. NO. EDU 3393-86). In the Spring of 1986, the Board again took action, pursuant to N.J.S.A. 18A:29-14, to withhold petitioner's salary increment for the 1986-87 school year. Petitioner perfected her Petition of Appeal before the Commissioner challenging the Board's action (Helen Yorke v. Board of Education of the Township of Piscataway, Middlesex County, OAL DKT. NO. EDU 7426-86). This matter was consolidated with the tenure matter and the instant matter.

During the tenure proceedings, by motion made and granted, the two increment withholding cases were severed from the tenure matter. Consequently, on November 7, 1986, a prehearing conference was held with regards to the consolidated salary increment withholding matters. Thereafter, on March 27, 1987, the consolidated withholding cases were placed on the OAL's inactive list pending decision in the tenure matter.

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On August 3, 1987, the Acting Commissioner issued his decision with regards to the tenure matter ((OAL DKT. NO. EDU 3393-86) and among the penalties imposed upon petitioner herein by the Commissioner was the withholding of any and all salary increments for the 1986-87 school year. Thus, by Order of the Commissioner, petitioners challenge to the withholding of her 1986-87 increment was rendered moot (EDU 7426-86).

The instant matter was heard on November 16 and 17, 1987. The parties requested and were granted leave to submit posthearing briefs. The record was closed on January 4, 1988, upon receipt of the last submission.

FINDINGS OF FACT

Having carefully reviewed and considered the testimony of the witnesses together with the documents moved into evidence, and having given fair weight thereto; I **FIND** the following **FACTS** in this matter:

Petitioner, a high school mathematics teacher, was presented with a Summary Evaluation of her teaching performance for the 1983-84 school year on May 24, 1984, by her immediate supervisor, Carl Anthony, Chairperson of the High School Mathematics Department (R-1). Petitioner submitted her comments in rebuttal to Anthony's Summary Evaluation for 1983-84 (R-1). On or about June 1, 1984, petitioner and Anthony signed a document identified as petitioner's Individual Professional Improvement Plan (PIP) for the 1984-85 school year (R-1). Anthony testified that petitioner's PIP, executed in June 1984, formed the basis for his evaluation of petitioner during the 1984-85 school year.

During the 1984-85 school year, Anthony observed and evaluated petitioner's teaching performance on November 12, 1984 (Algebra I), December 5, 1984 (Algebra I) and February 26, 1985 (Algebra II). Each observation and evaluation was followed by Anthony's submission of a Supervisory Report at a conference with petitioner (J-1, J-2, J-4). Petitioner signed each of Anthony's Supervisory Reports to acknowledge receipt of same (J-1, J-2, J-4). Petitioner also submitted comments by way of a rebuttal (J-3) to Anthony's Supervisory Report of December 5, 1984 (J-2).

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The Supervisory Report is composed of three sections: i.e.; (1) A checklist form including nine major areas to be observed and evaluated; (2) Narative comments by the evaluator on areas observed that need improvement by the teacher; and, (3) A PIP progress report. On the November 12, 1984 checklist, Anthony indicated eight major areas in which he observed petitioner to be competent and one major area where he indicated petitioner needed improvement. This was followed by Anthony's outline of eight comments in areas that need improvement under the broad, major heading entitled "Knowledge and Effective Use of Subject Contents", together with six recommendations (J-1). Anthony also set forth three comments/suggestions with regard to petitioner's PIP and his rating of "unsatisfactory." (J-1)

In the December 5, 1984 Supervisory Report, Anthony indicated petitioner's competence in four of the nine major areas, one major area was not observed, and four areas in which petitioner needed improvement (J-2). The four major areas which, in Anthony's opinion, petitioner needed improvement were identified, in part, as; Lesson Preparation and Organization, Teaching/Learning Atmosphere, Knowledge and Effective Use of Subject Content and, Teacher/Pupil Rapport (J-2). Accompanying this checklist was Anthony's detailed comments, in outline form, with respect to each of the areas Anthony determined petitioner needed improvement together with his outline of six recommendations (J-2). A PIP progress report was also included, which set forth four recommendations by Anthony and an "unsatisfactory" rating of petitioner (J-2).

Petitioner submitted her comments (J-3) in rebuttal to Anthony's observations and evaluations as expressed in the December 5, 1984, Supervisory Report (J-2). Petitioner contended, among other things, that:

> This evaluation is a one-sided biased interpretation of a lesson about which Carl Anthony has made many inaccurate assumptions... (J-3).

Petitioner, therein, addressed specific examples of her preparation for, and the classroom activities performed, which were criticised by Anthony in the December 5, 1984 Supervisory Report. In conclusion, petitioner opines, in part, that:

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> ...the thrust and apparent attitude of this review seems so incomprehensible that the only plausible explanation could be some unspoken, unwritten biased or prejudiced underlying motive or problem by the reviewer... (J-3).

Subsequently, Anthony executed a third Supervisory Report based upon his observation of petitioner on February 26, 1985 (J-4). On the checklist of the nine major areas, Anthony observed that petitioner was competent in seven and needed improvement in two. The two major areas in which Anthony determined petitioners need for improvement were identified as; Lesson Preparation and Organization and, Knowledge and Effective Use of Subject Content. This was followed by Anthony's outline comments together with his recommendations. Attached thereto was petitioner's PIP progress report without comment by Anthony, however, the rating of "unsatisfactory" was checked (J-4).

On or about March 25, 1985, petitioner signed a Summary Evaluation executed by Anthony (J-5). On Part I, A. Most Significant Teaching Components, Anthony rated petitioner unsatisfactory on two of the two items; i.e., Lesson preparation and organization and, teaching/learning atmosphere. Under Part B, Significant Teaching Components, Anthony rated petitioner unsatisfactory on three of a total of nine items (J-5). Attached thereto was a three-page typewritten narative executed by Anthony to explain or comment upon his rating of petitioner for the 1984-85 school year and prior years. Anthony recommended that petitioner "be denied a full salary increase and salary increment for one year (1985-86 school year)" (J-5). This portion of the Summary Evaluation was not signed nor dated by petitioner, however, she submitted her rebuttal by way of a three typewritten page document together with attachments (J-6).

On April 4, 1985, both Anthony and petitioner signed petitioner's final PIP for the 1985-86 school year. Petitioner testified, among other things, that the 1985-86 PIP was developed by Anthony while petitioner sat and listened. Petitioner admitted that she took no action with respect to the PIP, however, she executed an addendum to the 1985-86 PIP (J-5).

Subsequent to her receipt of Anthony's Summary Evaluation for 1984-85 and her PIP for 1985-86, petitioner invited two supervisory staff members to observe her teaching performance. Patricia Walsh conducted such an observation subsequent

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to which she and petitioner signed the Supervisory Report on May 6, 1985 (J-7). Thereafter, Carol Rigney conducted an observation of petitioner on May 9, 1985. Petitioner signed the Supervisory Report on May 14, 1985. Rigney's signature is not dated (R-8).

Both Walsh and Rigney observed and checkmarked petitioner's strengths in the major areas of concern. Neither observer indicated that petitioner needed improvement in any of the nine major areas. Both evaluators commended petitioner on her classroom performance, with Walsh expressing positive comments about petitioner's out-of-classroom demeanor and conduct (J-7, J-8).

Subsequently, based on Anthony's recommendation, the Board acted to withhold petitioner's 1985-86 salary and adjustment increment, pursuant to N.J.S.A. 18A:29-14. Prior thereto, petitioner appeared before the Board to explain her position and defend against Anthony's recommendation.

DISCUSSION AND CONCLUSIONS

The controlling statute with respect to the instant matter is found at N.J.S.A. 18A:29-14, which provides as follows:

> "Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education. It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefore, to the member concerned. The member may appeal such action to the commissioner under rules prescribed by him. The commissioner shall consider such appeal and shall either affirm the action of the board of education or direct that the increment or increments be paid. The commissioner may designate an assistant commissioner of education to act for him in his place and with his powers on such appeals. It shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment."

The Courts of our State have held that an annual salary or adjustment increment is not a matter of statutory right but, rather, its award to a teaching staff member is based upon meritorious service to the school district. Consequently, it is subject to denial by a local board of education for inefficiency or other good cause. North Plainfield Educ. Ass'n. v. Bd. of Educ., 96 N.J. 587, 594 (1984). In the matter of

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Bd. of Education Bernards Tp. v. Bernards Tp. Ed. Ass'n., 79 N.J. 311 (1979), the Court said that:

> ....The decision to withhold an increment -- although directly affecting the work and welfare of a teacher--is thus dependent upon an evaluation of the quality of the services which the teacher has rendered. The purpose of the statute is thus to reward only those who have contributed to the educational process thereby encouraging high standards of performance. In determining whether to withhold a salary increment, a local board is therefore making a judgment concerning the quality of the educational system. It is reasonable to assume that an adversely affected teacher will strive to eliminate the causes or bases of "inefficiency." The decision to withhold an increment is therefore a matter of essential managerial prerogative which has been delegated by the Legislature to the Board. .... Id. at 321

Thus, the Court has instructed that an annual salary or adjustment increment is a managerial prerogative to reward only to those who have contributed to the educational process through the encouragement of high standards of performance. It has been said that: "A person may have a vested right to a salary but he has no vested right to an increment." Williams v. Bd. of Ed. of Twp. of Teaneck, 1977 S.L.D. 1008, 1012; Zitani v. Bd. of Ed. of Twp. of Willingboro, 1975 S.L.D. 439, 444. Accordingly, it is well established that a board of education is clothed with the authority to withhold a salary increment or an adjustment increment or both for inefficiency or other good casue. N.J.S.A. 18A:29-14. Such determinations are within a board's discretionary authority, absent a finding of arbitrary, unreasonable, capricious or illegal actions. Boult v. Bd. of Ed. of Passaic, 136 N.J.L. 521 (E.&A. 1948).

Petitioner here argues that when dealing with the role of the Commissioner concerning the review of local board of education decisions to withhold salary increments, the discussion must begin with Appellate bench's decision in Kopera v. West Orange Bd. of Education, 60 N.J. Super., 288 (App. Div. 1960). Petitioner cites respondent West Orange Board's argument which quotes from Attorney General David D. Furman's brief, who said that:

> ...Under this view of the substantive law, the Commissioner could not properly redetermine for himself whether petitioner had in fact been unsatisfactory as a teacher; that issue would be irrelevant as a matter of law. The only question open for review by the Commissioner would be whether the Board had a reasonable basis for its factual conclusion.... Id. at 295

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Thereafter, the Court said:

> ...[W]e think the Commissioner should have determined (1) whether the underlying facts were as those who made the evaluation claimed, and (2) whether it was unreasonable for them to conclude as they did upon those facts, bearing in mind that they were experts, admittedly without bias or prejudice, and closely familiar with the mise en scene; and that the burden of proving unreasonableness is upon the appellant. (emphasis supplied) Id. at 296-297

Petitioner urges the Commissioner to apply the two-prong Kopera analysis in determining whether her increments were properly withheld. She argues that the Commissioner must first determine whether the underlying facts which formed the basis for the increment withholding were true. And second, whether those facts constituted a reasonable basis for the increment withholding.

In addition, petitioner submits that based upon a review of Commissioner and Appellate court decisions involving the withholding of increments on inefficiency related grounds, the following standards must be met by a board of education in order to fulfill the Kopera standards:

> 1. There must be a specific identification of a teaching staff member's inefficiencies and/or deficiencies with regard to the performance of designated professional duties which are based upon clearly identifiable standards and norms adopted by a local board. These standards must be applied uniformly to all individuals in a particular teaching category or classification.
>
> 2. The local board of education must establish that there were comprehensive efforts over a substantial period of time to remediate perceived inefficiencies based on clearly identifiable standards and norms.
>
> 3. A local board of education must establish that the affected teaching staff member had been placed on notice that there were a sufficient number of perceived inefficiencies with regard to the performance of that person's professional duties identified as part of the evaluation process so as to warrant the withholding of an increment sufficiently prior to the invocation of this second most severe sanction against a teaching staff member so as to permit the remediation of any perceived problems. (Cases have clearly established that it is not enough to supply this notice through advising an individual that a determination had been made to withhold his or her increment days before official Board action.) (Petitioner's brief at 2-3)

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Petitioner appears to shift her burden of proof from herself to the Board with respect to the three elements set forth above; i.e., (1) specific identification of inefficiencies and/or deficiencies based upon identifiable standards or norms, (2) time to remediate the identified inefficiencies and/or deficiencies and, (3) notice of such inefficiencies and/or deficiencies prior to the withholding of increment. That notion is rejected by this administrative tribunal. Kopera clearly holds to the contrary "that the burden of proving unreasonableness is upon the [petitioner]." id. at 297. There is no shifting burdens in salary increment withholding cases established by rule, court decision or Commissioner decision. Rather, it is petitioner's affirmative burden to demonstrate, by a preponderance of the credible evidence, that the Board failed to meet one or more of those elements in order to prevail on the grounds of unreasonableness. Kopera.

Consequently, I **CONCLUDE** that petitioner has failed to meet her burden. This is so for the following reasons as established by the facts in this matter:

The record demonstrates that Anthony observed and evaluated petitioner's performance on three occasions during the 1984-85 school year (J-1, J-2, J-4). On each of the Supervisory Reports executed by Anthony, he identified specific areas of petitioner's competence and those areas where he determined petitioner needed to improve. Additionally, Anthony spelled out in detail those areas in which petitioner needed improvement together with recommendations for achieving such improvements. Anthony also related the Supervisory Report to petitioner's PIP agreed upon in June 1984.

The facts demonstrate that petitioner was provided the opportunity to remediate those deficiencies indentified by Anthony. On his December 12, 1984 Supervisory Report, Anthony identified four major areas in which petitioner needed improvement (J-2). On the Subsequent Supervisory Report, Anthony identified only two major areas petitioner needed to improve, while he assessed her to be competent in seven of the nine major areas (J-4). Thus, it may be fairly inferred, that not only was petitioner provided the opportunity to remediate her inefficiencies and deficiencies, she did in fact remedy two of the four deficiencies identified in the December 12, 1984 Supervisory Report.

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There is neither a question nor doubt that petitioner had been placed on notice that there were a sufficient number of identified performance deficiencies to warrant a recommendation from Anthony to the Board to impose the sanction of increment withholding. On each of Anthony's Supervisory Reports for the 1984-85 school year, Anthony indicated petitioner's progress to be "unsatisfactory" with regard to the PIP progress report (J-1, J-2, J-4). It is undisputed that on March 25, 1985, petitioner signed the Summary Evaluation executed by Anthony which, among other things, carried his recommendation to withhold petitioner's salary increment for the 1985-86 school year (J-5). The facts also disclose that petitioner reduced her response and comments to the Summary Evaluation to writing (J-6). In addition, petitioner availed herself with the opportunity to meet with the Board to state her case in her attempt to dissuade it from taking its action to withhold. Gollub v. Englewood Bd. of Ed., 1980 S.L.D. 1354; Contra, Fitzpatrick v. Bd. of Ed. of Montvale, 1969 S.L.D. 4.

I **CONCLUDE**, therefore, that the Kopera standards have been established on this record that; (1) the underlying facts are those claimed by the evaluation, and (2) it was not unreasonable for the Board to conclude to withhold petitioner's salary increment based upon those facts.

I further **CONCLUDE** that petitioner has failed to carry her burden of proof that the Board's action to withhold her 1985-86 salary and/or adjustment increment was unreasonable.

ORDER

Accordingly, it is hereby **ORDERED** that the herein Petition of Appeal be and is **DISMISSED**.

This recommended decision may be adopted, modified or rejected by **SAUL COOPERMAN, COMMISSIONER, DEPARTMENT OF EDUCATION**, who by law is empowered to make a final decision in this matter. However if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** my Initial Decision with **SAUL COOPERMAN, COMMISSIONER** for consideration.

8 February 1988
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

2/10/88
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

FEB 11 1988
DATE

Mailed to Parties:
OFFICE OF ADMINISTRATIVE LAW

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HELEN YORKE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions were timely filed pursuant to N.J.A.C. 1:1-18.4. The Board's reply exceptions were also timely filed.

It is petitioner's position that the ALJ "ignored the facts and misapplied the law." (Exceptions, at p. 1) She stresses that in view of the findings in the tenure matter filed against her, "there can be no doubt of Dr. Anthony's personal animosity toward her. Since three Administrators had favorably evaluated [her] the year prior to and year of the increment withholding, Anthony's observations must be rejected." (Id.) Petitioner incorporates by reference her post-hearing brief for a complete recitation of arguments in support of her position. She submits that the Commissioner should reject the initial decision and restore her increment for the 1985-86 school year.

The Board's reply exceptions simply state its reliance on its post-hearing submission in reply to petitioner's exceptions. The Board would have the Commissioner affirm the initial decision, dismissing the instant Petition of Appeal.

Upon his careful and independent review of the record, including the parties' exhibits, post-hearing submissions and the videotape submitted by petitioner, as well as the exceptions and replies thereto, the Commissioner concurs with the findings and conclusions of the ALJ below and adopts them as his own. He adds the following.

Initially, the Commissioner iterates the point made by the ALJ below that in a withholding case, it is not for him or the ALJ to substitute their opinions for that of the Board in evaluating petitioner. Rather, the appropriate standard of review is that found in Kopera v. West Orange Board of Education, 60 N.J. Super. 288 (1960) which established a two-pronged analysis in determining whether a board's action in withholding was appropriate:

(1) whether the underlying facts were as those who made the evaluation claimed, and

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(2) whether it was unreasonable for them to conclude as they did upon those facts, bearing in mind that they were experts, admittedly without bias or prejudice, and closely familiar with the mise en scene; and that the burden of proving unreasonableness is upon the appellant. (Kopera at 296-297)

Petitioner argues that her supervisor's evaluations of her are incredible for two reasons:

a. he had "an intense personal dislike toward her" (Petitioner's Post-Hearing Brief, at p. 7);

b. other school administrators wrote positive evaluations of her during the school year in question.

As to the alleged animosity her supervisor felt toward petitioner, the Commissioner is in accord with the ALJ that she has failed to meet her burden of proof. As noted by the ALJ, in Dr. Anthony's December 5, 1984 Supervisory Report, he identified four major areas in which petitioner needed improvement (J-2). On the subsequent Supervisory Report, Anthony identified only two major areas petitioner needed to improve, while he assessed her to be competent in seven of the nine major areas (J-4). Such evidence tends to support the supervisor's objectivity as an evaluator. (See Initial Decision, ante) Further support for the evaluator's lack of bias can be found in his positive evaluations of petitioner in earlier years. See, for example, R-2, Summary Evaluation dated May 23, 1983. By way of contrast, see In the Matter of the Tenure Hearing of Patricia Nafash, School District of the Borough of Ridgefield, decided by the Commissioner March 12, 1984 (tenure charges dismissed because evaluations and observations relied on were discredited as demonstrating bias on part of evaluator). In that case, the music supervisor's evaluation of that petitioner had been uniformly negative from his first evaluation of her. Petitioner's post-hearing brief further alleges that she testified that "Mr. Anthony for many years prior to the hearing and the increment withholding has had an intense personal dislike toward her." (Post-hearing Brief, at p. 7) Averring that Dr. Anthony denied this allegation and instead asserted that he had a "'professional' cordial relationship" (Id.) with petitioner, she now claims that the Commissioner must again make a credibility judgment against Dr. Anthony in this the withholding case against her. She cites, in support of this proposition, the 1987 tenure hearing brought against her, wherein the same ALJ sat as in the instant matter, and which found Dr. Anthony's testimony incredible as to the nature of their relationship when he averred it was professional. Petitioner claims that such finding makes clear that Dr. Anthony's on-going personal animosity toward her "colored his observations" of her during the 1984-85 school year as well as the year of the tenure hearing. (Petitioner's Post-Hearing Brief, at p. 8)

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It is noted that the transcript of the hearing below is not made part of the record before the Commissioner. Accordingly, the Commissioner will draw no conclusion pertaining to allegations proffered by one party as to what was said at the hearing below. Moreover, the Commissioner has carefully reviewed the initial decision and Commissioner's decision in In the Matter of the Tenure Hearing of Helen Yorke, School District of the Township of Piscataway, decided by the Commissioner August 3, 1987. That case found incredible Dr. Anthony's testimony characterizing his relationship with petitioner as professional in responding to the single incident from which the tenure charge stemmed, a matter related to the marking of a departmental math examination, an event which occurred nearly a year after the instant withholding matter arose. The Commissioner concurs with the statement of the Board made in its post-hearing brief in this regard:

> ***To be sure, the Court in its initial decision in the tenure case was highly critical of Dr. Anthony's handling of the January 1986 departmental examination and its aftermath. But the facts giving rise to the tenure hearing occurred six months after the conclusion of the school year on which the current increment withholding action is based. Your Honor quite properly rejected petitioner's argument and put her to her proofs in this case." (emphasis in text) (at pp. 3-4)

In the absence of transcripts, the Commissioner deems petitioner's argument alleging long-standing animosity resulting in an allegation of less than a professional relationship between petitioner and her area supervisor for the year currently before him without merit.

Moreover, the Commissioner dismisses petitioner's second basis for contending that Dr. Anthony's evaluations should be disallowed, i.e., that other administrators wrote positive evaluations of her during the year in question. First, the Commissioner notes that the two evaluations done by other than her area supervisor for the year in question were perfunctory. See Exhibits J-7, J-8, Supervisory Report of Ms. Yorke by Patricia Walsh, Vice Principal, dated April 25, 1985 and Supervisory Report of Ms. Yorke by Carol Rigney, Assistant to the Principal, dated May 9, 1985, respectively. Similarly P-1, Supervisory Report of Ms. Yorke conducted by Leroy Baker, another vice principal, on January 4, 1984, was also perfunctory. Further, no such evaluation carries the evidential weight of those conducted by Dr. Anthony, the subject area supervisor, who is, by virtue of his specialized expertise, in a better position to evaluate the members of the math department from the perspective of subject content. Moreover, not only are P-1, J-7 and J-8 superficial, but also they do not represent the consistency that comes of repeated evaluations by the same supervisor. In this regard it is noted that marked as "Give Attention" on nearly every one of petitioner's evaluations is "Knowledge and Effective Use of Subject Content." It is in this

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area that the department supervisor, as compared to others, is best able to gauge petitioner's performance. That this area improved only sporadically, despite suggestions and comments made over the course of years that Dr. Anthony evaluated petitioner, as well as for the year in question, lends credence to the ALJ's conclusion below that "the facts were as those who made the evaluation claimed" (Kopera, supra), and that Dr. Anthony remained open-minded in evaluating petitioner.

Further, it is not for the Commissioner to decide on the basis of a videotape or evaluations and observations submitted whether he believes petitioner's performance was worthy of an increment. That decision rests with the Board alone. Kopera, supra Neither will the Commissioner review this matter under a standard to be imposed under the tenure statutes' standard of review for charges of inefficiency. In this regard, the Commissioner concurs with the ALJ that petitioner herein, citing such case law as Rowley v. Bd. of Ed. of Manalapan-Englishtown, 205 N.J. Super. 65 (App. Div. 1985), would appear to shift her ultimate burden of proof from herself to the Board, according to the standard of review required under tenure charges of inefficiency. For the reasons stated at pages six to nine of the initial decision, the Commissioner rejects petitioner's arguments and the case law upon which she relies in this regard as being inapposite to this, a withholding matter.

Accordingly, for the reasons expressed in the initial decision as amplified herein, the Petition of Appeal is dismissed with prejudice.

COMMISSIONER OF EDUCATION

March 18, 1988

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HELEN YORKE,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, March 18, 1988

For the Petitioner-Appellant, Klausner, Hunter and Oxfeld
(Stephen E. Klausner, Esq., of Counsel)

For the Respondent-Respondent, Rubin, Rubin & Malgran
(David B. Rubin, Esq., of Counsel)

The Commissioner of Education rendered his decision in this case on March 18, 1988, holding that Petitioner had not carried her burden of proving that the Board's action to withhold her increment for 1985-86 on the basis of performance deficiencies was unreasonable. Petitioner appealed to the State Board of Education, filing her appeal on April 21, 1988, by federal express delivery on April 22. See N.J.A.C. 6:2-1.4

Pursuant to N.J.S.A. 18A:6-28, appeals to the State Board must be taken "within 30 days after the decision appealed from is filed" (emphasis added). In contrast to the period for filing petitions to the Commissioner of Education, see N.J.A.C. 6:24-1.2; N.J.A.C. 6:24-1.17, the time limit within which an appeal must be taken to the State Board is statutory, and, given the jurisdictional nature of the statutory time limit, the State Board lacks the authority to extend it. e.g., B.W., a minor child by his parents, J.W. and B.W. v. Board of Education of the City of Brigantine and Safety Bus Service, decided by the State Board, November 4, 1987

In this case, the Commissioner's decision was rendered on March 18, 1988, and it was mailed to the parties on that date. Accordingly, pursuant to N.J.A.C. 6:2-1.2, the decision appealed from was filed on March 21. Therefore, as mandated by N.J.S.A. 18A:6-28, see N.J.A.C. 6:2-1.1; N.J.A.C. 6:2-1.2, as computed under N.J.A.C. 6:2-1.5, Petitioner was required to file notice of appeal by April 20, 1988. As stated, Petitioner's counsel did not file by that date. Accordingly, the matter was referred to the legal committee for consideration of the effect of the failure of Petitioner's counsel to file timely notice.

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In response to notice of the referral, Petitioner's counsel indicated that his failure was due to his misreading or misunderstanding of the applicable regulations so that he understood that he had 30 days from receipt of the Commissioner's decision in which to file.

At its meeting of May 18, 1988, the legal committee reviewed the failure, considering the failure in light of the letter from Petitioner's counsel. By letter of May 23, the committee notified petitioner's counsel that it had determined to provide Petitioner's counsel with the opportunity to submit a certification establishing the actual date of his receipt of the Commissioner's decision and the circumstances relevant to the filing, although it emphasized that it was at a loss to understand how any attorney could misread or misunderstand the regulations involved. The letter also specified that the certification of Petitioner's counsel should be filed by June 1, 1988.

On June 6, 1988, Petitioner's counsel filed his certification, indicating in his cover letter that this submission was late because his secretary was on vacation. In his certification, Petitioner's counsel did not certify as to the date of his receipt of the Commissioner's decision, but did certify that a delay in receipt of a "couple of days" was caused by the fact he had relocated his office and the decision was mailed to his old address. He further certified that he believed he had until April 22 to file the appeal since a court rule, not cited, provides for appeal from an agency decision based on the date of receipt.

Our review of the file in this case indicates that although the street addresses differ, the Commissioner's decision was mailed to counsel's post office box, which is the same post office box as that of his current address of record.[1] We are not convinced that receipt in fact was delayed by an error in mailing, but, in any event, do not find that a delay of a "couple of days" would excuse compliance with the statutory time limit. Further, we find that, whether or not the court rules compute the time limit for appeal in that forum from the date of actual receipt of an agency decision, Petitioner's counsel was not excused from his obligation as an attorney to read the statute and the regulations applicable to appeals to the State Board and to conform to the statutory and regulatory requirements. We also fail to see how any attorney who performed even a cursory review of N.J.S.A. 18A:6-28 and the regulations could misunderstand them.

In summary, after considering the circumstances as presented by Petitioner's counsel, we conclude that his failure to file the appeal within the statutory time limit as computed under the applicable regulations was not excusable, and that the requirement with which Petitioner's counsel failed to comply was of such significance that we dismiss the appeal in this matter. While

[1] We note that under the policy of the U.S. Postal system, the decision would have been delivered to the post office box.

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we are cognizant that as a consequence of our dismissal, Petitioner's appeal will not be heard by the State Board, we emphasize that it is Petitioner's counsel who bears the responsibility for this outcome.

July 6, 1988

Pending N.J. Superior Court

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4531-87
AGENCY DKT. NO. 176-5/87

CITY OF TRENTON
BOARD OF EDUCATION,
Petitioner,
v.
JESSE WOOLARD,
Respondent.

Gregory Johnson, Esq., for petitioner (Lemuel H. Blackburn, Jr., Esq., attorney)

Barbara K. Grossman, Esq., for respondent (Freeman, Zeller & Bryant, attorneys)

Record Closed: January 4, 1988 Decided: February 10, 1988

BEFORE **DANIEL B. MC KEOWN**, ALJ:

INTRODUCTION

On May 28, 1987 the Board of Education of the City of Trenton (Board) certified charges of incapacity and unbecoming conduct under N.J.S.A. 18A:6-10 et seq. to the Commissioner of Education for determination against Jesse Woolard (respondent), an attendance officer with a tenure status in its employ. After the Commissioner of Education transferred the matter to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq., a prehearing conference was conducted July 23, 1987. Thereafter, a plenary hearing was conducted December 31, 1987 at the Office of Administrative Law, Mercerville. Prior to the commencement of testimony the Board's motion for summary decision under N.J.S.A. 2C:51-2, Forfeiture of public office, was denied as was respondent's motion to dismiss the charges under N.J.S.A. 10:4-6 et seq., the Open Public Meetings Act was also denied.

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BACKGROUND FACTS

The background facts of the matter established by the evidence of record and over which there is no dispute are these. Respondent has been employed by the Board as an attendance officer since 1981. On or about November 6, 1986 respondent was involved in a motor vehicle accident while off duty. According to a daily newspaper account (P-2), respondent was charged by the Trenton City police with driving while under the influence of alcohol, refusal to take a breathalyzer test, reckless driving, driving while on the revoked list, and driving while unlicensed. The superintendent, according to his statement of evidence in support of the charges he filed against respondent, learned the next day through the local newspaper of respondent's involvement in the accident and the charge of not having a valid driver license. The Director of Attendance for the Board, Calvin A. Taylor, also learned on November 7, 1986 of respondent's involvement in the accident and the assertion he did not have a driver license. Subsequently, Taylor advised respondent by memorandum (P-4) dated November 17, 1986 that "Your status as an Attendance Officer transporting students and parents is questionable at this point. You are not to transport anyone until a determination is made * * *." Taylor assigned respondent to the Board's Junior High School #2. There, respondent was obligated to identify all students who were absent more than 10% of school days, complete referral forms for chronic absentees, and to prepare lists of students to be served with a five day legal notice. From November 17, 1986 to the present time, Taylor has had no further communication with respondent regarding this entire matter.

Sometime during November 1986 the Board's Director of Personnel, Jeanne O. Pearson, learned from an assistant superintendent who had learned from Taylor that respondent was accused of not having a valid driver license. Ms. Pearson contacted the Board attorney for advice. This she did in late December 1986 or early January 1987.

Sometime later, Ms. Pearson secured from the New Jersey Division of Motor Vehicles a copy of respondent's certified driver abstract. (P-3) The abstract shows respondent's driver license has been and still is suspended since January 16, 1984. Pearson then requested Board counsel to prepare tenure charges against respondent sometime during February 1987. It is noted that Pearson testified that while she generally recommends the suspension of employees pending tenure charges, she elected not to recommend respondent's suspension.

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Ms. Pearson advised respondent by letter dated March 19, 1987 (J-1, at p. 3) that the Board planned to meet March 23, 1987 at 5:00 p.m., in closed session at its regular meeting place in order to discuss his employment status. Ms. Pearson also advised respondent that if he wanted the Board to conduct the meeting publicly, to notify her no later than 12:00 noon on March 23, 1987.

The Board, according to a letter (J-1, p. 4) dated March 24, 1987 did not discuss respondent's employment status at the March 23 meeting. Rather, respondent was advised by Pearson that the Board would meet in closed session March 26, 1987 in order to discuss his employment status. Once again, respondent was advised that if he wanted the Board to meet publicly to discuss his employment status, to so advise Pearson by 12:00 noon, March 26, 1987.

In the meantime Board counsel had prepared written charges and a statement of evidence in support thereof against respondent. Pearson testified that when she received the documents from Board counsel, she had the superintendent review those documents and sign them on March 23, 1987. The charges, it is noted, were signed by the superintendent on March 24, 1987. Pearson testified that the charges, together with the statement of evidence signed by the superintendent, were filed with the Board secretary on March 24, 1987. That same evening, March 24, the Board had a regularly scheduled "conference" meeting during which, at the superintendent's urging, the Board accepted the charges and caused its board secretary to forward a copy of the charges, together with a statement of evidence and exhibits to respondent by cover letter dated March 26, 1987. In that letter, respondent was advised he had 15 days from the date of his receipt of the letter to submit his written position and documentation in support thereof.

On April 3, 1987 Mr. Taylor recommended in writing (C-1) to Ms. Pearson that a salary increment not be granted respondent for 1987-88.

On May 18, 1987 Pearson advised respondent as follows:

> Please be advised that the superintendent will recommend to the Trenton Board of Education that tenure charges be filed against you.
>
> Please be further advised that these charges will be discussed at the meeting of the Trenton Board of Education, when it meets on Thursday, May 28, 1987. This meeting will be held in the Administration Building of the Trenton Board of Education located at 108 North Clinton Avenue, Trenton, New Jersey.

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> In accordance with N.J.S.A. Title 18A:27-32 you may within fifteen (15) days after the Board meeting, request in writing a statement of the reason for these charges.
>
> (J-1, at p. 9)

It must be noted that the citation to N.J.S.A. 18A:27-32 is erroneous. There is no such citation in Education Law. Apparently, Ms. Pearson intended to cite N.J.S.A. 18:27-3.2 which, in these circumstances, is wholly inapplicable. That statute addresses a nontenure teacher who will not be offered an employment contract for the succeeding school year and the nontenure teacher's right to request a statement of the reasons for such nonreemployment within 15 days after such notice. There is no dispute that respondent has acquired the legislative status of tenure in the Board's employ as an attendance officer. As such, his employment is not dependent upon a proffered contract of employment by the Board.

By separate letter (J-1, at p. 10) on May 18, 1987 Ms. Pearson advised respondent that the Board was scheduled to meet May 26 and May 28 in closed session to discuss his employment status. Again, respondent was advised that at his request the Board would discuss his employment publicly as opposed to privately.

On May 28, 1987 the Board determined to certify the tenure charges against respondent with the Commissioner of Education. The charges, together with the statement of evidence executed under oath in support thereof were sent to the Commissioner May 29, 1987 and received in his office May 29, 1987.

At the time the prehearing conference was conducted July 23, two issues were identified. They were as follows:

1. Whether, if the Board establishes by a preponderance of credible evidence the truth of either or both charges against Jesse Woolard, does such conduct in all the circumstances rise to the level of conduct unbecoming, incapacity, or other just cause sufficient to warrant Woolard's termination of employment or some lesser discipline or no discipline.

2. Whether the Board at any meeting relevant to these charges violated the Open Public Meetings Act and if so to what relief is respondent entitled.

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The matter was then scheduled to be heard on October 6 and 7, 1987.

Respondent then filed on September 9, 1987 a letter memorandum in support of his motion to dismiss the charges upon the alleged violations by the Board of the Open Public Meetings Act. Shortly thereafter, respondent's counsel sought a stay of the administrative tenure case against her client pending disposition of the motor vehicle charges which were to be heard in Trenton municipal court. The Board did not object to counsel's application for a stay of the administrative hearing pending disposition of the charges by the Trenton municipal court. (See, Order of Inactivity entered October 9, 1987).

When the matter was taken off the 30 day inactive list on or about November 10, 1987 counsel were requested in writing to advise of the status of the charges pending against respondent in municipal court. This judge was advised respondent had been incarcerated for a period of time as the result of the motor vehicle charges heard against him in Trenton municipal court. It is noted the Board continued to pay respondent his salary during his period of incarceration. When respondent was released from jail, he simply returned to his attendance officer employment duties.

The evidence (P-6) in this record shows respondent was convicted on two separate charges of operating a motor vehicle while under the influence of alcohol in violation of N.J.S.A. 39:4-50[1], and of operating a motor vehicle while his driver license was suspended or revoked, in violation of N.J.S.A. 39:3-40. The charges of reckless driving and operating a motor vehicle without a driver license were dismissed. Respondent, in addition to other penalties imposed by the court including a two year driver license suspension, was to have been incarcerated for 45 days upon the finding of guilty for operating a motor vehicle while his license was suspended or revoked.

[1] The document from Trenton municipal court regarding disposition of the charges brought against respondent is dated November 20, 1987 and is signed by Carol Russomanno. More likely than not, Ms. Russomanno erred in reporting a finding of guilty on two separate counts of operating a motor vehicle while under the influence of alcohol. Rather, I infer that one of the two violations should more properly be the violation of N.J.S.A. 39:4-50.2, Consent to taking of samples of breath. Respondent more likely than not was charged with refusal to take a breathalyzer test for which he was found guilty and a fine of $250 was imposed upon him, together with a license suspension for two years. This penalty is consistent with the statutory penalties for refusal to submit to chemical tests as set forth in N.J.S.A. 39:4-50.4(a).

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This concludes a recitation of the background facts of the matter.

MOTIONS

The Board's motion for summary decision on the grounds respondent's convictions in municipal court on October 15, 1987 are "offenses" within the contemplation of N.J.S.A. 2C:51-2 and that the underlying conduct touch upon his position of employment was rejected. In similar manner, respondent's motion to dismiss the charges against him was also denied upon the basis that contrary to the argument advanced respondent is not entitled to have the Board meet publicly with respect to the consideration of tenure charges filed before it against a tenured employee. N.J.S.A. 18A:6-11; Cirangle v. Maywood Bd. of Ed., 164 N.J. Super. 595 (Law Div. 1978). Ms. Pearson should not have advised respondent he could have had any one of the meetings referred to in her memoranda conducted publicly. N.J.S.A. 18A:6-11 is clear on its face that "The consideration and actions of the board as to any [tenure] charge shall not take place at a public meeting." In short, the consideration and actions of a local board with respect to any tenure charge is exempted from the Open Public Meetings Act so long as the consideration and actions undertaken by the Board are authorized by law.

CHARGES

The statement of charges, signed by the superintendent on March 23, 1987 against respondent, are reproduced here in pertinent part:

* * *

2. On January 3, 1981 Jesse Woolard [respondent] was appointed as an Attendance Officer for the Trenton Board of Education.

3. He became a Tenured Attendance Officer January 3, 1982.

4. The Trenton Board of Education charges Respondent, Jesse Woolard, with incapacity and unbecoming conduct as follows:

   a. CHARGE I

      (1) Mr. Woolard is incapable of performing the requirements of his job as Attendance Officer.

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(2) One of the requirements of the position of Attendance Officer is that Mr. Woolard possess a valid driver's license.

(3) On November 7, 1986 it came to the attention of the Trenton Board of Education that Mr. Woolard did not have a valid driver's license, but was, in fact, driving on the revoked list, and driving while unlicensed.

(4) The Trenton Board of Education has received a Certified Abstract of Driver History Record for Mr. Woolard. Pursuant to the Abstract Mr. Woolard's driver's license has been suspended since January 16, 1984.

(5) Mr. Woolard has been driving during the course of his employment throughout the period of time he has been on the revoked list.

B. CHARGE II

(1) On November 6, 1986 Mr. Woolard was involved in an automobile accident in which the vehicle he was driving struck a pedestrian.

(2) At the time Mr. Woolard was charged with driving while intoxicated, refusal to take a Breathalyzer test, reckless driving, driving while on the revoked list and driving while unlicensed.

* * *

BOARD'S PROOFS IN SUPPORT OF THE CHARGES

The Director of Attendance Calvin A. Taylor testified at hearing that an attendance officer's obligation is to ensure that all youngsters between the ages of six and 16 are in attendance at school unless otherwise properly excused. Mr. Taylor knows respondent well because it is he, Taylor, who had recommended respondent for initial employment with the Board. While Mr. Taylor testified that a driver license is an essential qualification for employment as an attendance officer, he admitted he never inquired of respondent whether he had a valid driver license. Taylor testified that he initially assumed respondent was validly licensed to operate a motor vehicle. While Mr. Taylor testified under oath that a driver license is an essential qualification for an attendance officer and is listed as such on a written job description, Mr. Taylor was unable to recall, or identify with specificity, or produce a copy of the job description setting forth such a qualification. Board counsel did produce a vacancy announcement (J-

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l) for school attendance officer, which announcement is dated August 21, 1986. This vacancy announcement does state a driver license and an automobile are qualifications for appointment to the position.

Mr. Taylor testified that at no time did respondent ever tell him he did not have a valid driver license. Nevertheless, respondent submitted invoices (P-5) to him, Mr. Taylor, for mileage reimbursement for the use of his car, respondent's, on Board business. These invoices, are for the 1986 calendar year, and are supported by records of daily mileages over the signature of respondent himself. The documents show respondent submitted an invoice for January 1986 and was paid by the Board $106 for the use of his car; respondent submitted an invoice for the use of his car for February and was paid by the Board $118; respondent was paid $78 by the Board for the use of his car in March 1986; $97 in April 1986; $133 in June 1986 and a second payment of $57 in June 1986; $90 on or about October 7, 1986; and, $73 on or about November 26, 1986. Each of these invoices were submitted by respondent to Mr. Taylor for his approval for the use of respondent's vehicle during a period of time respondent did not have a valid driver license to operate a motor vehicle in the State of New Jersey.

This constitutes a recitation of the proofs submitted by the Board, in addition to the background facts set forth above, in support of the charges it certified against respondent.

RESPONDENT'S DEFENSE

Respondent testified that a major part of his day as an attendance officer is spent delivering what are called "five day notices" to various homes throughout the school's attendance area. These five day notices are sent pursuant to N.J.S.A. 18A:38-29. In addition, respondent testified that he also apprehends pupils and confers with parents.

Respondent testified that Junior High School #5 where he is presently assigned has a geographic boundary of six or seven city blocks from which its pupils come. Most houses are in walking distance of the school; approximately 30 homes are not in walking distance. Nevertheless, respondent testified that he stopped driving on duty during September 1986 after which he was transferred to his present assignment at Junior High School #5. This school is closer to his home and he got a ride to work with a coworker

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who, respondent testified under oath, was also his neighbor. Nevertheless, respondent did not know this neighbor's first name, although he did phonetically state the neighbor and coworker's last name to be "Opphemhia". Respondent testified he did not advise anyone he stopped operating a motor vehicle until sometime during November 1986. Respondent testified he then told an assistant superintendent and Mr. Taylor he had stopped operating a motor vehicle and that his neighbor and coworker was driving him to work and driving him around to perform his duties. When questioned by this judge how it is the coworker could drive him, respondent, around the school neighborhood without neglecting his own duties, respondent testified that his neighbor-coworker had to go to the same neighborhood areas in order to perform his own duties. Accordingly, respondent explained the coworker used his, respondent's, vehicle and respondent simply was a passenger in his own automobile.

Respondent testified that from November 1986 until the present his performance on the job has not been criticized by any of his supervisors.

This concludes a recitation of respondent's defense to the charges.

FINDINGS OF FACT

Respondent's testimony that he was never told a driver license was necessary for his position of employment as an attendance officer is rejected in light of the invoices he submitted for payment during the 1986 calendar year. The inference is drawn from the fact of the invoices that respondent, as an attendance officer, had to do much travelling. As an example, during December 1985 for which he submitted an invoice during January 1986 in the amount of $106, respondent traveled 425 miles. During January 1986 for which he submitted an invoice of $118 in March 1986, respondent traveled 471 miles. Respondent traveled 311 miles during February 1986, 389 miles during March 1986, 530 miles during April 1986 and so on. Clearly, respondent cannot walk those kinds of miles in each and every month. Therefore, I **FIND** as fact that a driver license was necessary for the kinds of duties respondent had been performing as an attendance officer through at least November 1986.

The Board has charged respondent with incapacity and conduct unbecoming an employee. Specifically, it cannot be said respondent is incapable of performing the

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requirements of his job as attendance officer because it is clear respondent has been performing duties as an attendance officer since November 1986 when Mr. Taylor removed him from the obligation of driving a motor vehicle while on duty. Clearly, and contrary to subparagraph 2 of Charge 1, whether a valid driver license is necessary, depends on the responsibilities assigned an attendance officer. The Board has produced absolutely no proof whatsoever that it ever adopted or has in force and effect a job description for an attendance officer which requires a driver license. The vacancy announcement (J-1) refers to the qualification of a driver license for appointment as a school attendance officer, but that announcement is dated August 21, 1986 long after respondent began as an attendance officer.

Respondent was operating a motor vehicle during his employment as an attendance officer with the Board at least during January through November 1986, and more likely than not since January 1984 when his license was initially suspended and he did so without disclosing to any of his supervisors the fact he was not properly licensed to operate a motor vehicle. Such conduct is egregious and outrageous by respondent. Equally egregious, however, is the fact the Board regularly paid invoices submitted by respondent for use of his automobile on Board business which invoices were approved by Mr. Taylor. Consider the implications of financial liability which would attach to the Board had respondent caused injury while operating a motor vehicle as an agent for the Board. Not only did Mr. Taylor fail to verify whether respondent was properly licensed to operate a motor vehicle, no one in the Board's department of personnel verified whether respondent had a valid license to drive, nor did the superintendent of schools ever direct anyone to ensure that any employee operating a motor vehicle while on duty was in possession of a valid New Jersey driver license. Respondent's driver license has been suspended since at least January 1984. Respondent, I infer, has been operating a motor vehicle as an attendance officer in the employ of the Board between the period January 1984 through November 1986 but was not properly licensed to do so.

Respondent knowingly, deliberately, and with full knowledge that he was violating the law, regularly and consistently operated a motor vehicle not only on his own time but on official Board business from January 1984 forward without being properly licensed to do so. The very fact respondent's obligations were to search out truant pupils, to return such pupils to school, to counsel such pupils and their parents on the virtues of obeying the law, while simultaneously himself disobeying and disregarding the law, is intolerable and inexcusable under any circumstance. Such conduct is conduct unbecoming an employee and as such warrants discipline.

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The Board has established by a preponderance of credible evidence the truth of Charge 1, paragraphs 2 through 5, in that respondent was required to possess a valid driver license to carry out the duties assigned him as an attendance officer and which he failed to possess; respondent did not have a valid driver license on November 7, 1986; respondent's driver license has been suspended since January 1984; and, that respondent was operating a motor vehicle on Board business throughout the period of time his driver license had been suspended. I **CONCLUDE** that such conduct constitutes conduct unbecoming. The Board did not prove incapacity in a legal sense as it alleges in paragraph 1 of Charge 1, particularly in light of the fact respondent has been performing duties assigned him as an attendance officer since November 1986, but without operating a motor vehicle during such an assignment.

While the conduct alleged in Charge 2 is proven to be true in fact, such conduct does not rise to the level of conduct unbecoming an employee merely by the fact of the conduct. Accordingly, Charge 2 is **DISMISSED**.

CONCLUSION

In this case, respondent's performance as an attendance officer in the Board's employ since 1981 has at least been satisfactory according to the evidence in this record. Nevertheless, that performance since 1984 forward must be viewed in light of the fact respondent operated a motor vehicle while on Board business without being properly licensed. Respondent was subject to an insurance surcharge as provided by law because of a prior conviction of operating a motor vehicle while under the influence of alcohol during January 1984 which conviction was the basis for his driver license suspension. Respondent has not paid that insurance surcharge as required by law and, accordingly, respondent once again flaunts the law in a total disregard for his compliance therewith. In short, there is nothing before me by way of evidence to mitigate any discipline to be imposed upon respondent for the conduct he has engaged in which has been concluded herein to be equivalent to conduct unbecoming an employee.

Accordingly, the full measure of discipline sought by the Board must be applied to respondent. The very fact that respondent would accept monies from the Board for operating his motor vehicle while on Board business, but that the operation of the motor vehicle was without a valid driver license, is in all the circumstances inexcusable.

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Respondent failed to disclose the absence of a valid driver license possessed by him to his supervisors and by such conduct he essentially hid that fact from his supervisors. Respondent's explanation that his neighbor drove him about is rejected as being inherently lacking in trustworthiness. Put simply, I do not accept the veracity of respondent's testimony in this regard. I find it inconceivable that the so-called neighbor-coworker's work schedule would be such on a daily basis to be coincidental to respondent's schedule. I cannot accept as fact that this person was respondent's neighbor yet respondent does not know that person's first name. I cannot accept as fact that respondent, knowing full well how critically important that person's testimony would be, failed to produce that person to corroborate respondent's explanation of the events.

Accordingly, the full measure of discipline to be imposed upon respondent and as sought by the Board is termination of employment from his tenured position. Accordingly, respondent Jesse L. Woolard is hereby terminated from his employment as an attendance officer in the employ of the Trenton City Board of Education as of the date his decision becomes final.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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OAL DKT. NO. EDU 4531-87

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

February 10, 1988
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

2-11-88
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

FEB 17 1988
DATE

Ronald I. Parke
OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE TENURE	:	
HEARING OF JESSE WOOLARD, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF TRENTON,	:	DECISION
MERCER COUNTY.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Respondent's exceptions were timely filed pursuant to N.J.A.C. 1:1-18.4.

Respondent avers the ALJ's finding that the Board did not have to comply with the Open Public Meetings Act (OPMA) and his reliance upon Cirangle, supra, was erroneous and improper. He argues, inter alia, that in accordance with the Superior Court's language in Cirangle, the OPMA and Tenure Act must be construed together and harmonized when possible which, he claims, the ALJ did not do, holding them in conflict instead. As to this, respondent contends that while N.J.S.A. 18A:6-11 prohibits Board action on tenure charges in a public meeting, it contains no prohibition against providing notice that one's employment status is to be discussed. Moreover, since the Board clearly had the practice of giving advance notice, it was obligated to do so in the instant matter irrespective of the fact that the Board misapprehended the law and misadvised him of his rights to a public hearing. Respondent also argues that Cirangle dealt with the issue of waiver, not notice, thus it does not stand for the proposition that the Board and ALJ advance, i.e., that the Tenure Act will be violated if the Board complies with the OPMA, N.J.S.A. 10:4-8(d) and 4-9.

Respondent excepts to the ALJ's finding which rejects his testimony that he was never made aware that a driver's license was required for his job contending that this goes against the weight of testimony at the hearing. He likewise excepts to the ALJ's rejection of his testimony that he did not drive on the job while on the revoked list but rather was driven by several friends and a neighbor, avowing that no proof whatsoever was offered that his "eminently plausible explanation" was incorrect. Moreover, respondent contends the ALJ contradicted his finding that a license was necessary when on page 10 of the initial decision he found that the Board "produced absolutely no proof whatsoever that it ever adopted or has in force and effect a job description for an attendance officer which requires a driver license." Further, because the ALJ found that the incapacity charge was not proved and because his testimony was uncontroverted that he did not drive while on the revoked list, Charge I in its entirety should be dismissed.

Moreover, respondent argues:

> ...[S]ince the ALJ found that the BOE failed to prove either incapacity (Charge 1) or conduct

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unbecoming (Charge 2), it is clear that the charges against Respondent were, implicitly with respect to Charge 1 and expressly with respect to Charge 2, dismissed by the ALJ.

Accordingly, it is respectfully submitted that the ALJ's Conclusion [in] his Initial Decision, that "the full measure of discipline sought by the Board must be applied to respondent," is completely improper, arbitrary, capricious and without any foundation whatsoever.

In his Conclusion to the Initial Decision, the ALJ arrives at the novel determination that Respondent's conduct "has been concluded herein to be equivalent to conduct unbecoming an employee." (emphasis added) This, after expressly dismissing Charge 2. It is respectfully submitted that, having found cause to dismiss the charge of conduct unbecoming, the ALJ was not then free to uphold said charge under the convoluted, contrived and totally improper stand of conduct "equivalent" to conduct unbecoming. It is submitted that the ALJ's imposition of discipline against Respondent based on a charge that had been properly dismissed, constitutes a clear and flagrant violation of the ALJ's discretion and, as such, must be reversed by the Commissioner.

Furthermore, the ALJ based his conclusion that Respondent engaged in conduct "equivalent" to conduct unbecoming, upon the identical specific conduct which was found to not to rise to the level of conduct unbecoming, i.e., the conduct set forth in Charge 2, which was dismissed. Furthermore, the ALJ's rationale for said conclusion completely ignored and contradicted the uncontroverted testimony at hearing in this matter. (emphasis in text)

(Exceptions, at pp. 16-17)

Upon independent and thorough review of the record in this matter, the Commissioner is unpersuaded by the arguments advanced by respondent that the ALJ erred in his determination that respondent should be dismissed from his tenured position as an attendance officer. As to the allegation of OPMA violation, the Commissioner fully concurs with the ALJ's reliance on Cirangle, supra, to conclude that advance notice to respondent was not required because there is no entitlement to have the Board consider the issue of tenure charges in a public meeting.

The Court in Cirangle specifically considered the relationship between OPMA and the procedures for tenure charges embodied in N.J.S.A. 18A:6-11 and concluded that:

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> The specific and limited scope of N.J.S.A. 18A:6-11 must be measured against the sweeping application of the Open Public Meetings Act. When general and specific acts are in pari materia they should be construed together and harmonized if possible. However, if there is any conflict, the more detailed act will prevail even if it was passed prior to the more general statute unless it is apparent that the Legislature intended to make the general act controlling. Where the special statute is passed subsequent to the more general one, it will be regarded either as an exception to or qualification of the prior general law. 2A Sutherland, Statutory Construction (4 ed. 1973), sec. 51.05. Not only is the Tenure Employees Hearing Law more narrow in scope than the Open Public Meetings Act but it is also subsequent in time of adoption. Despite the fact that neither measure refers to or mentions the other, both were considered by the same Legislature and became effective within 19 days of each other....
>
> Historically, the Tenure Employees Hearing Law never dealt with the issue of whether disciplinary matters should be heard in public or private. Clear and specific language prohibiting consideration and action at public meetings was inserted for the first time in the latest amendment promulgated shortly after adoption of the Open Public Meetings Law. Bearing in mind the legislative intent to remove hearings of this nature from local school boards because of the disruptive effect upon the community, it becomes apparent that the failure to specifically afford accused employees the right to demand a public hearing cannot be chalked up to legislative oversight. The Legislature has manifested its intention to exclude the public even in the face of a demand for an open meeting by the affected tenured employee. (emphasis supplied)
>
> (164 N.J. Super. at 601-602)

As can be seen, the ALJ was not incorrect to have viewed the OPMA and N.J.S.A. 18A:6-11 as in conflict and determining the more narrow and specific education law controlling.

Although respondent acknowledges that Cirangle, supra, prohibits public consideration of the tenure charges, he nonetheless insists that advance notice to him was still required; however, he is wrong in this position. As clearly indicated by the Court in Rice v. Union County Reg. High School Bd. of Ed., 155 N.J. Super. 64 (App. Div. 1977), cert. den. 76 N.J. 238 (1978), reasonable advance notice to employees whose employment may be adversely affected is required "so as to enable them to (1) make a decision on whether

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they desire a public discussion and (2) prepare and present an appropriate request in writing." (at 73) Since there is no entitlement whatsoever to request consideration of the tenure charges in public, it is clear that advance notice is, therefore, not required.

This is not to say that the rights of the affected employee are abrogated. On the contrary, N.J.S.A. 18A:6-11 has very specific requirements delineated by the legislature on precisely how tenure charges are to be filed and certified and what protections are afforded the employee in the process, i.e. the Board must provide the employee a copy of the written charge, the statement of evidence under oath to support the charge and an opportunity to respond prior to its determination to certify the charge to the Commissioner and upon making said determination it must notify the employee personally or by certified mail.

As to respondent's arguments that the ALJ erred in addressing the merits of the charges, the Commissioner is in full agreement with the ALJ that respondent has been proved guilty of unbecoming conduct as it relates to the first series of accusations under "Charge I" and that incapacity was not proven. However, he rejects the ALJ's conclusion that unbecoming conduct is not supported in "Charge II" as explained below.

Because the Board did not present a documented job description specifying the requirement of a driver's license for the position of attendance officer and given the fact that the Board of its own volition saw fit to remove driving-related assignments from respondent's duties upon learning of his being on the revoked list, incapacity was not proved. However, this does not mean that the unbecoming conduct conclusions are in error because it is quite clear from the record that notwithstanding the absence of a job description and the testimony that respondent was never told a driver's license was necessary, driving-related duties were an essential component of the job respondent filled at least until November 1986 when his unlicensed status was brought to the attention of the Board. The vouchers for reimbursement of hundreds of miles a month and thousands of miles a year clearly attest to that.

Moreover, it is simply ludicrous to believe that respondent managed to have friends and a neighbor drive him thousands of miles on the job while he was on the revoked list even if the neighbor was a community worker, absent any proof of this being provided by respondent to back his explanation. Therefore, the Commissioner fully concurs with the ALJ's conclusions and credibility determination with respect to this for the reasons so well expressed in the initial decision as exemplified by the following:

> Respondent knowingly, deliberately, and with full knowledge that he was violating the law, regularly and consistently operated a motor vehicle not only on his own time but on official Board business from January 1984 forward without

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> being properly licensed to do so. The very fact respondent's obligations were to search out truant pupils, to return such pupils to school, to counsel such pupils and their parents on the virtues of obeying the law, while simultaneously himself disobeying and disregarding the law, is intolerable and inexcusable under any circumstance. Such conduct is conduct unbecoming an employee and as such warrants discipline.
>
> ...The very fact that respondent would accept monies from the Board for operating his motor vehicle while on Board business, but that the operation of the motor vehicle was without a valid driver license, is in all the circumstances inexcusable. Respondent failed to disclose the absence of a valid driver license possessed by him to his supervisors and by such conduct he essentially hid that fact from his supervisors. Respondent's explanation that his neighbor drove him about is rejected as being inherently lacking in trustworthiness. Put simply, I do not accept the veracity of respondent's testimony in this regard. I find it inconceivable that the so-called neighbor-coworker's work schedule would be such on a daily basis to be coincidental to respondent's schedule. I cannot accept as fact that this person was respondent's neighbor yet respondent does not know that person's first name. I cannot accept as fact that respondent, knowing full well how critically important that person's testimony would be, failed to produce that person to corroborate respondent's explanation of the events. (at pp. 10-12)

As to "Charge II" which relates to respondent's actions on November 6, 1986 leading to his arrest, conviction, and incarceration, the Commissioner disagrees with the ALJ that the conduct, while proven to be true, does not rise to unbecoming conduct merely by the fact of the actions. As stated above, respondent's job responsibilities included contact with truant pupils, the counseling of those students and their parents on the virtues of obeying the law while he himself engaged in egregious illegal activity on November 6, 1986 by driving while on the revoked list, striking down a pedestrian who sustained serious personal injury and also refusing to take a breathalyzer test. Such behavior is clearly contrary to what is expected of an attendance officer in the employ of a public school.

Accordingly, the ALJ's recommended disciplinary sanction of dismissal is adopted by the Commissioner. Respondent is to be terminated as of the date of this decision.

Moreover, given the egregious action of the Board in regularly paying invoices submitted for driving expenses to an

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individual it never verified was properly licensed to operate a motor vehicle, the Commissioner orders that the Board immediately take steps to ensure that each and every individual operating a motor vehicle while on duty possesses a valid New Jersey driver's license and to ensure that job descriptions have been duly promulgated for such positions which require such licensing. A copy of this decision is to be sent to the Mercer County Superintendent of Schools for her review.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

March 24, 1988

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IN THE MATTER OF THE TENURE	:	
HEARING OF JESSEE WOOLARD, SCHOOL	:	STATE BOARD OF EDUCATION
DISTRICT OF THE CITY OF TRENTON,	:	DECISION
MERCER COUNTY.	:	
	:	

Decided by the Commissioner of Education, March 24, 1988

For the Petitioner-Respondent, Lemuel H. Blackburn, Jr., Esq. (Gregory Johnson, Esq., of Counsel)

For the Respondent-Appellant, Freeman, Zeller and Bryant (Barbara K. Grossman, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

September 7, 1988

Pending NJ Superior Court

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2536-87
AGENCY DKT. NO. 23-2/87

BOARD OF EDUCATION OF THE BOROUGH OF SADDLE RIVER, BERGEN COUNTY,
Petitioner,

v.

LARRY TUCKER AND JANE TUCKER,
Respondents.

Mark G. Sullivan, Esq., for petitioner
(Sullivan and Sullivan, attorneys)

Shirley L. Berger, Esq., for respondent
(Hancoch Weisman, attorneys)

Record Closed: December 30, 1987 Decided: February 11, 1988

BEFORE **JAMES A. OSPENSON,** ALJ:

The Board of Education of the Borough of Saddle River, Bergen County, alleged that the four children of Larry Tucker and Jane Tucker, respondents, whose current address is in Saddle River, and whose children are currently enrolled in its school system

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and that of its receiving district, did not reside in the district within 30 days of commencement of the 1986-87 academic year. Pursuant to N.J.S.A. 18A:38-3 and its policy no. 5118, the Board allows tuition-free status to non-resident students who reside within the district within 30 days of commencement of the academic year. In a petition of appeal filed in the Division of Controversies and Disputes of the Department of Education on February 10, 1987, the Board sought judgment against respondents for the amount of pro-rated tuition from the beginning of the 1986-87 school year until December 15, 1986. In their answer filed in the Bureau on April 13, 1987, respondents denied liability for such tuition and raised affirmative defenses, contending, generally, that they closed title to their Saddle River home about April 1986, but did not complete their move into it until about December 1986. For continuity of education, from April to June 1986, respondents' children continued to attend schools in their former home in Englewood Cliffs. For like reasons, they started the school year of 1986-87 in Saddle River and in its receiving high school. For the entire April to December 1986 period, it was contended, respondents paid local residential property taxes to both municipalities.

The Commissioner of the Department of Education transmitted the matter to the Office of Administrative Law on April 14, 1987 for hearing and determination as a contested case in accordance with N.J.S.A. 52:14F-1 et seq.

On notice to the parties, the matter came on for prehearing conference in the Office of Administrative Law on June 1, 1987 and an order was entered establishing, inter alia, a hearing date on August 24, 1987. At request and/or with consent of the parties the date was adjourned to November 9, 1987, at which time the matter was heard and continued to December 1, 1987, when it was concluded. Thereafter, time for posthearing submissions having elapsed, the record closed on December 30, 1987.

At issue in the matter generally, as set forth in the prehearing conference order, is whether the Board can demand tuition of respondents pursuant to N.J.S.A. 18A:38-1, 3, and its policy no. 5111, as the same are applied to the facts in question.

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EVIDENCE AT HEARING

Board policy no. 5111, adopted October 8, 1985 (P-1), concerning "non-residents," provides as follows:

> If a resident with a child enrolled in the Saddle River public school district moves from the district 30 school days or less from the end of the school year, the child will be permitted to attend the district school or the receiving high school without any tuition charge until the end of the school year providing the resident agrees to and does provide transportation.
>
> Children of future residents moving into Saddle River within 30 school days of school opening may be enrolled in Wandell or its receiving high school at no tuition cost providing acceptable documentation of the move is presented and the future resident agrees to and does provide transportation.
>
> If residency has not been established within 30 school days, the future resident will be charged tuition for every school day thereafter until residency is established.
>
> No enrollment will be permitted unless acceptable documentation is presented that show that residency will be established on or before January 1 of the school year.
>
> All applications for enrollment without payment of tuition in accordance with this policy shall be submitted to the board secretary or superintendent and each member of the board of education shall be notified that application had been made.
>
> Circumstances other than those described above may be considered by the board on an individual basis.

The Board made demand upon respondents for payment of tuition for the months of October and November and 15 days in December 1986, which totaled $4,233.78 and was

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said to be based upon State Department of Education per pupil cost established for fiscal 1984-85 by the Division of Finance, as appeared from P-2.

Robert E. Collins, superintendent, testified he had met the Tuckers in late May or June 1986 and had sent them a copy of Board policy no. 5118 in early September of that year, prior to opening of school. He met Mrs. Tucker at a school function on December 16, 1986. She told him then the family was moving into their new home that weekend. He believed they resided in Englewood Cliffs before the move. He said respondents never contacted him why the policy should not be implemented against them in their case. He said the Board regularly sent tuition bills to respondents at the end of October 1986 and then in November and December 1986. In all they were billed for 43 days tuition; they had four children in the Saddle Brook school system, two in Wandell School, which is K-8, and two in its receiving high school in Ramsey. He said there was a standing Board order for the Board secretary to render such bills to those like respondents who owed tuition.

Collins said the Board discussed respondents' situation at closed sessions before rendition of the December final bill. The Board did not formally resolve to file suit against respondents but directed such action at an executive session in January or December. The Board, he said, had not been made aware of any special circumstances regarding respondents. He gave the opinion that there were no exceptions to the Board requirement of payment of tuition.

Called by the Board, Philip Jones testified he is employed by Arnold M. Jones Detective Agency, Fort Lee, as an investigator. He is licensed and registered by the Division of State Police. P-3 in evidence is his report of an investigation he conducted on December 16, 1986 and December 22, 1986. Object of the investigation as assigned him

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by the Board was this:

> The objective of this investigation is to prove that the Tucker family is not presently living in the house at 50 East Saddle River Road, Saddle River, New Jersey.

On December 16, 1987, according to his report and testimony, he learned that a certificate of occupancy had been issued to respondents on April 19, 1985 for 50 East Saddle River Road, Saddle River. When he went to the address to see if respondents were living there then, he knocked on the door and spoke with a female who identified herself as Mrs. Tucker, owner of the house. She told him they did not live in the house presently but were moving in on Saturday, December 20, 1986. A verification check by the investigator on December 22, 1986 at the residence showed lights on both first and second floors. He was able to observe furniture inside the house and saw at least one vehicle in the driveway. He discontinued the investigation then. He said he realized the family had moved in.

P-4 and P-5A in evidence were permanent voter registration forms of respondents, which showed changes in home address from Englewood Cliffs to 50 East Saddle River Road, Saddle River, as of July 20, 1987.

The Board rested.

Respondent Larry H. Tucker testified he closed title on the family home at 50 East Saddle River Road on April 10, 1986, intending at the time to move in after school was over. At the time the family still owned their home at 58 Anderson Avenue, Englewood Cliffs. They began moving furniture and household possessions to Saddle River the day after the closing, that is, paintings, books, records, children's books, some clothing and many miscellaneous items. The family was unable to move into the home as scheduled, however, he said, because of his work travel commitments and because of a

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slow-down in work at the new home. The family felt they should wait for the children to return home from summer camp before moving. There was further delay in moving in, he said, when a prime workman on the new home suffered an accident to his hand, a severed ligament, which left the home in disarray and further delayed the move. Nevertheless, he said, he and his wife planned and gave a party at the new home for their local congressman on September 21, 1986 from 4:30 p.m. to 7:30 p.m. A printed invitation is R-3 in evidence. The invitation announced good news in that "The Tuckers finally found a house!" It noted the bad news that "Our new furniture hasn't arrived yet." From April 1986, when they bought the house and began paying its taxes to the Saddle River tax collector until December 15, 1986 when they moved in, respondents were at the house on a daily basis, either entertaining, sprucing up, or moving furniture in.

Tucker said the family wanted to have their children complete their education in the Englewood Cliffs school district, where they were also local property taxpayers, and wanted to secure continuity of education by starting the children out together in September in the new district. They were unable to close out the sale of their Englewood Cliffs' house, he said, until just recently before hearing on December 1, 1987.

R-4 in evidence was identified by respondent as a bill of August Pensa Modern Movers, Fort Lee, for moving expenses as described on April 1986, in the sum of $416.50.

R-2 in evidence is respondent Larry H. Tucker's driver license issued July 2, 1986 and showing his address as 50 East Saddle River Road, Saddle River.

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DISCUSSION AND FINDINGS

The Board argued generally that respondents were neither residents nor domiciliaries in the Saddle River district until they actually "moved into" their new home and that they had never changed their domicile or residence from their other home in Englewood Cliffs until December, 1986. Thus, argued the Board, respondents were properly surcharged for some 43 days tuition after an initial 30-day period from beginning of the school year in September 1986, in accordance with Board policy no. 5118, a policy within the Board's power to adopt under N.J.S.A. 18A:38-3:

> Any person not resident in the school district, if eligible except for residence, may be admitted to the schools of the district with the consent of the board of education upon such terms, with or without payment of tuition, as the board may prescribe.

The Board's policy upon its face declared that circumstances other than those preventing prospective enrollees from moving into the district within 30 days of school opening may be considered by the Board on an individual basis. Whether the Board ever reasonably and rationally considered circumstances confronting these respondents before it initiated suit against them is problematical. But it is clear the Board commissioned a private investigation in December 1986 "to prove that the Tucker family is not presently living in the house at 50 East Saddle River Road, Saddle River, New Jersey." P-3.

Before one may consider how to apply Board policy to circumstances here, however, or whether the Board ought to but did not consider other mitigating circumstances, the question must first be addressed whether respondents have shown themselves not merely as residents but as domiciliaries of Saddle River as of September 1986 and thereafter. For if that be the case, respondents' children would be entitled to a free public education within the district under N.J.S.A. 18A:38-1(a). The evidence is

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clear, of course, that respondents were owners and residential property taxpayers. They acquired the home in April 1986, began payment of real estate taxes, moved furniture and physical possessions into the Saddle River home in April 1986 (R-4) and afterwards, and entertained there in September 1986 by announcement to friends they had finally found a house. R-3. The question is, therefore, whether such evidence, which is not challenged, indicates a Saddle River domicile. In a voting rights case, the New Jersey Supreme Court in 1972 declared the doctrine of fairness should be applied in order for justice to be done when viewing concepts of domicile and residence. In Worden v. Mercer County Board of Elections, 61 N.J. 325 (1972) the court said:

> The concept of domicile is not constant. It is designed to assure fairness to the individual or to the State or both in a given setting. Its ingredients therefore vary, depending upon what is just and useful in a given contest. [At 349].

I hold respondents and their children have established their domicile at least as of September 1986 at the 50 East Saddle River Road, Saddle River, for purposes of a statutory entitlement as domiciliaries to free public education in the district. The simple circumstance they may never have slept overnight in the premises, if that indeed were the case, is not sufficient to deny them domiciliary status. All reasonable indicia of an accomplished, intentional change of domicile from their home in Englewood Cliffs to the Saddle River home appear in the record. The equitably fluid concept of domicile is in no way offended by expanding it to include these respondents in their particular circumstances. On the other hand, in my view, the Board was overly strict in application of its tuition policy and was not shown to have considered those circumstances even as its policy seems to imply it should have. Cf. Bd. of Ed., Borough of Saddle River v. Iomazzo, 1987 S.L.D. — (Comm'r's dec., Dec. 17, 1987, slip op. at 16-18).

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CONCLUSION

Accordingly, based on the foregoing, I **CONCLUDE** the Board petition in this matter for judgment of tuition costs against respondents should be, and is hereby, **DISMISSED.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN** , who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

February 11, 1988
DATE

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

FEB 16 1988
DATE

DEPARTMENT OF EDUCATION

FEB 18 1988

Mailed To Parties:

DATE

FOR OFFICE OF ADMINISTRATIVE LAW

js

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BOARD OF EDUCATION OF THE BOROUGH OF SADDLE RIVER, BERGEN COUNTY, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
LARRY TUCKER AND JANE TUCKER, RESPONDENTS.	:	DECISION

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Board's exceptions and respondents' reply exceptions thereto were timely filed pursuant to N.J.A.C. 1:1-18.4.

Citing Boult and Harris v. Bd. of Ed. of Passaic, 1939-40 S.L.D. 7, aff'd 135 N.J.L. 329 (Sup. Ct. 1947), aff'd 136 N.J.L. 521 (E.& A. 1948), the Board contends the ALJ inappropriately substituted his own judgment for that of the Board "in finding that 'the Board was overly strict in application of its tuition policy and was not shown to have considered *** circumstances' which the policy itself allows the Board to consider." (Exceptions, at p. 1 quoting Initial Decision, ante) Further, as to the circumstances in question, the Board contends the ALJ ignored the unrebutted testimony of the Superintendent of Schools that respondents never offered any special circumstances until after the petition was, in fact, filed before the Commissioner of Education. (Exceptions, at p. 2) The Board avows that the above finding on page 8 of the initial decision suggests an improper burden of proof, and also "an illegitimate requirement in that the circumstances to be considered were never offered by the Respondents until after they had been served with the Petition." (Exceptions, at p. 2)

Further, the Board avers that the ALJ neglected to evaluate the testimony and evidence marked as P-5A that Mrs. Tucker, who did not testify, voted in the November 1986 general election in Englewood Cliffs. Citing N.J.S.A. 19:4-1, the Board claims, "[I]t is common knowledge that one does not vote where one does not live. Additionally, this is required as a matter of law." (Exceptions, at p. 2) The Board contends that Mrs. Tucker's voting in Englewood Cliffs establishes that Englewood Cliffs was, in fact, her place of domicile.

The Board avers that:

> It is clear in the instant matter that the Respondents were neither residents, having never resided within the district until December 1986, nor were they domiciled therein (an element of which is residence). (Exceptions, at p. 3)

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It claims that the Tuckers were properly charged tuition by the Board, therefore, and that the decision of the ALJ is incorrect.

Respondents' reply exceptions counter, point for point, the exceptions posited by the Board. Said reply exceptions are summarized in pertinent part below.

In reply to Exception 1, respondents claim that the policy in question confers upon the Board the ability to consider individual circumstances when problems arise. It cites as an example of this proposition Board of Education of the Borough of Saddle River v. Iomazzo, decided by the Commissioner December 17, 1987 at pp. 16-18. Contrary to the Board's assertion that circumstances were never offered by respondents until after it was served with the petition, respondents proffer Exhibit R-1 (P-21) in support of their contention that they did explain to school officials, well before the filing of the petition, why they thought their children were entitled to a free education in Saddle River. They further counter the Board's position in this regard by proffering Exhibit P-3, as demonstrating that "the Board commissioned a private investigator 'to prove that the Tucker family is not presently living in *** Saddle River.'" (Reply Exceptions, at p. 2 quoting P-3) Moreover, respondents claim that "Superintendent Collins testified that 'there were no exceptions to the Board requirement of payment of tuition.'" (Reply Exceptions, at p. 2 quoting Initial Decision, ante) Thus, respondents contend, the Board demonstrated a lack of intent to consider the Tuckers' circumstances and that, therefore, "the ALJ properly concluded that 'the Board was overly strict in application of its tuition policy.'" (Reply Exceptions, at p. 2 quoting Initial Decision, ante)

In reply to Exception 2, respondents aver that the record supports the ALJ's finding that respondents and their children established domicile for purposes of statutory entitlement to free public education in Saddle River. Respondents contend their voter registration status is not dispositive of their domicile. Further, relying on the initial decision at p. 8 which cites Worden v. Mercer County Board of Elections, 61 N.J. 325 (1972) for the proposition that domicile is a "flexible, fluid concept" (Reply Exceptions, at p. 3), respondents aver that the evidence presented at the hearing clearly established that they regarded their Saddle River home as their true and permanent home during the time in question. Moreover, respondents contend no evidence was presented to refute Mr. Tucker's testimony that he regarded the Saddle River residence as his permanent, fixed home during the period in question. Further, citing V.R. on behalf of A.R. v. Board of Education of the Borough of Hamburg, 2 N.J.A.R. 283, 286 (1980) for the proposition that a child's domicile is that of the father's, respondents contend their children are deemed to have the same domicile as Mr. Tucker. Further, they claim that since Mr. Tucker changed his domicile to Saddle River before the period in dispute and continued to be domiciled during that time, his children were also domiciled in Saddle River and were thus entitled to a free education there pursuant to N.J.S.A. 18A:38-1.

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In reply to Exception 3, respondents claim the record supports the ALJ's holding that respondents and their children have established domicile in Saddle River for purposes of statutory entitlement to a free public education, pursuant to N.J.S.A. 18A:38-1, and thus the Board is not entitled to payment of tuition under its tuition policy.

Upon his careful and independent review of the record, which it is noted does not include the transcripts of the hearing below, the Commissioner affirms the initial decision for the reasons expressed therein. Moreover, because the parties did not make available to the Commissioner the transcript of the hearing below, he will not address the allegations proffered by one side or the other as to what was adduced from the testimony. Rather, in this regard the Commissioner will rely on those findings and conclusions made by the ALJ. N.J.S.A. 52:14B-10 Accordingly, the Commissioner dismisses as being without merit those arguments raised by way of exception and/or reply exception predicated on the parties' individual versions of the testimony taken below.

In all other respects, the arguments posed by the parties in exceptions and replies have been addressed in the initial decision. The Commissioner adopts as his own the findings of fact and conclusion of law of the ALJ. In so doing he would add the following. Board policy no. 5118 has been at issue in three other Petitions of Appeal before the Commissioner since March, 1986. See, Board of Education of the Borough of Saddle River v. Edward J. and Irena M. Holiat, decided by the Commissioner November 25, 1987; Board of Education of the Borough of Saddle River v. Edmund and Deborah Mei, decided by the Commissioner December 1, 1986; Board of Education of the Borough of Saddle River v. Robert Iomazzo and Mary Ann Iomazzo, decided by the Commissioner December 17, 1987. The Commissioner takes particular notice of the fact that in each of these four instances, the Board's determination has been set aside. The Commissioner wishes to urge the Board to apply its policy relative to the establishment of domicile within the district for purposes of entitlement to a free public school education in such a manner as to comply with the legal determinations made in the above-cited cases as well as with the commendable spirit of accommodation and flexibility suggested by the policy.

Accordingly, the initial decision is adopted for the reasons stated therein. The Petition of Appeal is dismissed with prejudice.

COMMISSIONER OF EDUCATION

March 25, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4461-87
AGENCY DKT. NO. 189-6/87

ANNE HALL,
Petitioner,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF JEFFERSON, MORRIS COUNTY,
Respondent.

Stephen B. Hunter, Esq., for petitioner
(Klausner, Hunter and Oxfeld, attorneys)

James P. Granello, Esq., for the Board
(Murray and Granello, attorneys)

Record closed: January 20, 1988 Decided: February 23, 1988

BEFORE **JAMES A. OSPENSON,** ALJ:

Anne Hall, a tenured school secretary employed by the Board of Education of the Township of Jefferson, Morris County, tendered her resignation from the position on April 16, 1984, to become effective June 30, 1987, at the end of the 1986-87 school year, more than two years thence. The Board accepted the resignation by unanimous vote at its meeting of May 14, 1984. By letter on February 26, 1986, petitioner requested extension

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of her retirement date from June 30, 1987 to June 30, 1989. When the superintendent of schools acknowledged her request for extension of retirement date on March 21, 1986 and when he later, on April 14, 1987 informed petitioner the Board reaffirmed its acceptance of resignation on May 14, 1984, petitioner filed a petition of appeal against the Board contending the Board had improperly based its refusal of extension on her job performance during 1986-87, which she alleged was more than satisfactory, and alleging termination of her employment was thus in abridgment of her rights under the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq. She sought judgment of the Commissioner so declaring, reinstatement to her position together with back pay and emoluments, and both temporary and permanent injunctive relief pending and following plenary hearing. The Board admitted petitioner's tenured employment generally, but denied her claims for relief in that Board acceptance of her 1984 resignation had been properly accepted before recission and that Board refusal to extend the effective date of resignation was otherwise proper and lawful. The Board contended, finally, petitioner's application for interim restraints should be denied for want of showing of irreparable harm or likelihood of success on the merits after plenary hearing. The petition of appeal was filed in the Bureau of Controversies and Disputes of the Department of Education on June 17, 1987. The Board's answer was filed there on July 7, 1987. Accordingly, the Commissioner of the Department of Education transmitted the matter to the Office of Administrative Law on June 26, 1987 before answer for hearing and determination as a contested case in accordance with N.J.S.A. 52:14F-1 et seq.

On short notice to the parties, the matter was set down for prehearing conference in the Office of Administrative Law on July 13, 1987. Petitioner's motion for preliminary restraints enjoining the Board from altering her employment status until plenary hearing was addressed by the administrative law judge on affidavits, memoranda and arguments at prehearing conference. The motion was DENIED for want of good cause shown therefor, there being imbalance against petitioner's interest on showings of irreparability of harm and the probability of ultimate success in petitioner's suit and there being no presumptive showing Board action was not correct or proper under the

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circumstances. Absent any allegation or showing of fraud, misrepresentation or coercion upon petitioner by the Board, a unilateral attempt to rescind a resignation previously accepted by the Board is ineffective. See Cohen v. Bd. of Ed., Town of Hackettstown, Warren County, 1979 S.L.D. 439, 441-2; Klinka v. Bd. of Ed., Twsp. of Florence, 1983 S.L.D. — (Sept. 26, 1983), aff'd State Board, 1984 S.L.D. — (—); and see generally, as to standards for issuance of interim restraints, Hornik v. Bd. of Ed., Twsp. of Marlboro, 1976 S.L.D. 987, 988.

A copy of the prehearing order of July 13, 1987 incorporating the decision on motion for preliminary or interim relief was filed with the Commissioner on July 14, 1987. No further review by the agency was done interlocutorily.

Under the prehearing conference order, the matter was set for hearing in the Office Administrative Law on September 23, 1987. At request and/or with the consent of the parties the matter was rescheduled for hearing on November 25, 1987. It was rescheduled at request and/or with consent of the parties to December 9, 1987. The prehearing conference order directed the parties to confer for purpose of fashioning stipulations of all relevant and material propositions of fact in chronological and sequential order, which thereafter were to be filed in the cause no later than ten days before hearing. Thereafter, the matters at issue were to be addressed and resolved as if on cross-motions for summary decision in accordance with N.J.A.C. 1:1-12.5 et seq., on pleadings, admissions, stipulations, documentation and memoranda of law. All such stipulations and memoranda of law having thereafter been filed by January 20, 1988, the record closed then.

As directed in the prehearing conference order, at issue in the matter were the following:

A. Whether petitioner's resignation of April 16, 1984 to be effective June 30, 1987, which was accepted by the Board at its meeting on May 14, 1984, was legally binding on the parties;

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B. Even if so, whether petitioner shall have proven by a preponderance of the credible evidence that action of the Board in refusing extension of her effective retirement date of June 30, 1987, was arbitrary, capricious or unreasonable and/or otherwise in abridgment of her tenure rights under N.J.S.A. 18A:6-10; and

C. If so, whether petitioner shall be entitled to relief as demanded.

ADMISSIONS, STIPULATIONS AND FINDINGS OF FACT

The parties having so admitted and/or stipulated, I make the following **FINDINGS of FACT:**

1. Petitioner Anne Hall, a tenured school secretary employed by the Board of Education of the Township of Jefferson, Morris County, tendered her resignation from the position on April 16, 1984 to become effective June 30, 1987 at the end of the 1986-87 school year more than two years thence. See Exhibit "A" attached.

2. The Board accepted the resignation by unanimous vote at its meeting of May 14, 1984. See Exhibit "B" attached.

3. By letter of February 26, 1986, petitioner requested an extension of her retirement date from June 30, 1987 to June 30, 1989. See Exhibit "C" attached.

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4. On March 21, 1986, Sheldon Rubin, superintendent of schools, responded to her request for an extension stating in part that any such extension as may be granted will be based upon her performance during the 1986-87 school year, and, further, in the event that an extension is denied she would lose her sick day pay upon retirement benefit if she did not take said benefit during the 1986-87 school year. See Exhibit "D" attached.

5. By letter dated March 31, 1986, she requested that her sick day benefit be added to her 1986-87 contract. See Exhibit "E" attached.

6. In a letter dated September 22, 1986, M.E. Meloon, assistant superintendent business/Board secretary, wrote to petitioner that the administration was looking for a good performance and constructive attitude toward her fellow workers and her job from petitioner, and, further, that her status would be reviewed during the 1986-87 school year and a decision would be based upon her performance. See Exhibits "F", F-1 and F-2 attached.

7. The January 31, 1987 evaluation of petitioner's performance with regard to the 1986-87 school year, which is attached as Exhibit "G," was prepared by petitioner's immediate supervisors, Judy Rosenfeld, cafeteria manager, and Robert Ross, building principal, and was viewed by her evaluators as representing a satisfactory evaluation.

8. Petitioner prepared a rebuttal to the evaluation dated January 31, 1987, a copy of which is attached hereto as Exhibit "H."

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9. On March 17, 1987, Meloon reported to the Board in closed session that despite satisfactory work, petitioner's attitude was terrible and he could not recommend to the Board that her request to withdraw her retirement notice be honored. A true copy of the minutes of the closed session conference no. 2 meeting held on March 17, 1987 is attached hereto as Exhibit "I" deleting reference to other employees.

10 Based upon an absence of recommendation from the administration, the Board took no action at the April 1987 meeting to alter the previous decision rendered on May 14, 1984 to accept petitioner's resignation.

11. On April 14, 1987, petitioner was advised by Meloon that the Board's action on May 14, 1984 stood unchanged and her retirement would be effective as of June 30, 1987. See Exhibit "J" attached.

12. Thereafter, petitioner indicated that it was not her intention to retire as of June 30, 1987. See Exhibits "K" and "L" attached.

13. During the 1986-87 school year, the Board did approve the following changes in retirement dates for the reasons set forth below:

    A. On April 13, 1987, for Rita Sheldon from June 30, 1990 to June 30, 1991, to complete a full 25 years of service that would qualify the retiree for medical benefits after retirement.

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B. On June 25, 1987, for Margaret Stein from October 1, 1989 to October 1, 1988, to retire one year earlier than originally requested for personal reasons.

C. On June 25, 1987, for Patricia Merz from June 30, 1988 to November 1, 1989, for an extension due to a pension calculation problem that would affect the employee in an adverse manner.

D. On June 25, 1987, for Audrey Paterson from December 31, 1990 to June j30, 1991, to preserve office continuity by leaving at the end of a school year instead of in December.

E. On July 14, 1986, for Edith Robbins, to retire one year earlier than requested for personal reasons.

14. Prior to the 1986-87 school year, school district employees requested and were granted recission of their retirement requests as follows:

A. Hilda Graves on May 9, 1983 due to a serious illness.

B. Margaret Spinelli on April 9, 1984, based on recommendation of her physician.

C. Chesencia Osborne on September 10, 1984, for personal reasons.

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D. Loretta Jacker on November 12, 1984, based on principal's recommendation for the good of the district.

E. Mary Cherichella on March 11, 1985, no reason given in the minutes.

F. Ruth Riker on March 11, 1985, no reason given in the minutes.

G. Isabella Satterlee on April 8, 1985, no reason given in the minutes.

H. Ruth Riker on June 27, 1985, no reason given in the minutes.

I. Fran Roth on December 9, 1985, no reason given in the minutes.

J. N. Staccioli on April 14, 1986, no reason given in the minutes.

K. Fran Roth on June 9, 1986 without sperintendent's approval. See Exhibit "N" attached.

L. Ruth Riker on October 13, 1986 due to death of husband.

See pages from sets of minutes showing approval of changes as set forth in Stipulations 13 and 14 attached as Exhibit "M."

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15. The parties agreed that the facts admitted in prior pleadings can be relied upon in answering their cross motions but controverted facts cannot be relied upon.

16. No tenure charge proceedings were brought to terminate petitioner, pursuant to the Tenure Employees Hearing Law. N.J.S.A. 18A:6-10 et seq.

DISCUSSION

It is clear, as a general rule, that a Board of Education may refuse to honor an employee's attempt to rescind a resignation after the Board has formally acted to accept it, where the attempted recission comes before the effective date of resignation. Kozak v. Bd. of Ed., Twsp. of Waterford, 1976 S.L.D. 633. A resignation is properly accepted when the Board does so by resolution; it cannot thereafter be unilaterally withdrawn by the employee. Cohen v. Bd. of Ed., Town of Hackettstown, Warren County, 1979 S.L.D. 439, 441-2. Only in circumstances involving unusual equitable considerations, apparently, has the court ever allowed recission of resignation after Board acceptance; circumstances in the case, however, were described as an "extraordinary concatenation of events." Cf. Evaul v. Bd. of Ed., City of Camden, 35 N.J. 244, 249 (1961). There is none here.

Petitioner argued that conditioning continuation of petitioner's employment on satisfactory performance during the 1986-87 school year placed it in the position where it could only terminate petitioner on tenure charges under N.J.S.A. 18A:6-10; that principles of estoppel, waiver and laches applied to "mandate" the conclusion the Board itself acknowledged only tenure charge proceedings could terminate petitioner's employment and that evidence in the stipulated record showed petitioner's performance satisfactory during 1986-87. Petitioner argued also that evidence in the record showed long-standing Board practice to grant employee requests for modification of retirement dates and thus it only arbitrarily in petitioner's case refused her request.

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It is true that petitioner was administratively advised that Board consideration of extension of her resignation time would depend upon her current work performance. But I do not perceive that such notification vitiated or modified the Board's earlier acceptance of resignation or that it effectually restored in petitioner a continuation of tenure. It imported no obligation to continue that employment beyond June 30, 1987. I perceive no erosion of any of petitioner's tenure rights. Those rights continued undiluted until June 30, 1987. The only question open, it seems to me, is whether Board action in refusing to extend petitioner's resignation date was arbitrary, capricious or unreasonable.

Petitioner's performance in 1986-87 was not satisfactory. That the Board at its April 14, 1987 meeting reaffirmed its earlier acceptance of resignation and refused extension of employment based on staff recommendations while allowing it to others can hardly be said to be arbitrary. The action was within managerial prerogative and in no way an abridgment of petitioner's tenure rights. Such rights endured only until June 30, 1987, but not thereafter. Cf. Tomlin v. Bd. of Ed., Twsp. of Downe, Cumberland County, 1984 S.L.D. —(Oct. 11, 1984); aff'd State Board, 1985 S.L.D. — (Feb. 6, 1985) (slip op. at 5-6). There is no allegation or showing of fraud, misrepresentation or coercion upon petitioner by the Board; hence her unilateral attempt to rescind her resignation previously accepted by the Board remains ineffective. There is no competent evidence upon which to conclude the Board waived its right to deny petitioner's request or is estopped from such denial because it granted requests of others.

CONCLUSION

Based on the foregoing, I **CONCLUDE** (1) that petitioner's resignation of April 16, 1984 to be effective June 30, 1987, accepted by the Board on May 14, 1984, was legally binding on the parties; and (2) that petitioner has failed to prove by a

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preponderance of the credible evidence that action of Board in refusing extension of retirement based upon her performance in 1986-87 was arbitrary, capricious or unreasonable or was otherwise an abridgment of her tenure rights under N.J.S.A. 18A:6-10. The petition of appeal is **DISMISSED**.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

February 23, 1988
DATE

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

2-26-88
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

FEB 26 1988
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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ANNE HALL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF JEFFERSON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions and the Board's reply exceptions were timely filed pursuant to N.J.A.C. 1:1-18.4.

Petitioner submits extensive exceptions which are summarized, in pertinent part, below.

EXCEPTION ONE

> THE ADMINISTRATIVE LAW JUDGE FAILED TO CONSIDER THE STIPULATED RECORD IN THIS MATTER AND, FURTHERMORE, FAILED TO ADDRESS ANY OF THE SUBSTANTIVE LEGAL ISSUES PRESENTED TO HIM BY THE PETITIONER

In this regard, petitioner relies upon those legal arguments set forth in her post-hearing brief in support of her Motion for Summary Decision, as follows:

> Point One: By its actions in conditioning the continuation of Petitioner's tenured employment within the Jefferson Township School District solely on satisfactory performance during the 1986-87 academic year, the Board placed itself in a position wherein it was required to initiate tenure charges pursuant to N.J.S.A. 18A:6-10 et seq. in order to terminate Petitioner, Anne Hall, for unsatisfactory performance.
>
> Point Two: The principles of estoppel, waiver and laches when applied to the case at bar mandate the conclusion that the Board of Education, by its actions, clearly acknowledged that they could only terminate Anne Hall at the conclusion of the 1986-87 school year through the invocation of tenure charge proceedings invoked pursuant to N.J.S.A. 18A:6-10.
>
> Point Three: Based on the stipulated record, Petitioner had satisfied any performance based

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objectives regarding her continued employment within the district, assuming arguendo that the Court concludes that the actual evaluation of Petitioner's performance during the 1986-87 time period at issue is required.

Point Four: The actions of Maurice Meloon, the Assistant Superintendent of Schools for Business and Board Secretary, to prepare the April 14, 1987 letter to Anne Hall (Exhibit J to the Stipulation of Facts) was ultra vires his authority and the absence of a specific Board Resolution memorialized in Board Minutes addressing Anne Hall's request for an extension of her retirement date mandates the conclusion that Anne Hall was illegally terminated. (Exceptions, at p. 2, quoting Post-Hearing Submission, at pp. 1, 10, 13, 16)

Petitioner avers that the ALJ failed to respond to any of the above-stated arguments, instead citing "a totally inapposite line of Commissioner of Education cases which have concluded that a Board of Education may refuse to approve an attempted unilateral rescission of a resignation by an employee after the Board had formally acted to accept the resignation." (Exceptions, at pp. 2-3) Petitioner would distinguish the facts in this matter from those cases relied upon by the ALJ.

Petitioner claims that the Board granted the request "in every prior instance wherein a Jefferson Township School District employee sought to rescind his/her previously proffered letter of resignation***." (emphasis in text) (Exceptions, at p. 3) Moreover, through its administrators, petitioner contends, the Board led her to believe that it did not view her April 16, 1984 letter of resignation to be binding, consistent with earlier prior instances involving efforts to change retirement dates. Neither did the Board act, through formal resolution, on her request for a change in the retirement date, "notwithstanding evidence (See Exhibit N and the June, 1986 minutes of Exhibit M) that, in the past, the Superintendent of Schools' one administrative recommendation to deny a specific request for an extension of a retirement date had been overruled by the Board of Education through Board Resolution." (Exceptions, at p. 4) While noted in Exhibit I that the Board agreed that her request for an extension of employment would be acted upon at the April 1987 closed session meeting, "[i]t never was," exclaims petitioner. (Id.) Petitioner cites the above as facts independently representing separate bases for distinguishing the instant case from the cases cited by the Board in its brief and adopted by the ALJ in the initial decision.

Petitioner's arguments suggesting unclean hands, laches, estoppel and detrimental reliance are predicated on her claim that

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the Board, albeit without saying so in so many words, conveyed by its correspondence of April 1986 and, also by its past practice of granting date changes for retirement that

> she should not worry about her letter of resignation being previously accepted by the Board of Education, given the Board's "track record" of previously approving all other applications for changes in retirement dates. Still, Judge Ospenson chose not to even comment on any of the issues raised in Point Two of Petitioner's Brief in Support of Summary Judgment. (Exceptions, at p. 5)

As to petitioner's argument concerning whether the Board acted in an arbitrary, capricious and unreasonable manner in refusing to extend her retirement date, petitioner suggests that the ALJ should have required this matter to proceed to a plenary hearing to "develop an appropriate factual scenario upon which to consider the *** issue." (Id., at p. 6) Petitioner argues that the ALJ should have spent more than one sentence "in reacting to Petitioner's argument that the written record established, through the Board's own administrative actions, that Petitioner's performance was viewed as being at least satisfactory when this point was not specifically challenged by the Board in its Brief." (Id., at p. 7)

EXCEPTION TWO

> THE ADMINISTRATIVE LAW JUDGE FAILED TO CONCLUDE THAT THE JEFFERSON TOWNSHIP BOARD OF EDUCATION ACTED ILLEGALLY IN TERMINATING PETITIONER, ANNE HALL, WITHOUT THE CERTIFICATION OF TENURE CHARGES

In this regard petitioner cites pages 2-9 of her Brief in Support of Petitioner's Motion for Summary Decision. Said brief is incorporated herein by reference.

EXCEPTION THREE

> THE ADMINISTRATIVE LAW JUDGE ERRED IN NOT CONCLUDING THAT THE EQUITABLE DOCTRINES OF ESTOPPEL, LACHES, WAIVER AND UNCLEAN HANDS COUPLED WITH PETITIONER'S DETRIMENTAL RELIANCE ON THE STATEMENTS AND ACTIONS OF BOARD AGENTS AND REPRESENTATIVES WERE FULLY SUPPORTIVE OF PETITIONER'S CONTENTIONS IN THIS MATTER

Petitioner refers the Commissioner to pages 10-12 of her brief in this regard.

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EXCEPTION FOUR

THE ADMINISTRATIVE LAW JUDGE ERRED IN FAILING TO CONCLUDE THAT THE FACTUAL RECORD PRESENTED TO THE COURT ESTABLISHED THAT PETITIONER HAD RENDERED SATISFACTORY PROFESSIONAL SERVICE DURING THE 1986-87 ACADEMIC YEAR ASSUMING ARGUENDO THAT IT WAS DEEMED NECESSARY TO INQUIRE INTO PETITIONER'S ACTUAL PERFORMANCE DURING THAT YEAR

In this regard, petitioner refers the Commissioner to her brief at pages 13-15.

EXCEPTION FIVE

THE ADMINISTRATIVE LAW JUDGE ERRED IN FAILING TO DETERMINE THAT THE ACTIONS OF THE ASSISTANT SUPERINTENDENT OF SCHOOLS TO DENY ANNE HALL'S REQUEST FOR A NEW RETIREMENT DATE WAS ULTRA VIRES HIS AUTHORITY

Petitioner contends the letter from the Assistant Superintendent of Schools for Business and Board Secretary dated April 14, 1987 was ultra vires and, further, that the absence of a Board resolution memorialized with the Board minutes addressing her request for an extension of her retirement date mandates the conclusion that she was "illegally terminated." (Exceptions, at p. 6) Petitioner refers the Commissioner to her brief at pages 16-18 in support of this contention and also to page two of Exhibit I, suggesting that while the closed session Board minutes of March 17, 1987 reflected that it would act at the next Board meeting on her request, it never acted to approve nor deny her request.

For the above reasons, petitioner requests, inter alia, that the Commissioner issue an order reinstating her to a full-time secretarial/clerical position at her appropriate rate of pay, with provision for making her whole for any lost wages and emoluments and for reasonably foreseeable and consequential damages incurred as a result of the Board's actions.

The Board's reply exceptions cite the stipulated facts made part of the initial decision, ante, as well as the pre-hearing order, which set forth the issues agreed to by the parties in arguing that the only open question in this case was whether the Board's refusal to extend petitioner's resignation date was arbitrary, capricious or unreasonable. The Board agrees with the ALJ that it did not violate petitioner's tenure rights, nor was it arbitrary, capricious or unreasonable. The Board contends that petitioner

> had nearly a month to consider withdrawing her request to resign prior to Board action in May,

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> 1984 and waited nearly two years after the Board accepted her resignation to decide to change her mind and, in doing so, requested an additional two year extension beyond her scheduled date of retirement. (Reply Exceptions, at p. 2)

Further, the Board avers that petitioner failed to show that any of the other cases of changes in retirement dates acted upon by the Board were done under circumstances identical to petitioner's situation.

The Board also suggests that regarding the ALJ's finding that petitioner's work performance in 1986-87 was not satisfactory, its decision was based upon the recommendation of the staff that she not be extended. The Board concurs with the ALJ's conclusion that once it acted upon her request, it was under no legal obligation to formally move to reconsider her request. Accordingly, the Board argues, the lack of action by the Board constituted a reaffirmation of its previous action to accept her resignation effective June 30, 1987.

The Board urges the Commissioner to adopt the initial decision in its entirety and to dismiss the Petition of Appeal.

Upon his careful and independent review of this matter the Commissioner must remand it for further findings on the following aspects of this case.

The Commissioner notes that the record before him does not indicate of which retirement program petitioner is a part. There are three: Teachers' Pension and Annuity Fund (The Fund), N.J.S.A. 18A:66-1, et seq. and its implementing regulations N.J.A.C. 17:3-6.1 et seq.; Public Employees' Retirement System (The System), N.J.S.A. 43:15A-7.1 et seq. and its implementing regulations, N.J.A.C. 17:2-6.1 et seq.; and the noncontributory Pension Program for County, Municipal and School District Pensions, (the Program), N.J.S.A. 43:8B-1 et seq. The Commissioner hereby directs the parties to submit this information to the record. Further, based upon such information and the Commissioner's findings below, the ALJ is hereby directed to resolve the following questions of fact and law.

Moreover, it is clearly established in law that retirement, generally, is a voluntary act. N.J.S.A. 18A:66-1 et seq. See also Sobel v. Bd. of Trustees Teachers' Pens. and Ann. Fd., 139 N.J. Super. 55, 57 (1976) (retirement for age and years of service is essentially voluntary, N.J.S.A. 18A:66-43(a)).

To set in process an application for retirement for either TPAF or PERS, a candidate must file the appropriate forms with the appropriate retirement fund or system. N.J.A.C. 17:3-6.1(a) - (d) and N.J.A.C. 17:2-6.1 set forth these requirements and contain nearly identical language:

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17:3-6.1 Applications

(a) Applications for retirement must be made on forms prescribed by the Fund [System]. Such forms must be completed in all respects and filed with the Fund [System] [at least one month] before the requested date of retirement.

(b) In the event a member files an incomplete application, the deficiency shall be brought to his or her attention and he or she will be required to file a completed application with the Fund [System] to enable acceptance for processing.

(c) Before an application for retirement may be accepted for processing, it must be supported by a certificate from the employer setting forth the employment termination date, the salaries reported for contributions in the member's final years of employment and proof of age, if none is already in the member's record.

(d) In addition to the foregoing requirements, an application for disability retirement must be supported by a report of the member's personal or attending physician and a statement from the employer regarding the member's incapacity for further duty.

Moreover, the regulations further provide for changes in the application for retirement with the two pension programs: Both N.J.A.C. 17:3-6.2 and N.J.A.C. 17:2-6.2 state the following with regard to changes in effective dates:

(a) A member shall have the right to withdraw, cancel or change an application for retirement at any time before his retirement allowance becomes due and payable; thereafter the retirement shall stand as approved by the Board.

Finally, while the Commissioner has held in Lorraine E. Laing, Board of Education of Township of Edison, 1977 S.L.D. 422, aff'd State Board 427, aff'd N.J. Superior Court, App. Div. 1978 S.L.D. 1025, a case involving matters arising under TPAF, that no distinction exists between the Board's approval of an application for retirement and a letter of resignation, intent to retire is predicated upon submission of application for retirement to the Fund/System:

Petitioner draws a distinction between the Board's approval of her application for retirement and a letter of resignation. The Commissioner finds no such distinction in this

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> matter. Petitioner submitted her application for retirement to the TPAF and made this fact known to the Superintendent on September 4, 1973. (Tr. 86-87) The Board considered this a fait accompli and approved her retirement from the Edison school district. This act terminated her employment just as effectively as the acceptance of a letter of resignation would have done. Petitioner clearly intended to terminate her employment and she did so. Nowhere is it suggested that a teacher must resign a position before having an application for retirement considered by the TPAF. (emphasis supplied)
>
> (at 426)

Reading the above statutes, regulations and case law in pari materia, the Commissioner concludes that intent to retire under the TPAF Fund or PERS System is evidenced by submission of retirement papers to the Fund/System. The record before him does not indicate whether or not petitioner submitted such application to either.

However, N.J.S.A. 43:8B-1 et seq., the noncontributory pension program for school district employees not members of either the Fund or the System, states that such an employee "may, at the discretion of his employer, be retired and granted a pension under the provisions of this act." (N.J.S.A. 43:8B-2). This language would seem to require that the employee first seek the Board's permission to retire, unlike in the case of the Fund or the System, which requires intent to retire be made to it.

Moreover, the Commissioner is baffled by the admission of the Board that petitioner was paid contractual pension benefits for the year 1986-87 when she apparently worked full time that same year. See Answer, Tenth Affirmative Defense, at page 5 which states:

> Respondent has suffered harm in that Respondent has paid Petitioner her contractual retirement benefits during the 1986-87 school year, and Petitioner's acceptance of her retirement benefits acts as a release to the Board.

Accordingly, the Commissioner remands this matter for further findings of fact and law relative to the following:

If petitioner is a member of TPAF or PERS:

1. When did petitioner cease services to the district, if in fact she has, be it voluntary or involuntary?

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2. What is meant by "contractual retirement benefits" and what prompted the Board to pay her retirement benefits if she continued working?

3. Did petitioner actually submit her retirement papers pursuant to N.J.A.C. 17:3-6.1 et seq. or N.J.A.C. 17:2-6.1 et seq. and, if so, when?

4. What legal effect, if any, the foregoing factual determinations have upon petitioner's claim to continued tenured employment with the Board?

5. If she is a member of the noncontributory pension plan, at what point did the Board determine formally to commence pension payments to petitioner in accordance with N.J.S.A. 43:8B-1?

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

March 31, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2392-88
(ON REMAND OF EDU 4461-87)
AGENCY DKT. NO. 189-6/87

ANNE HALL,
Petitioner,
v.
BOARD OF EDUCATION OF THE
TOWNSHIP OF JEFFERSON,
MORRIS COUNTY,
Respondent.

Stephen B. Hunter, Esq., for petitioner
(Klausner, Hunter & Oxfeld, attorneys)

James P. Granello, Esq., for respondent

Record Closed: August 18, 1988 Decided: September 9, 1988

BEFORE **JAMES A. OSPENSON**, ALJ:

This matter is on remand by the Commissioner of the Department of Education to the Office of Administrative Law of docket number EDU 4461-87. In that matter, it appeared that Anne Hall, a tenured school secretary employed by the Board of Education of the Township of Jefferson, Morris County, tendered her resignation from the position on April 16, 1984, to become effective June 30, 1987, at the end of the 1986-87 school year, more than two years thence. The Board accepted the resignation by unanimous vote

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at its meeting of May 14, 1984. By letter on February 26, 1986, petitioner requested extension of her retirement date from June 30, 1987, to June 30, 1989. When the superintendent of schools acknowledged her request for extension of retirement date on March 21, 1986, and when he later, on April 14, 1987, informed petitioner the Board had reaffirmed its acceptance of resignation on May 14, 1984, petitioner filed a petition of appeal against the Board contending it had improperly based its refusal of extension on her job performance during 1986-87, which she alleged was more than satisfactory, and alleging termination of her employment was thus an abridgment of her rights under the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq. She sought judgment of the Commissioner so declaring, reinstatement to her position together with back pay and emoluments, and both temporary and permanent injunctive relief pending and following plenary hearing. The Board admitted petitioner's tenured employment generally, but denied her claims for relief in that Board acceptance of her 1984 resignation had been properly done before rescission and that Board refusal to extend the effective date of resignation was otherwise proper and lawful.

The matter was heard and decided in the Office of Administrative Law on stipulations of fact with documentation submitted by the parties, with memoranda of law. In an initial decision of February 23, 1988, the administrative law judge concluded (1) that petitioner's resignation of April 16, 1984, to be effective June 30, 1987, accepted by the Board on May 14, 1984, was legally binding on the parties; and (2) that petitoner had failed to prove by a preponderance of the credible evidence that action of the Board in refusing extension of retirement based on her performance in 1986-87 was arbitrary, capricious or unreasonable or was otherwise an abridgment of her tenure rights under N.J.S.A. 18A:6-10. The petition of appeal was DISMISSED. Thereafter, by decision of March 31, 1988, the Commissioner remanded the matter to the Office of Administrative Law for further findings of fact and law relative to five listed questions. The matter was retransmitted to the Office of Administrative Law on April 7, 1988, under OAL Dkt. No. EDU 2392-88.

On notice to the parties, the matter came on for a prehearing conference on June 1, 1988, and an order was entered limiting the issues to be resolved in the matter as those

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listed in five questions set forth in the Commissioner's decision of March 31, 1988. The parties were directed to confer for the purpose of fashioning stipulations with documentation as necessary for the purpose of answering the five questions. The parties filed their stipulations and respective memoranda of law on August 18, 1988. The record closed then.

Before the prehearing conference, petitioner moved for an order disqualifying the administrative law judge, cognizable under N.J.A.C. 1:1-14.12(a). The order was addressed at prehearing conference on June 3, 1988, and DENIED for want of good cause shown. A written order in denial was incorporated as paragraph 13 of the prehearing conference order, which indicated denial might be reviewed interlocutorily by the Director of the Office of Administrative Law in accordance with N.J.A.C. 1:1-14.10(k), (l). It was not so reviewed by the Director and thus became final.

ADMISSIONS, STIPULATIONS AND FINDINGS OF FACT

The parties having so admitted and/or stipulated in answer to the Commissioner's questions, I make the following findings of fact:

1. When did the petitioner cease services to the district, if, in fact, she has, be it voluntary or involuntary? June 30, 1987.

   Annexed hereto as Exhibits A, B, C, D, E, F, G, & H are documents that refer to the "cessation of active service" issue (Exhibits A & B), and to the issue of the continuation of petitioner's health insurance coverages pending the Commissioner of Education's final decision in this matter. (Exhibits C, D, E, F, G & H)

2. What is meant by "contractual retirement benefits" and what prompted the Board to pay her retirement benefits if she continued working?

   "Contractual retirement benefits" are those benefits that an employee is entitled to within the Jefferson Township School District as he/she approaches retirement age and so notifies the Board of Education of his/her intent to retire within a certain period of time, i.e., five years in one case, one year in another.

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The contract referred to is the agreement between the Jefferson Township Education Association and the Jefferson Township Board of Education. Article XVI, paragraph E, allows for longevity payments to be paid to employees who have been employed in this district for at least sixteen years. This applies to both certificated and non-certificated personnel. The rate of payment does vary slightly, depending on a person's status, i.e., certificated or non-certificated.

Subparagraph 5 of the same article allows an employee who is eligible by State rules to retire, to notify the Board of their intent and they then become eligible for a period of five years to collect the longevity payments allowed for employees of this district under the 26-30 year provision. Anne Hall was collecting this payment as she gave the Board adequate notice to do so.

Payment for this benefit to petitioner started in the 1984-85 school year, and she received $1,500 as a result. Petitioner was eligible to receive these longevity payments through the end of the 1988-89 school year.

The same article (Article XVI) referred to above in paragraph F allows the following:

> Any employee having been in the employ of the school district for ten (10) or more years, who submits to the Superintendent of Schools a written statement of intention to retire, shall be eligible for a special retirement allowance, provided twelve (12) months notice of such intention to retire is given.
>
> The retirement allowance shall be computed at the rate of one (1) day's pay for every four (4) days of accumulated unused sick leave to the employee's credit at he time of the announced contemplated retirement.
>
> The daily compensation to the employees who retire under the aforesaid recommendation shall be at the daily rate of pay which they earned in the year that the notice of retirement was given.

Petitioner was collecting this payment, as she gave the Board adequate notice of intention to retire. Payment started to her for this benefit in the school year 1986-87 and was completed in the amount of $1,555.00.

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Annexed hereto as Exhibit I is a March 21, 1986 letter from Sheldon Rubin, Superintendent of Schools, to petitioner, which is self-explanatory.

3. Did petitioner actually submit her retirement papers pursuant to N.J.A.C. 17:3-6.1 et seq., or N.J.A.C. 17:2-6.1 et seq. and, if so, when?

Yes, [to PERS] on or about June 22, 1987 with a request for delayed retirement date.

The Board of Education submitted its certification of final salary on or about May 13, 1987 when the information came to the payroll department through the superintendent's monthly report and minutes of the Board. This is the procedure that has been followed by the Board for at least 16 years. See copy of Board certification to the Public Employees' Retirement System attached hereto. (Exhibit J)

Annexed hereto as Exhibits K, L, M, N and O are documents that are self-explanatory.

4. What legal effect, if any, the foregoing factual determinations have upon petitioner's claim to continued tenure employment with the Board?

Any supplemental legal submissions prepared by counsel for petitioner or by the Board will be submitted to [the administrative law judge] by August 18, 1988.

5. If she is a member of a non-contributary pension plan, at what point did the Board determine formally to commence payments to the petitioner, in accordance with N.J.S.A. 43:8B-1?

Not applicable.

DISCUSSION

The fourth question on remand was what legal effect, if any, the factual determinations in questions 1, 2 and 3 have upon petitioner's claim to continued tenured employment with the Board.

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Petitioner argued that her application to the Division of Pensions of June 22, 1987, was only conditional because of pending litigation; that continuation by the Board of her health insurance coverages during pendency of this proceeding evinced intent to maintain and continue her employment status; that her utilization of commutation of accrued sick leave was by direction of the superintendent; and that the additional documentary evidence and findings by stipulation showed consistency throughout with her position that she was being involuntarily terminated by the Board and that she had not engaged in a voluntary act of retirement from the school district. The Board argued to the contrary.

The intitial decision of February 23, 1988, under OAL Dkt. No. EDU 4461-87, suggested that, as a general rule, a board of education may refuse to honor an employee's attempt to rescind a resignation after the board has formally acted to accept it, where the attempted rescission comes before the effective date of resignation. A resignation is properly accepted when the board does so by resolution; it cannot thereafter be unilaterally withdrawn by the employee. At least once in circumstances involving unusual equitable considerations, apparently, the court has allowed rescission of resignation after board acceptance; but circumstances in the case were described as an "extraordinary concatenation of events." Cf., Evaul v. Board of Ed., City of Camden, 35 N.J. 244, 249 (1961). There is none here. [Initial Decision, February 23, 1988, at 9.] In Evaul, a teacher with 25 years seniority wrote a resignation that was accepted just before she shortly attempted to rescind it. Compelling peculiar circumstances (an over-stressed, upset teacher wrote out a resignation, gave it to her superintendent at 4:00 p.m.; the board of education accepted it at a special meeting that night at 8:00 p.m.) prompted the court to apply equitable principles to order her reinstatement, the court noting that in the interim between acceptance and her prompt attempt to rescind, the Board took no action to its detriment in reliance upon effectiveness of her release. The court noted, however, that the teacher in the case, unlike petitioner here, had not asked for back salary. It held that though she was entitled to reinstatement, she was not entitled to collect back salary because loss of her teaching position was occasioned by her own impetuous conduct and her reinstatement was based upon equitable principles. 35 N.J. at 249-50. Application of equitable principles in this case, in my view, disfavor petitioner. She announced her resignation in writing to the Board on April 16, 1984, to become effective June 30, 1987.

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The Board accepted her resignation by unanimous vote at its meeting of May 14, 1984. Additional facts stipulated by the parties show petitioner went further to evidence her intent to retire by invoking contractual rights to conversion and collection of longevity payments. Petitioner made claim upon the Board and received $1,500 beginning in the 1984-85 school year and continuing through the 1988-89 school year. The same contract permitted commutation and collection of accumulated unused sick leave benefits, which petitioner applied for and received during the school year 1986-87 in the amount of $1,155. When she then on February 26, 1986, attempted to rescind her resignation and extend her tenure, her unilateral act came after the Board had relied upon her earlier resignation to its detriment. Its detrimental position change in reliance on her representations of intent to retire should be contrasted with the "extraordinary concatenation of events" in Evaul. In answer to the fourth question of the Commissioner on remand, it is my view the newly developed factual determinations herein only substantiate the conclusion reached in the initial decision of February 23, 1988.

CONCLUSION

Based on the foregoing, I CONCLUDE (1) that petitioner's resignation of April 16, 1984, to be effective June 30, 1987, accepted by the Board on May 14, 1984, was legally binding on the parties; (2) that petitioner has failed to prove by a preponderance of the credible evidence that action of the Board in refusing extension of retirement based upon her performance in 1986-87 was arbitrary, capricious or unreasonable or otherwise an abridgment of her tenure rights under N.J.S.A. 18A:6-10; (3) that the Board acted on petitioner's resignation and stated intent to retire to its detriment by commuting longevity entitlements and disbursing them and in commuting accrued sick leave entitlement and disbursing them; and (4) that it would be inequitable for the Board to be compelled to abide petitioner's reinstatement in face thereof. The petition of appeal is DISMISSED.

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This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

September 9, 1968
DATE

James A. Ospenson
JAMES A. OSPENSON, A.L.J

Receipt Acknowledged:

Sept. 12, 1988
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

SEP 13 1988
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

amr

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ANNE HALL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF JEFFERSON, MORRIS COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner filed timely exceptions to the initial decision on remand pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. The Board filed timely reply exceptions thereto.

Petitioner's exceptions aver that the Commissioner's remand required the ALJ to make factual findings consistent with the Commissioner's directives. She claims the factual questions posed by the Commissioner were answered by stipulation of the parties, but that "Judge Ospenson simply reiterates his prior legal analysis *** and fails to deal with any of the specific legal issues presented to him by the Petitioner. None of the points addressed in Petitioner's initial exceptions are responded to by Judge Ospenson." (Exceptions, at p. 1) Petitioner avers the exceptions she posited to the earlier initial decision in this matter remain viable and she, thus, incorporates said exceptions into the record now before the Commissioner as being current. She also attaches a copy of the supplemental legal submission forwarded to Judge Ospenson and the stipulations of the parties answering the questions posited to the parties in the Commissioner's remanded decision. Such submissions are herein incorporated into the record by reference. Petitioner submits that the question before the Commissioner is

> ***[H]ow can the Commissioner of Education permit the termination of a tenured employee without compliance with the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq. when that individual, for a period of 16 months preceding her involuntary termination, had repeatedly emphasized that she wished to remain an active employee and where the affected school district employee was seeking the same benefit granted uniformly by the Jefferson Township Board of Education for a period of over a decade, i.e., the right to rescind a previously proffered letter of resignation. (Id., at p. 2)

The Board replies to the above exceptions as follows:

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THE COMMISSIONER OF EDUCATION SHOULD ADOPT THE FINDINGS AND DETERMINATION RENDERED IN THE INITIAL DECISION ON SEPTEMBER 13, 1988 AND DISMISS THE INSTANT APPEAL.

Averring that the ALJ did consider all of the relevant facts including those supplemental stipulations and findings of fact in his initial decision rendered on September 13, 1988, the Board reiterates the findings of the ALJ as found in the initial decision on remand, ante. The Board claims that the additional facts adduced on remand only substantiate the previous conclusion reached in the initial decision of February 23, 1988.

The Board adds that recently the Commissioner has reiterated his previous rulings that once a request to resign is accepted by the Board of Education, it cannot be unilaterally withdrawn. It cites Hanley v. Board of Education of the Township of East Brunswick, decided by the Commissioner June 9, 1988 and Lorraine E. Laing v. Board of Education of the Township of Edison, 1977 S.L.D. 422, aff'd State Board 427, aff'd New Jersey Superior Court (App. Div.), 1978 S.L.D. 1025 in support of this contention. It states further that petitioner waited nearly 18 months after the Board acted upon her resignation to announce that she had changed her mind and wanted an extension of an additional two years before retiring.

> This occurred after she had begun to receive her contractual benefits for those employees who were intending to resign. The Board of Education acted on the Petitioner's resignation and stated intent to retire to its detriment by commuting longevity entitlements and disbursing them and by commuting accrued sick leave entitlements and disbursing them. It would be inequitable for the Board to be compelled to abide by the Petitioner's request for reinstatement in light of the actions already taken by the Board of Education. (emphasis in text)
>
> (Reply Exceptions, at p. 2)

The Board would have the Commissioner adopt as his own the initial decision on remand dismissing the petition.

Upon his careful and independent review of the record, the Commissioner rejects the initial decision on remand for the reasons which follow.

For clarity's sake, the Commissioner sets forth the following chronology of events pertaining to petitioner's employment history with the Board:

April 16, 1984	Petitioner tendered her letter of intent to retire to the Board to become effective June 30, 1987, three years, 2 months later.

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May 14, 1984	Board accepted petitioner's letter of intent to retire by unanimous vote.
1984-85 school year	Petitioner collects longevity payments in sum of $1,500 per year beginning 1984-85 school year continuing potentially through the 1988-89 school year pursuant to contract provision.
February 26, 1986	Petitioner requested extension of her retirement date from 6/30/87 to 6/30/89, two years later than date originally requested.
March 21, 1986	Superintendent acknowledged petitioner's request to extend retirement date, stating that while no decision had been made by the Board "any such extension as may be granted will be based upon your performance during the 1986-87 school year." (See Stipulation of Facts, Exhibit D) Superintendent also instructed petitioner that she should apply for conversion of accumulated sick days, should her request for an extension be denied.
1986-87 school year	Petitioner collected accumulated, unused sick leave benefits in the amount of $1,155, pursuant to contract provision.
April 14, 1987	Assistant Superintendent informed petitioner that the Board's action taken at the May 14, 1984 Board of Education meeting accepting her retirement effective June 30, 1987 as requested in her letter of April 16, 1984 was reaffirmed.
May 13, 1987	Assistant Superintendent submitted certification of service and final salary for petitioner to PERS.
June 17, 1987	Petition of Appeal filed before Commissioner.
June 22, 1987	Petitioner submitted retirement notification to PERS with request for delay in retirement date pending outcome of litigation.
June 30, 1987	Petitioner ceased services in district, following her receipt of correspondence from principal Robert J. Ross dated June 30, 1987 informing her that by instruction of the Superintendent, she was not to report to work effective July 1, 1987.

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June 30, 1987	Petitioner informed principal by letter that she had no intention of retiring June 30, 1987 but would honor his directive not to report to work past June 30, 1987.

As noted in the Commissioner's original decision in this matter, retirement is a voluntary act. N.J.S.A. 18A:66-1 et seq. See also Sobel v. Bd. of Trustees Teachers' Pens. and Ann. Fd., 139 N.J. Super. 55, 57 (App. Div. 1976) (retirement for age and years of service is essentially voluntary, N.J.S.A. 18A:66-43(a)). (See Commissioner's decision Anne Hall, decided March 31, 1988, Slip Opinion, at p. 20.) Having determined now through remand that petitioner in this matter did not file for retirement with PERS until June 22, 1987, and then under protest, as a result of the Board's reaffirmance of its acceptance of her retirement date as originally requested, that is June 30, 1987, the issue now before the Commissioner is whether the Board can compel petitioner to retire as of June 30, 1987 not as of June 30, 1989, two years later than the date originally submitted. In the Commissioner's judgment, it may not.

While it is true that a Board may refuse to accept a rescission of an employee's resignation after the date it is accepted by the Board, see generally Kozak v. Bd. of Education of the Township of Waterford, 1976 S.L.D. 633 and Hanley, supra, the facts in those cases dealt with by the Commissioner heretofore concerning resignations are distinguishable on the facts from this matter. Under the instant circumstances, the Board refused to extend a date of retirement well in advance of the time requested, while the employee remained in the employ of the Board. In Hanley, and in Laing, supra, the two cases dealing with rescission of retirement dates, the Commissioner notes that the employees in question first left the employ of the Board and thereafter sought reinstatement to their respective tenured positions, thereby severing their tenure rights by operation of a break in service. In this case, the Commissioner can find no basis in law or fact justifying the Board's refusal to honor petitioner's request for a later retirement date. To fail to so accommodate such request is tantamount to compelling petitioner's retirement, which is plainly contrary to the legislative intent that retirement be voluntary. N.J.S.A. 18A:66-1 et seq. Moreover, such action would be in contravention of her tenure rights absent charges brought pursuant to N.J.S.A. 18A:6-10 et seq.

The Commissioner finds the Board's obduracy in failing to grant petitioner's request for an extended retirement date irreconcilable particularly because it was the Board itself which established the policy in the district encouraging early announcement of retirement by offering contractual benefits such as longevity payments and early payment for unused sick leave entitlements in exchange for early announcement of intent to retire. The Board must expect that if it promotes announcement of retirement as much as five years in advance of an expected actual retirement date, that circumstances could arise to alter anticipated retirement, as was the case in petitioner's situation.

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The Commissioner notes petitioner's argument that in her case and in none of the other 17 such requests made to it to extend a date of retirement, the Board's failure to take formal action at an open public session to either deny or grant her request voids their reaffirmance of the earlier date. The Commissioner finds no such action was necessary in this case since the Board purportedly chose to take no new action, but rather merely reaffirmed through an administrative directive, its confirmation of the June 30, 1987 retirement date. Further, he finds no merit in petitioner's contention that because the Board granted said extension to the other 17 cases requesting extensions it was obligated to grant hers. No such requirement exists. However, the Commissioner does find merit in petitioner's argument that the Board's reconsideration of her retirement date could not hinge on petitioner's performance during the 1986-87 school year, absent the filing of tenure charges pursuant to N.J.S.A. 18A:6-10 et seq., since she did enjoy the protection of tenure. To do so would violate her tenure rights under N.J.S.A. 18A:17-2, in that she had not left the employ of the Board at any time before she was apprised by the Assistant Superintendent not to return to work after June 30, 1987.

The Commissioner would, moreover, correct petitioner in arguing that the remand in this matter was solely for further factual findings. As stated in the Commissioner's decision dated March 31, 1988, at p. 23:

> Accordingly, the Commissioner remands this matter for further findings of fact and law relative to the following:
>
> ***
>
> 4. What legal effect, if any, the foregoing factual determinations have upon petitioner's claim to continued tenured employment with the Board?*** (emphasis supplied)

On remand the ALJ complied precisely with the directives of the Commissioner and in fact did address the legal ramifications of the factual stipulations agreed to by the parties as a result of the remand. (See Initial Decision on Remand, ante.) The Commis- sioner dismisses as being without merit, therefore, petitioner's contention that the ALJ below did not consider her legal arguments in his remanded initial decision. The Commissioner's careful and independent review of the record as noted above, has likewise considered the arguments of the parties, both legal and factual, in arriving at his conclusions overturning the ALJ's initial decision on remand.

Accordingly, the Commissioner rejects the conclusion of the Office of Administrative Law dismissing the Petition of Appeal in this matter. He directs instead that, for the reasons stated above, petitioner be reinstated to her full-time tenured secretarial position as of July 1, 1987, with all back pay and emoluments of employment due and owing her from that date, less mitigation. In so

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finding, the Commissioner directs further that petitioner repay to the Board any contractual benefits which she may thus have been paid as a result of the Board's recognition of her earlier retirement date. In the alternative, the Board may deduct such benefits paid from salaries owed her. He denies, however, petitioner's request for reasonable, foreseeable and consequential damages in that such relief is beyond the power of the Commissioner to grant. For the same reason, he denies petitioner's request for attorney fees and costs. Finally, while rejecting the initial decision, the Commissioner adopts the ALJ's order issued on June 3, 1988 denying for want of good cause shown, petitioner's Motion to Disqualify the ALJ.

COMMISSIONER OF EDUCATION

October 20, 1988

Pending State Board

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6175-87
AGENCY DKT. NO. 270-8/87

A.H.A. and L.J.A., parents of N.T.A.,

Petitioner,

v.

BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF GLEN ROCK,

Respondent

Eugene T. Paolino, Esq., for petitioner
(Panepinto, Paolino & Doherty, attorneys)

Rodney T. Hara, Esq., for respondent
(Fogarty & Hara, attorneys)

Record Closed: February 22, 1988 Decided: February 22, 1988

BEFORE: **WARD R. YOUNG**, ALJ:

Petitioners, parents of infant N.T.A., alleged the Board's denial of its application for early kindergarten admission on behalf of N.T.A. was arbitrary, capricious, unreasonable, and/or an abuse of its discretionary authority.

The Glen Rock Board of Education (Board) denied the allegations and asserted its action was consistent with law and its own policy.

This matter was transmitted to the Office of Administrative Law as a contested case on September 11, 1987 pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on November 12, 1987 and the matter was set down for hearing on January 22,

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1988. Prior to the date for hearing a Motion for Summary Decision was filed by the Board pursuant to N.J.A.C. 1:1-12.1 et seq. The scheduled hearing was adjourned as the calendar for responsive and reply papers by regulation extended beyond the hearing date. The record closed upon receipt of the final submission on February 22, 1988.

I.

The following facts, stipulated by the parties and incorporated in the Prehearing Order entered on November 12, 1987, are adopted herein as **FINDINGS OF FACT:**

1. Petitioners are the parents of N.T.A.

2. The date of birth of N.T.A. is November 2, 1982.

3. On or about May 28, 1987, petitioners sought to have N.T.A. enrolled in the kindergarten program in the Glen Rock school system for the term commencing September 1987.

4. On June 3, 1987, petitioners were advised by the Glen Rock Superintendent of Schools that N.T.A.'s enrollment in September 1987 was denied.

5. Petitioners appealed the Superintendent's determination to the Glen Rock Board of Education.

6. On July 1, 1987, petitioners were advised by letter that the Board considered their appeal after hearing at its closed work session on June 29, 1987 and denied N.T.A.'s enrollment in September 1987.

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II.

The thrust of the Board's Motion in seeking summary judgment is its reliance upon the statutory scheme, its own policy, and its consistency in the application of its policy.

N.J.S.A. 18A:11-1 states:

> The board shall - -
> . . .
> c. Make, amend and repeal rules, not inconsistent with this title . . ., for its own government . . . and for the government and management of the public schools . . .; and
>
> d. Perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district.

N.J.S.A. 18A:38-5 states:

> No child under the age of five years shall be admitted to any public school, except such as may be provided pursuant to law for children of his age.
>
> No board of education shall be required to accept by transfer from public or private school any pupil who was not eligible by reason of age for admission on October 1 of that school year, but the board may in its discretion admit any such pupil if he or she meets such entrance requirements as may be established by rules or regulations of the board.

The Board exercised its discretionary authority pursuant to N.J.S.A. 18A:11-1 and adopted an entrance age policy in June 1979 consistent with N.J.S.A. 18A:38-5. Board policy J.B.B. states:

> Any child may be admitted to kindergarten if his/her fifth birthday occurs on or before October 1. Any child may be admitted to first grade if his/her sixth birthday occurs on or before October 1. A child whose family moves into Glen Rock shall enter the grade level of his previous school, public or private, if that child has met the age-level requirements of the previous local public school district.

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The affidavit of the Superintendent of Schools, Dario Valcarcel, Jr., indicates that the Board has consistently applied its policy on early admission to kindergarten, and to the best of his knowledge and belief, no student has been admitted to kindergarten who did not meet the requirements of the Board policy. (See attachment to respondent's brief.)

III.

Concerning the allegation (incorporated in the petition) that "certain other applications for early admission to the Glen Rock School system have been approved despite the stated Board policy," petitioners answered interrogatory #12 by asserting it was indicated to them by a principal, and also stated the same source in asserting that one appeal from a denial of entrance to the first grade because of age was upheld. (See, interrogatory #6, Exhibit A-2.) The record, however, is void of any credible evidence with identity to support petitioner's assertion.

Petitioners argue that the Board's admission policy does not provide for discretionary exceptions, and further that the Board was remiss in not requesting prior school records, psychological test results, health records or recommendations for review prior to its denial action after having provided a hearing for petitioners. Petitioners also contend there is no resolution reflecting the Board's denial of kindergarten admission, but do concede the minutes of the Board's June 29, 1987 meeting indicate their appearance before the Board and the Board's denial of their request for their daughter's early admission into kindergarten in September 1987 by a vote of 7-0.

Petitioners oppose the Board's Motion for Summary Decision, contending that genuine issues of material fact exist, and that additional discovery is absolutely necessary in determining whether or not the Board has complied with State law and its own policy.

Counsel for petitioners asserts he indicated in the telephonic prehearing conference that additional discovery might be necessary upon receipt of respondent's answers to interrogatories, and that no mention of such an indication was recorded in the Prehearing Order. He asserts that "It is clear from the responses to interrogatories and

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the discovery obtained to date that the depositions of Mr. Valcarcel, Mr. Knapp and various members of the Board might be required," and further states that "In addition, it might be necessary to further inquire as to whether any students, kindergarten or otherwise, were admitted to the Glen Rock school system who did not meet the age requirements of Board Policy, J.B.B." See, Paolino certification attached to petitioners' brief.

Petitioners' final argument is that the Board's denial was based on its own policy and N.J.S.A. 18A:38-5, whereas it is their contention that N.J.S.A. 18A:44-2 governs the admission of kindergarten age children. N.J.S.A. 18A:44-2 states:

> The Board of Education of any district may establish a kindergarten school or a kindergarten department in any school under its control and may admit to such kindergarten school or department any child over the age of four and under the age of five and shall admit to such kindergarten school or department any child over the age of five and under the age of six years who is a resident of the district.

IV.

Concerning petitioners' contention that the undersigned was remiss in failing to incorporate the indication of counsel that respondent's answers to interrogatories may require further discovery, no request for amendment to the Prehearing Order was made pursuant to N.J.A.C. 1:1-13.2(b). Nor does the absence of counsel's indication in the Order preclude the pursuit of further discovery. Depositions are available on motion for good cause pursuant to N.J.A.C. 1:1-10.2(c), but no motion was filed. N.J.A.C. 1:1-10.4 requires the parties to commence immediately to seek access as provided by law to public documents and to exhaust other informal means of obtaining discoverable material, but the record is void of any evidence that petitioners were precluded from review of Board minutes or refused information sought. No motion to compel was ever filed.

The assertion of petitioners that respondent failed to provide specificity for pupils admitted to kindergarten in 1985, 1986, and 1987 on waiver of the Board's policy is

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ludicrous in light of the certification of the Superintendent of Schools that there were none.

Petitioners' assertion of the failure of the Board to request more information on the preparedness of N.T.A. for kindergarten admission is weightless in light of the fact tnat the Board's policy does not provide for exceptions. Nor did the Board's failure to request preclude a submission when petitioners were heard.

Concerning petitioners' argument that the Board did not provide any resolution upon which it acted to deny their request for the early kindergarten admission of N.T.A., I know of no requirement for the verbatim recording of such a resolution in the minutes of Board meetings. Nor am I aware of any requirement for the recording of reasons for every Board action in the absence of a request for same. The record is void of any evidence or even an assertion that petitioners requested reasons or that the Board refused to provide any.

It is facially clear that N.T.A. simply did not meet the entrance age requirement of the Board's policy.

Petitioners' reliance on N.J.A.C. 18A:44-2 is misplaced as well as misinterpreted. That statute merely authorizes the establishment of kindergarten schools or departments ind provides discretionary authority for a local board to admit children over four years of age and under five years, but requires the admisison of district resident children over the age of five years and under six years.

N.J.S.A. 18A:38-5 establishes a cut-off date of October 1, and more importantly strengthens the discretionary authority vested in the Board pursuant to N.J.S.A. 18A:11-1.

The disagreement of petitioners with the admission policy of the Board and its application of that policy which negatively impacts on the admission of N.T.A. to kindergarten is insufficient cause to set the Board's action aside.

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V.

I **FIND:**

1. The admission policy of the Glen Rock Board of Education is not inconsisent with law and a proper exercise of discretionary authority.

2. The application of the Board's policy and denial of early kindergarten admission of N.T.A. is also a proper exercise of its lawful discretionary authority, and was neither arbitrary, capricious, or unreasonable.

I **CONCLUDE**, therefore, that summary decision is **GRANTED** to the Board, and that the Petition of Appeal shall be and is hereby **DISMISSED.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Commissioner Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

22 February 1988
DATE

WARD R. YOUNG, ALJ

2-24-88
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

FEB 25 1988
DATE

Mailed To Parties:

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A.H.A. AND I.J.A., PARENTS OF N.T.A.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF GLEN ROCK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon review of the record the Commissioner agrees with the findings and conclusion of the ALJ and, therefore, adopts the initial decision as the final decision in this matter for the reasons expressed therein. The Petition of Appeal is hereby dismissed with prejudice.

COMMISSIONER OF EDUCATION

April 4, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4799-87
AGENCY DKT. NO. 181-6/87

JOSEPH CURRAO,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF BAYONNE,

Respondent

George W. Canellis, Esq., for petitioner
(Dwyer & Canellis, P.A.)

Robert T. Clarke, Esq., for respondent
(Apruzzese, McDermott, Mastro & Murphy, attorneys)

Record Closed: March 1, 1988 Decided: March 3, 1988

BEFORE: **WARD R. YOUNG, ALJ:**

Petitioner, a tenured teacher of machine shop employed by the Bayonne Board of Education (Board) continuously since the 1964-65 school year, alleged the Board terminated his employment as of July 1, 1987 through a reduction in force in violation of his tenure rights. The issue framed at the prehearing conference was amended by petitioner's stipulation on the record to delete the alleged violation of his seniority rights.

The Board denied the allegation and asserted its action was a proper exercise of its discretionary authority caused by fiscal restraints and a decline in machine shop enrollment.

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The matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on November 13, 1987 by the Honorable Daniel B. McKeown, A.L.J., and set down for plenary hearing. The undersigned heard the matter on March 1, 1988 at the Office of Administrative Law, Newark, after reassignment due to the incapacitation of Judge McKeown. No post-hearing submissions were imposed on counsel nor requested by either, and the record closed at the termination of hearing on March 1, 1988.

The necessity of the Board to exercise fiscal restraint for the 1987-88 school year nor its authority to reduce its force pursuant to N.J.S.A. 18A:28-9 are disputed by petitioner. The gravamen of this dispute is petitioner's contention that the Board's action impacted on him because of his political activity associated with the mayoral election held on May 12, 1986, at which time the candidate supported by him, one Mr. Ruthkowski, failed to unseat the incumbent, one Mr. Collins.

RELEVANT TESTIMONIAL EVIDENCE

Petitioner testified that he has been politically active locally for many years and supported the incumbent Mayor Collins in previous elections on three or four occasions. He stated he did not support Collins in the May 1986 election because he believed the City of Bayonne needed a change of administration.

Petitioner also testified that he first learned of a possible reduction in force because of a budget crisis and decrease in enrollment in March 1987, which became factual upon written notice to him in April 1987 for the reasons as stated.

Petitioner stipulated that the only certification held by him restricts his assignment to the teaching of machine shop. Since the Board abolished machine shop from its curricular offerings, there was no other assignment for which he was eligible. He therefore stipulated to the deletion of the alleged violation of seniority rights from the issue framed in the Prehearing Order.

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Superintendent Murphy testified as to the revenue loss of approximately 2.1 million dollars for the 1987-88 school years caused by the increase of Bayonne property values by 35 per cent and its resultant impact by the state aid formula, less than full state aid funding, and decreases in federal funding. He further stated that reduction in force actions of the Board impacted on administration and nonprofessional personnel as well as teachers, including the daughters of Mayor Collins and the Bayonne Police Chief, and resulted in a savings of approximately $949,000. He also testified that the final 1987-88 school budget resulted in a tax increase for school purposes of $4.65 per $1000 of assessed value. His testimony revealed the fact that Mayor Collins was aware of the fiscal restraints imposed by the Board through the abolishment of positions as a member of the Board of School Estimate, but at no time were there any discussions of any personnel who would be impacted by such restraints.

Principal Wanko testified that levels of machine shop classes were combined because of low enrollment beginning in the 1985-86 school year. He also stated records of student enrollment for credit in machine shop, taken from "pink cards" reported by teachers, indicated 21, 10, 18, 11, 21, 12 and 12 pupils from the 1980-81 school year through 1986-87, respectively, and that 8 pupils were scheduled for enrollment in 1987-88 pursuant to the process completed in April 1987 by the guidance staff. He also testified that he recommended the deletion of 33 curricular offerings, which were effectuated, notwithstanding that some were subsequently reinstated by consolidation or enrollment increases. See, R-1.

Concerning political activities of teachers, Wanko testified that he expressed his view to teaching staff member Baran that he considered it unwise, and notwithstanding the endorsement of candidate Rutkowski by the Bayonne Teachers Association, the educational process was not impacted by such a position. He further testified that his recommendation of course deletions or positions to be abolished were not influenced in any way by the political activity of any staff member, but resulted solely from his analysis of needs related to enrollment in light of fiscal restraints imposed.

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Board President Garito testified that the political activities of staff members to be impacted by reductions in force were at no time discussed or considered by the Board.

It is simply noted that the Mayoral election was held on May 12, 1986, and the termination of the employment of petitioner pursuant to N.J.S.A. 18A:28-9 did not occur until April 1987, effective for the 1987-88 school year.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I adopt the following as **FINDINGS OF FACT:**

1. The Board of Education of the City of Bayonne faced a budgetary crisis for the 1987-88 school year.

2. Recommended course deletions and subsequent position abolishment were based on a careful analysis of pupil needs in light of imposed fiscal restraints.

3. Petitioner has failed to meet his burden of proof that his termination was motivated by his political activism, or that his tenure rights were violated.

I **CONCLUDE,** therefore, that the Petition of Appeal shall be and is hereby **DISMISSED.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Commissioner Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

3 March 1988
DATE

WARD R. YOUNG, ALJ

MAR 07 [illegible]
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

MAR 8 1988
DATE

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FOR OFFICE OF ADMINISTRATIVE LAW

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JOSEPH CURRAO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon review of the record, the Commissioner is in full agreement with the ALJ's findings and conclusion and adopts them as his own. Accordingly, the Petition of Appeal is dismissed for the reasons stated in the initial decision.

COMMISSIONER OF EDUCATION

April 4, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5513-87
AGENCY DKT. NO. 239-7/87

ESSEX COUNTY VOCATIONAL SCHOOLS BOARD OF EDUCATION,
Petitioner,
v.
PETER R. CIPOLLINI,
Respondent.

Nathanya G. Simon, Esq., for petitioner
(Schwartz, Pisano, Simon & Edelstein, attorneys)

Arnold S. Cohen, Esq., for respondent
(Oxfeld, Cohen & Blunda, attorneys)

Record Closed: February 4, 1988 Decided: February 18, 1988

BEFORE **WARD R. YOUNG**, ALJ:

The Essex County Vocational Schools Board of Education (Board) certified charges of conduct unbecoming a teaching staff member against Peter R. Cipollini, a tenured teacher employed by the Board.

Cipollini "denied that there are facts to demonstrate that there is probable cause to warrant the dismissal of employment . . .", and incorporated a Counterclaim in his Answer for the reinstatement of his employment and adjustment salary increments withheld by the Board for the 1987-88 school year.

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The matter was transmitted to the Office of Administrative Law as a contested case on August 13, 1987 pursuant to N.J.S.A. 52:14F-1 et seq. A telephonic prehearing conference was held on September 3, 1987. The Prehearing Order entered on that date incorporated, inter alia, the plenary hearing schedule on the tenure charges, as well as the withholding action to be determined on the Board's Motion to Dismiss. The Board's Motion was granted by reason of an untimely filing in a decision entered on November 5, 1987.

The plenary hearing on the tenure charges was held and concluded on December 17, 1987 at the Office of Administrative Law, Newark, The record closed with the filing of post-hearing submissions on February 4, 1988.

The following stipulations are adopted herein as **FINDINGS OF FACT:**

I

1. Cipollini was initially employed in petitioner's school district as of September 1, 1976.

2. Ciipollini has been continually assigned as a teacher of general shop for classified special education pupils.

3. Cipollini has been assigned for all but about two years of service at the West Caldwell Center.

4. Cipollini is certified as a teacher of Industrial Arts, Carpentry, and Coordinator of Industrial Education.

The following **FINDINGS OF FACT** supplement the above as the result of a careful review of all testimonial and documentary evidence.

1. Cipollini requested a leave of absence from January 2, 1987 to June 18, 1987 "due to pressing legal and personal matters" in a letter to Superintendent Harvey under date of November 3, 1986.

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2. The Board denied Cipollini's request at its special meeting on November 10, 1986.

3. Cipollini again requested the leave of absence by sending his November 3, 1986 letter to Board President Cocco under date of November 26, 1986.

4. Dr. Robert A. Brodner, a physician caring for Mrs. Cipollini in Florida recommended the leave of absence in a letter to the Board under date of January 23, 1987 to allow Cipollini to return to Florida to assist with his wife's home care.

5. Cippolini's second request was denied by the Board.

6. Cipollini advised the Board in a letter under date of February 25, 1987 that he must take an indefinite emergency leave commencing March 2, 1987, and copied the Superintendent and Principal.

7. The Superintendent advised Cipollini in a letter under date of March 5, 1987, mailed to him at his New Jersey address as well as through his wife's physician in Florida, to return to work by March 16, 1987 or face disciplinary action for taking leave without authorization.

8. Cipollini advised Harvey in a letter under date of March 16, 1987 of his intention not to resume his classroom duties until further notice in order to resolve his personal problems.

9. Harvey advised Cipollini of the Board's withholding action of April 27, 1987 in a letter under date of May 1, 1987.

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II

It cannot be disputed that Cipollini unilaterally took leave on March 2, 1987 after his leave requests had been denied by the Board. I therefore **FIND** the certified charges to be true. Cipollini argues that the mitigating circumstances of his wife's back problem, residence in Florida, and her need for his assistance in caring for her does not warrant dismissal of his employment.

It must be presumed that the above circumstances represent the pressing personal matters referred to in his leave request. See, P-1. Notwithstanding that the Superintendent testified that a pressing matter of marital difficulties was indicated to him by Cipollini's principal, Cipollini did not testify as to this possible circumstance, and no such finding is made due to the hearsay character of the Superintendent's testimony. The principal did not testify.

Although the absolute presence of Cipollini in Florida to care for his wife may be questioned, I am satisfied that Cipollini's conduct was motivated by personal emotional problems, whatever those problems may have been. A cause of Cipollini's problems must be deemed to be the geographical separation of husband and wife. Mrs. Cipollini apparently decided to reside in the state of Florida while her husband was contractually obligated to provide services as a teacher in the State of New Jersey. The undisputed fact that Cipollini chose to breach his contractual obligation to be with her and his reasons for doing so does not rise to the level of sufficient mitigating circumstances to pardon his conduct. **I SO FIND.**

The credible testimony of the Superintendent clearly established that Cipollini's absence undermined the educational process of those pupils entrusted to him and therefore deprived them of a thorough and efficient education. The preponderance of testimonial and documentary evidence clearly establishes that Cipollini was well aware of the expressed concern of his conduct and disciplinary consequences if he did not return to his employment as of March 16.

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It is noted that a permanent replacement for Cipollini was not found, and that substitutes finished the school year. A reorganization for the 1987-88 school year resulted in a reduction in force and resolved the staffing problem of a Cipollini replacement.

III

Respondent argues that the withholding of his salary increments and certification of tenure charges causes him to suffer an impermissable double penalty, and cites several labor arbitration decisions for support in his initial brief of January 21 at 9, 10, and 11. The Board argues there are distinctions in the reasons proffered by the Board for its withholding action and certification of tenure charges.

The arguments of both parties are rejected. Firstly, the withholding and certified tenure charges are actions of the Board consistent with legislative intent. N.J.S.A. 18A:11-1(d) authorizes the Board to "Perform all acts and do all things . . . necessary for the lawful and proper conduct . . ." N.J.S.A. 18A:6-10 authorizes a Board to certify tenure charges. N.J.S.A. 18A:29-14, or prrogatives under N.J.S.A. 18A:6-10 or N.J.S.A. 18A:29-14 authorizes the Board to withhold employment and/or adjustment increments. I find no statutory provision requiring a Board to choose between the exercise of its managerial prerogatives under N.J.S.A. 18A:6-10 or N.J.S.A. 18A:29-14, or prohibiting the applicability of both. I do find it ludicrous to believe that the legislature intended that tenured teaching staff members, against whom a Board certified charges and suspended without pay, shall be compensated (beginning with the one hundred and twenty-first day after certification) with a salary increase pending a determination of the charges by the Commissioner pursuant to N.J.S.A. 18A:6-14.

The reasons for the Board's withholding action "is your unauthorized absence from your position, taking a leave of absence without Board permission, and absence after denial to a leave of absence and a directive to return." See, J-8. The Board certified "charges of unbecoming conduct" against respondent at its July 20, 1987 meeting. The language in the latter action characterizes the Board's reasons for its withholding action, and in my view, represents a distinction without a difference.

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A review of the testimonial and documentary evidence in the record of this matter raises a serious question of the credibility of the respondent. His leave requests of November 3, 1986 and November 26, 1986 indicate "pressing legal and personal matters" as the underlying reasons. See, J-1 and J-3. It was not until a January 23, 1987 letter from Dr. Brodner and a subsequent February 25, 1987 letter from respondent that a medical reason involving his wife was introduced. See, J-4 and J-5. The introduction of a new reason occurred after his requests were denied. It is also noted that his requests for leave were for an effective date of January 2, 1987 and his unilateral action to take leave occurred on March 2, 1987, or two months later. I am not persuaded that respondent expressed the full and true reasons for his desire to join his wife in Florida. **I SO FIND.**

IV

In the Matter of the Tenure Hearing of Elizabeth Merkooloff, School District of the Twp. of Washington, 1980 S.L.D. 1370, the Commissioner stressed again that which he previously said in Clinton F. Smith et al. v. Bd. of Ed. of the Boro of Paramus, 1968 S.L.D. 62:

> The principal enunciated by the Court in Bates v. Board of Education, 72 P. 907 (Calif. Sup. Ct., 1963), and quoted with approval in McGrath v. Burkhard, 280 P.2d 864 (Calif. App. 1955), bears repeating here:
>
> The public schools were not created, nor are they supported, for the benefit of the teachers therein, . . . but for the benefit of the pupils and the resulting benefit to their parents and the Community at large . . . (at 67)
> (at 1371)

The Commissioner also stated at 1371 in Merkooloff:

> The Commissioner believes that these young pupils in their formative years surely deserve the best education possible with as complete continuity as can be accorded them, recognizing that excessive teacher absenteeism has a deleterious effect on their education.

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In Kenneth Diffenderfer v. Bd. of Ed. of the Boro of Washington, 1975 S.L.D. 343, aff'd St. Bd., 1976 S.L.D. 1137, the Commissioner determined that petitioner, a tenured principal, abandoned his position and tenure rights when he voluntarily applied for and succeeded in securing "a highly-competive position with the Department of the Army" (he was an officer of the Unitd States Army Reserves); advised the Board ex post facto he was commencing active military service on September 1 and requested a four-year leave of absence, which was denied.

In the Matter of the Tenure Hearing of Joseph A. Maratea, Twp. of Riverside, 1966 S.L.D. 77, the Commissioner said:

> The Commissioner is assiduous to protect school personnel in their employment when they are subjected to unfair or improper attacks or when they are unable to perform effectively because of conditions not of their own making or beyond their control. An employee is not entitled to the protection of tenure, however, when, by his own acts or failures, he creates conditions under which the proper operation of the schools is adversely affected. When the responsibility for the conditions unfavorable to the effective operation of the school rests with the employee then, the Commissioner holds, the protection of tenure is forfeit (at 106).

In the Matter of the Tenure Hearing of Jacque L. Sammons, School District of Black Horse Pike Regional, 1972 S.L.D. 302, the Commissioner said:

> [T]hey [teachers] are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. As one of the most dominant and influential forces in the lives of the children, who are compelled to attend the public schools, the teacher is an enormous force for improving the public weal. Those who teach do so by choice, and in this respect the teaching profession is more than a simple job; it is a calling. (at 321).

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It was also stated In the Matter of the Tenure Hearing of Herman B. Nash, School District of the Twp of Teaneck, 1971 S.L.D. 284:

> A teacher, as any citizen, who decides to take any form of action or inaction does so at his own risk. No matter what the ultimate objective sought, the individual must accept the responsibility for his actions . . . and must accept the consequences of his actions. (at 296).

See also, the decision of the State Board of Education In the Matter of the Tenure Hearing of Robert C. Bates, School District of Lower Camden County Regional, 1986 S.L.D. _____, (decided December 3, 1986).

IV

I **FIND** the Board has met its burden of proof by a preponderance of credible evidence that Peter R. Cipollini was guilty of conduct unbecoming a teacher; abandoned his position as teacher in petitioner's school district; and has forfeited the protection of tenure which the statutes otherwise afford.

I **CONCLUDE**, therefore, that Peter R. Cipollini shall be **DISMISSED** from his tenured employment. **IT IS SO ORDERED.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

18 February 1988
DATE

WARD R. YOUNG, ALJ

FEB 10 1988
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

FEB 23 1988
DATE

Mailed To Parties:
FOR OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE TENURE	:	
HEARING OF PETER R. CIPOLLINI,	:	
SCHOOL DISTRICT OF ESSEX COUNTY	:	COMMISSIONER OF EDUCATION
VOCATIONAL SCHOOLS, ESSEX COUNTY.	:	DECISION

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law. It is observed that respondent's exceptions to the initial decision as well as the Board's reply to those exceptions were filed with the Commissioner pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

In his exceptions respondent renews those arguments contained in his post-hearing brief filed with the ALJ which were previously addressed in pertinent part in the initial decision, ante, and also by virtue of the ALJ's Decision on Motion of November 5, 1987 dismissing respondent's counterclaim (Issue No. 2) with regard to his allegations involving the Board's withholding of his 1987-88 salary increment.

In the first instance, the Commissioner is satisfied that the ALJ correctly found that respondent's counterclaim (Issue No. 2) would not be considered in conjunction with the Board's tenure charge against him by virtue of its untimely filing pursuant to the provisions of N.J.A.C. 6:24-1.2.

The Commissioner does observe, however, that the ALJ did address respondent's argument in the initial decision that the withholding of his increment by the Board in addition to certifying tenure charges against him subjected respondent to an impermissible double penalty. In rejecting respondent's exceptions and affirming the ALJ's findings and conclusions found on pages 5 and 6 of the initial decision, the Commissioner also relies on those prior school law decisions which hold that salary increments are for the purpose of rewarding those who have contributed toward the educational process not to those who have absented themselves an excessive number of days during a given school year. Bernards Township Board of Education v. Bernards Township Education Association, 79 N.J. 31 (1979) and Helena Bialek and Patrick N. Meehan v. Board of Education of the Township of Teaneck, decided by the Commissioner July 19, 1985, aff'd State Board December 4, 1985.

Additionally, the Commissioner also rejects respondent's argument that the withholding of his 1987-88 salary increment and the Board's certification of tenure charges against him constitute a double penalty imposed against him by the Board. In this regard the

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Commissioner relies on his previous holding in In the Matter of the Tenure Hearing of Earmond DeMarco, School District of Glassboro, Gloucester County and Earmond DeMarco v. Board of Education of the Borough of Glassboro, 1980 S.L.D. 204, aff'd State Board 227. In DeMarco, the Commissioner held in pertinent part as follows:

> In this matter the Commissioner rendered a Decision on Motion on March 20, 1978 in which he said:
>
> > "The Commissioner finds no merit in respondent's argument for the application of the doctrine of election of remedies and judicial economy. There are two distinct statutory provisions providing independent redress to the Board for appropriate action as set down in N.J.S.A. 18A:29-14, withholding of increment, and N.J.S.A. 18A:6-10 et seq., the Tenure Employees Hearing Law. The Board was presented sufficient detail on which to make a decision to withhold respondent's increment (J-1) and accordingly took action authorized by the statute. The Commissioner cannot agree with respondent's argument that the increment withholding charges are broader than the tenure charges and the Board, having elected to withhold respondent's increment is precluded from pursuing tenure charges. Such was not the intent of the Legislature when it established the two separate remedies spelled out by the statutes in question and to so argue places form over substance.***" *** (at 204-205)

It is observed further that respondent in his exceptions to the initial decision takes issue with the ALJ's findings and conclusions related to the Board's tenure charges of unbecoming conduct and insubordination on the following grounds:

1. Respondent claims that the ALJ ignored his unrefuted testimony at the hearing as well as the testimony of the Superintendent which proves that the Board was previously aware of the fact that his written requests dated November 3 (J-1) and November 26, 1986 (J-3) were for the reasons stated by his wife's physician in his letter of January 23, 1987 (J-4) to the Board.

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2. The Board, having denied respondent all three of the above-cited requests, left him with no other alternative but to inform it in writing on February 25, 1987 of the following unilateral action he was taking:

> My wife's doctor has recommended that I care for and assist my wife in convalescence and rehabilitation for back surgery.
>
> In the best interest of her health, I reluctantly inform you that I must take an indefinite emergency leave of absence commencing 2 March 1987. (emphasis in text) (J-5)

3. Respondent claims that in the past he had requested a leave of absence from the Board and that such request was granted without requiring him to give a specific reason. He further maintains that no Board employee in the past has ever been denied a request for a leave of absence.

4. The ALJ erroneously found and concluded that respondent abandoned his tenured teaching position with the Board. Respondent argues that he was not charged with abandonment of position by the Board and that such charge was not part of the issues framed in the prehearing order of September 3, 1987 which reads in pertinent part:

> Are the charges of insubordination and conduct unbecoming certified by the Essex County Vocational Board of Education against tenured teaching staff member Peter R. Cipolini (sic) true, and if so, is dismissal of employment or a reduction in salary warranted?

5. Respondent maintains that in the event the Commissioner determines that he acted improperly given all of the factual circumstances which form the basis for the tenure charges of insubordination and unbecoming conduct against him, then the penalty of his dismissal from his tenured teaching position which has been recommended by the ALJ is excessively harsh and unwarranted in light of prior decisions rendered by the Commissioner under similar circumstances. In this regard respondent relies on a number of prior decisions in tenure cases rendered by the Commissioner where the penalty imposed was less than dismissal. The Commissioner notes that the decisions upon which respondent relies appears on pages 14 through 17 of his exceptions. They are incorporated by reference herein.

The Board in its reply to respondent's exceptions strenuously rejects his claim that the tenure charges as framed do not specifically charge him with abandonment of his tenured teaching

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position. In this regard, the Board relies on Charge No. 4 set forth in the Superintendent's statement of charges:

> Peter R. Cipollini did wrongfully and improperly abandon his position as a teaching staff member for the Board of Education of the Essex County Vocational Schools effective on or about March 16, 1987.

In summarizing its replies to respondent's exceptions, counsel for the Board states the following in her letter exceptions attached to the Board's post-hearing brief:

> Many of the allegations contained in the Exception Brief filed by my adversary contain facts not in evidence concerning the prior history, both medical and personal of Mrs. Cipollini. The Judge specifically denied questioning in this area at the time of trial. Further, the record shows by virtue of the testimony of Mr. Cipollini himself, that Mr. Cipollini knew nothing about Dr. Brodner's letter prior to its receipt in the school district. Mr. Cipollini stated that after it had been received in the school district, he found out that Mrs. Cipollini had requested the doctor to send it in order to help her husband with his employer in terms of being relieved of duties to join her in Florida. The record further shows that Mr. Cipollini went to Florida over the Christmas break and for two weeks in March and yet failed to make appropriate alternative arrangements during those times for the care of his wife. Further, the record clearly shows that the credible testimony of the Superintendent, Dr. William Harvey, indicated that neither as a matter of contract, Board practice or Board policy had a similar type of leave been granted during the history of his employment with the system. The denial of the leave of absence as same was presented to the Superintendent and Board of Education was reasonable under the circumstances. The Superintendent credibly testified as to the detrimental effect the leave of absence would cause upon the students in Mr. Cipollini's classes. As clearly indicated, a permanent replacement could not be found for Mr. Cipollini and substitutes were needed to finish the year and, in fact, the class was closed earlier in the year than had Mr. Cipollini been the regular teacher as contracted. Mr. Cipollini's absence without authorization,

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> abandonment of position and insubordination in failing to return after being directed to return by the Superintendent, resulted in unnecessary and unwarranted disruption to the educational process and was dereliction of responsibility to the students for whom he had responsibility during the 1986-87 school year.
>
> (Board's Letter Reply, at pp. 3-4)

The Commissioner has reviewed the respective positions advanced by the parties in connection with the findings, conclusions, and recommendations set forth in the initial decision. The Commissioner observes that the relevant facts set forth in the record of this matter do not support a finding with respect to the charge set forth in paragraph 4 of the Superintendent's statement of charges with regard to respondent being adjudged guilty of abandoning his tenured teaching position. "Abandon" as defined in Black's Law Dictionary 9 (rev. 4th ed. 1968) reads in pertinent part:

> ABANDON. To desert, surrender, forsake, or cede. To relinquish or give up with intent of never again resuming one's right or interest. Burroughs v. Pacific Telephone & Telegraph Co.., 220 P. 152, 155, 109 Or. 404. To give up or to cease to use. Southern Ry. Co. v. Commonwealth, 105 S.E. 65, 67, 128 Va. 176. To give up absolutely; to forsake entirely; to renounce utterly; to relinquish all connection with or concern in; to desert. Commonwealth v. Louisville & N.R. Co., 258 S.W. 101, 102, 201 Ky. 670. It includes the intention, and also the external act by which it is carried into effect.

In reviewing the record, the Commissioner observes that respondent's letter requests of November 3 (J-1) and November 26, 1986 (J-3) to the Board set a specific time of approximately 6 months during which he wanted permission to be absent from employment. These requests were subsequently denied by the Board. While respondent's letter of February 25, 1987 (J-5) indicated that he was going to absent himself from employment as of March 2, 1987 for an indefinite period of time, nevertheless the Commissioner does not conclude that respondent conveyed an intent to the Board to relinquish his tenured teaching position. Moreover, it is further observed respondent gave no indication of his intention to abandon his tenured teaching position when he responded in writing March 16, 1987 (J-7) to the Superintendent's written admonition of March 5, 1987 (J-6) that disciplinary action would be taken against him by the Board.

To the contrary, it is clear that respondent did have intention to return to his teaching position which is evidenced by

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his response to the Board's tenure charges against him which were certified by the Board on July 20, 1987. Given the facts as recited above the Commissioner finds and determines that respondent did not abandon his tenured teaching position. Respondent is guilty, however, of taking an extended unauthorized leave of absence from his tenured employment commencing on March 2, 1987 through the end of the 1986-87 school year.

Additionally, the Commissioner is not persuaded by respondent's arguments that the Board was aware or should have been aware of his true reasons for requesting an extended leave of absence as early as November 3, 1986.

It appears that respondent attempts to place the onus upon his superiors and the Board for what he considers their failure to be aware of his true reasons for requesting an extended leave of absence. The Commissioner cannot agree that respondent's letters of November 3 (J-1), November 26, 1986 (J-3) or the letter from his wife's physician dated January 23, 1987 (J-4) truly expressed his reasons for requesting an extended leave of absence. If anything, such correspondence only served to obscure the real reason respondent was requesting an extended leave of absence from the Board. It was not until February 25, 1987 (J-5) that respondent let it be known in writing to the Board why he was formally taking a leave of absence. However, this letter to the Board was not couched in the form of a request for approval but instead it was conveyed in the manner of a unilateral determination by respondent informing the Board that he was taking an indefinite emergency leave of absence commencing March 2, 1987.

In view of the above, the Commissioner cannot ignore the fact that the actions of respondent in this regard warrant a finding and determination of his being adjudged guilty of insubordination and conduct unbecoming a tenured teaching staff member.

In summary, the Commissioner adopts as his own those findings and conclusions in the initial decision which determine that respondent is guilty of unbecoming conduct and insubordination as a tenured teaching staff member by virtue of his failure to communicate to the Board his reasons for requesting an extended leave of absence in a timely fashion, his taking an unauthorized leave of absence and his refusal to obey a Board directive to return to his position of employment as of March 16, 1987. The Commissioner further finds and determines that the Board acted within its lawful authority to withhold respondent's salary increment for the 1987-88 school year notwithstanding the fact that it also pursued the certification of tenure charges against him on July 20, 1987.

The Commissioner reverses the part of the initial decision which finds and determines that respondent abandoned his tenured teaching position for the reasons stated herein. What remains for

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the Commissioner to determine at this juncture is the penalty to be imposed upon respondent who has been found and determined to be guilty of the remaining incidents constituting insubordination and conduct unbecoming a tenured teaching staff member.

In reaching a determination with respect to the penalty to be imposed upon respondent, the Commissioner concurs with that finding of the ALJ which concludes that respondent did not properly inform the Board of his true reasons for his desire to join his wife in Florida. Moreover, equally inexplicable is the fact that while respondent's wife's physician first notified the Board on January 23, 1987 (J-4) that respondent's wife underwent surgery in Florida on January 21, 1987, respondent waited until February 25, 1987 to inform the Board of this event and to inform it that he was taking an unauthorized indefinite emergency leave commencing March 2, 1987 (J-5). Respondent did carry out this ultimatum that he gave to the Board and it appears from his reply of March 16, 1987 (J-7) to the Superintendent's written admonishment of March 5, 1987 (J-6) that he was still living in New Jersey. In any event the record establishes that respondent left no forwarding address where he could be reached in Florida. (P-1) The Commissioner can only conclude from a review of the incidents recited above that respondent failed to let the Board know when he would return from his "indefinite emergency" unauthorized leave of absence and, furthermore, that he did not want the Board to communicate with him during this period of time.

Consequently, the Board was left with no alternative but to attempt to employ another person (substitute teacher) in respondent's position, at least for the remainder of the 1986-87 school year commencing on March 2, 1987.

The Commissioner cannot ignore respondent's flagrant disregard of his employment responsibilities with the Board which resulted from his action, nor can he excuse the indifference which respondent manifested in this regard toward those classified special education pupils whom he was assigned to teach during the 1986-87 school year.

The Commissioner finds especially appropriate the pertinent language cited by the ALJ in Merkooloff, Maratea and Sammons, supra. (Initial Decision, ante)

Finally, the Commissioner has previously admonished teaching staff members in Nash, supra, of the following:

> A teacher, as any citizen, who decides to take any form of action or inaction does so at his own risk. No matter what the ultimate objective sought, the individual must accept the responsibility for his actions . . . and must accept the consequences of his actions.
> (emphasis supplied) (at 296)

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Accordingly, the Commissioner reverses that finding and determination of the ALJ which concludes that respondent is guilty of abandonment of position, however, in all other respects the Commissioner adopts those findings and conclusion in the initial decision as his own.

In view of the above, the Commissioner finds and determines that respondent is solely responsible for his actions which constitute conduct unbecoming a teacher and insubordination as charged by the Board and has therefore forfeited his right to his tenured teaching position in the employ of the Essex County Vocational School District as of the date of this decision. The Commissioner so holds. It is further ordered that, pursuant to N.J.A.C. 6:11-3.7, a copy of the final decision in this matter be forwarded to the State Board of Examiners for its review and, in its discretion, any further action deemed appropriate.

COMMISSIONER OF EDUCATION

April 4, 1988

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IN THE MATTER OF THE TENURE	:	
HEARING OF PETER R. CIPOLLINI,	:	STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF ESSEX COUNTY	:	DECISION
VOCATIONAL SCHOOLS, ESSEX COUNTY.	:	
	:	

Decided by the Commissioner of Education, April 14, 1988

For the Petitioner-Respondent, Schwartz, Pisano, Simon & Edelstein (Nathanya G. Simon, Esq., of Counsel)

For the Respondent-Appellant, Oxfeld, Blunda, Friedman, Levine & Brooks (Arnold S. Cohen, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

August 3, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
(EXPEDITED)
OAL DKT. NO. EDU 1491-88
AGENCY DKT. NO. 36-3/88

IN THE MATTER OF
THE SCHOOL BOARD
CANDIDACY OF
JANICE I. LEENHOUTS,
SCHOOL DISTRICT OF
THE TOWNSHIP OF
BARNEGAT, OCEAN COUNTY,

Anthony J. Muttillo, petitioner, pro se
Janice I. Leenhouts, respondent, pro se
Kathleen Hofsteder, Esq., for the Board of Education (Gelzer, Kelaher, Shea, Novy & Carr, attorneys)

Record Closed: March 11, 1988 Decided: March 14, 1988

BEFORE **LILLARD E. LAW, ALJ:**

STATEMENT OF THE CASE

Petitioner, Anthony J. Muttillo, a candidate for a one year unexpired term for membership on the Board of Education of the Township of Barnegat (Board) at the annual school election to be held on April 5, 1988, challenges the candidacy of respondent Janice Ivy Leenhouts for the same seat on the Board alleging that

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respondent fails to meet the residency requirement and that her nominating petition is defective.

PROCEDURAL ASPECTS

Petitioner filed his Petition of Appeal, dated February 27, 1988, before the Commissioner of Education who was in receipt thereof on March 7, 1988. On March 1, 1988, respondent filed her Answer to the Petition of Appeal before the Commissioner who was in receipt thereof on March 7, 1988. On March 9, 1988, the Commissioner transmitted the matter to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. The Commissioner requested an expedited hearing, which was held on March 11, 1988, at the Barnegat Township Municipal Court, Barnegat, New Jersey. The record in this matter was closed on March 11, 1988.

ISSUES TO BE DETERMINED

Absent a prehearing conference, this tribunal carefully reviewed the pleadings to ascertain the issues to be determined in this matter and arrived at the following:

1. Whether respondent meets the residency requirement for membership on the Board, pursuant to N.J.S.A. 18A:12-1?

2. Whether respondent's nomination petition is so defective as to require her name to be removed from the ballot for the annual school election to be held on April 5, 1988?

3. Whether, despite defects in her nomination petition, it is valid for purposes of the annual school election to be held on April 5, 1988, pursuant to N.J.S.A. 18A:14-12?

BURDEN OF PROOFS

The petitioner must affirmatively demonstrate, by a preponderance of the reliable and credible evidence, the allegations as to respondent's failure to meet the

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statutory residency requirement and, that respondent's nominating petition is so defective as to remove her name from the ballot for the forthcoming annual school election.

ISSUE NUMBER ONE

At the opening of the hearing, petitioner withdrew and abandoned his charge that respondent failed to meet the residency requirement for membership on the Board. Consequently, Issue Number One is no longer in dispute and will not be considered in this decision.

TESTIMONIAL AND DOCUMENTARY EVIDENCE

Dorothy J. Carpo, Secretary of the Board, was called by petitioner, Muttillo herein and testified, among other things, that she received respondent's nominating petition on February 11, 1988, and pursuant to her duties, checked the nominating petition to determine that the proper number of signatures appeared thereon and also that the person who certified the petition was a petitioner and not respondent. Both petitioner Muttillo and respondent Leenhouts stipulated that Board Secretary Carpo properly performed her duties with respect to the Leenhouts nominating petition.

Joan Kaplan, Supervisor, Ocean County Board of Elections was called by petitioner Muttillo and testified, among other things, that she is in charge of the election books and registrars pursuant to the New Jersey Election Laws under Title 19 for the County of Ocean. Supervisor Kaplan asserted that petitioner Muttillo appeared at the office of the Ocean County Board of Elections with a copy of the Leenhouts nominating petition to determine whether or not the signatories on the petition were registered voters in the Township of Barnegat. Supervisor Kaplan testified that a clerk in her office was assigned to assist petitioner Muttillo. Because it was difficult to read the names of the signatories on the xerox copy of the nominating petition Muttillo supplied to the clerk, the clerk made errors when comparing the petition list of names with those names of registered voters on the Election Board computer. As a consequence of the clerk's errors, Supervisor Kaplan on February 26, 1988, executed a list of names of the signatories and certified as follows:

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To Whom it May Concern:
In review of our records we find the following:
Carolyn Fay - no record of voters registration
Randy Dragoroc - We have no record of this particular voter but have a RADOJKA at this address
Lucijana Luin - name is printed on petition and can't compare signature
Jerry Pesic - Not Registered
Cindy Cathcart - Registered
William Neyenhouse - Registered as William C. Neyenhouse
Robert Cathcard - Registered
Lorraine Fasso - Was pulled for a four year period.
Lynn Davis - Is registered as Linda A. Davis
Marilyn Bass - Registered voter
Deborah Wilber - Not Registered
Bill Leenhouts - We have a Willard Paul Leenhouts registered from 11 Bayside Ave.
Reviewed by Lois Murphy - Clerk of the Ocean County Board of Elections
Certified by Supervisor - Joan E. Kaplan [signed] (P-2)

Supervisor Kaplan asserted, among other things, that her expertise is with the New Jersey Statutes, Title 19. She testified that she was not familiar with nominating petitions for membership on a board of education nor did she profess expertise with the Education Laws under Title 18A and subchapter 14. Supervisor Kaplan did assert, moreover, that there was no such person registered to vote in Ocean County under the name of Carolyn Fay, the individual who signed and verified respondent's nominating petition.

On cross-examination by respondent Leenhouts, Supervisor Kaplan testified that upon further examination of respondent's nominating petition and acknowledging the Board of Election clerk's errors, Kaplan executed a second sworn statement, dated, March 1, 1988, wherein she certified the following:

To Whom it May Concern:
On further review, with the proper spelling available the following people we found to be registered in Ocean County and Barnegat.
Carolyn Fay - who is registered under Gunn
Radojka Dragovcic - Who signed petition Randy but last name was misspelled, is registered. Last name was misspelled as: Dragoroc
Jenny Pesic - Who's last name was misspelled by us on the computer, is a registered voter in Barnegat.
Computer picked up Pesie not Pesic.
Deborah Webber - Who's last name was given as

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Wilber, is a registered voter in Barnegat.
Luciajana Lucin - is a registered voter in Barnegat.
Last name was mispelled.
Last name given as Lucin.
[signed]
Joan E. Kaplan, Supervisor (R-1)

Supervisor Kaplan testified that Carolyn Fay was not a registered voter in Barnegat Township or Ocean County. She asserted, however, that Carolyn Gunn was a registered voter in both jurisdictions and that Carolyn Gunn was not required to change to her married name of Fay if she did not choose to do so under Title 19 of the New Jersey Election Laws. Supervisor Kaplan asserted that an individual who changes his/her name has up to one year in which to change their name on the voter registration. In the event the Ocean County Board of Election is not notified of the name change, that individual is registered to vote under the former name and is eligible to vote in all elections. Supervisor Kaplan testified that Carolyn Gunn is registered and on the rolls to vote as an eligible voter. She asserted that Carolyn Gunn is not disenfranchised in any manner.

At the close of Supervisor Kaplan's testimony, petitioner Muttillo propounded an oral motion to suppress. What petitioner Muttillo requested to be suppressed was not made clear on the record, therefore, this court could not render a decision on the motion.

Petitioner Muttillo then called Carolyn Fay as his witness who testified, among other things, that she was formerly known as Carolyn Gunn and that she had married in June 1984 and was now commonly known as Carolyn Fay. She asserted that her motor vehicle registration and driver license were in the name of Fay. She is also known as Fay by her employer and by the officials of the Barnegat Board of Education where her children attend school. Mrs. Fay contended, however, that she is known as Carolyn Gunn by the Ocean County Board of Elections and that the deed to the house she owns is also under the name of Gunn. Mrs. Fay testified she is an eligible and active voter under her former name of Carolyn Gunn wherein she voted in the annual school board election held in April 1987 and the Primary Election held in June 1987.

Mrs. Fay admitted she signed and verified respondent's nominating petition as Carolyn Fay rather than by her election registration Carolyn Gunn. She also

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admitted that she did not obtain the signatures on the nominating petition. Nor did Mrs. Fay know for a fact if each of the purported signatories actually signed the nominating petition or whether they each, individually, were qualified to vote. Mrs. Fay testified, however, that she signed respondent's nominating petition in absolute good faith and did likewise when she verified the petition.

Respondent. Janice Ivy Leenhouts, testified in her own behalf asserting, among other things, that her only motivation in presenting her nominating petition was to enter the race for a one year term on the Board. Respondent testified she sought the signatures on her nominating petition with the intent to secure ten valid signatures. In so doing, respondent inquired of each signatory as to whether or not they each were a registered voter and when they answered in the affirmative, respondent permitted them to sign the petition.

Respondent contended that she received no instructions that Mrs. Fay was required to witness the signatories sign the petition. Nor was respondent instructed that the person who verified her nominating petition was required to witness the signatures of the petitioners.

Respondent asserts that there was no intention to commit fraud with respect to her nominating petition and that all of her actions, as well as the signatories and Mrs. Fay who verified the petition, were in absolute good faith for the sole purpose of qualifying respondent for her election as a member of the Barnegat Township Board of Education.

FINDINGS OF FACT

Having carefully reviewed and considered the entire record including the testimony and documents moved into evidence, and having given fair weight thereto; and having observed the demeanor of the witnesses and assessed their credibility, I **FIND** the following **FACTS** in this matter:

1. Petitioner, Anthony J. Muttillo, is a candidate for a seat on the Board for a one year, unexpired term at the annual school election to be held on April 5, 1988.

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2. Petitioner Muttillo alleges that the nominating petition executed on behalf of Janice Ivy Leenhouts, who is running in opposition to petitioner Muttillo for the one year unexpired term on the Board, is so defective as to cause Leenhouts' name to be removed from the ballot for the election to be held on April 5, 1988.

3. Respondent was required to provide a minimum of ten signatures of legally qualified persons on a nominating petition to endorse her candidacy for the election to the Board (P-1).

4. Respondent provided twelve signatures on her nominating petition.

5. Upon an inquiry by petitioner Muttillo to the Ocean County Board of Elections, Joan E. Kaplan, Supervisor, certified on February 26, 1988, that five of the twelve signatures on respondent's nominating petition were not legally registered voters (P-2).

6. Subsequently Supervisor Kaplan recognized that there were numerous errors made by the clerk assigned to cross-check the names on the Board of Election computer with the names on the xerox copy of respondent's nominating petition supplied by petitioner.

7. Upon further review by Supervisor Kaplan, she thereafter, on March 1, 1988, issued a second certification clarifying and finding that all the signatories, except one, were duly registered and eligible to vote in the upcoming annual school board election (R-1).

8. Lorraine Fasso is the one signatory appearing on respondent's petition who is not registered to vote by virtue of her failure to vote for four consecutive years (P-2).

9. Carolyn Fay, the married name of Carolyn Gunn, is not registered to vote under the name of Carolyn Fay.

10. Carolyn Gunn, the former name of Carolyn Fay, is duly registered and eligible to vote under the name of Carolyn Gunn.

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11. Carolyn Fay signed respondent's nominating petition as Carolyn Fay endorsing respondent's candidacy for election to the Board.

12. Carolyn Fay executed the verification of respondent's nominating petition as Carolyn Fay.

13. Respondent had at least ten registered and qualified voters as petitioners who endorsed her candidacy for election to the Board.

14. There was no showing that the signers of respondent's nominating petition did so sign and/or verify in circumstances other than absolute good faith.

DISCUSSION AND CONCLUSIONS

Petitioner having conceded and stipulated that respondent is a bona fide resident of Barnegat Township and, therefore, eligible to run for election to the Board, now claims that respondent's nominating petition is so defective as to cause her name to be withdrawn from the ballot for the election to be held on April 5, 1988, to a one year, unexpired term on the Board. The controlling statute, with respect to alleged defective nominating petitions at the school election is found at N.J.S.A. 18A:14-12, and provides as follows:

> If, on or before the 49th day preceeding the date of the election, the secretary of the board finds a nominating petition to be defective excepting as to the number of signatures, the secretary of the board shall forthwith notify the candidate of the defect and of the candidate's right to remedy the defect not later than the 49th day preceeding the date of the election, and the candidate endorsing the petition may amend the same in form or substance, but not to add signatures, so as to remedy the defect at any time prior to said date. A nominating petition not so found to be defective shall be, as of the 48th day preceeding the election, conclusively valid for the purpose of this chapter. (emphasis added)

A clear reading of the statute, N.J.S.A. 18A:14-12, and a chronological review of the events concerning this matter, demonstrates that respondent Leenhouts'

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nominating petition is conclusively valid for the purpose of her standing for election to the Board of Education on April 5, 1988. It is established here that the 49th day preceeding the annual school election on April 5, 1988, falls on February 17, 1988. It is further established that February 18, 1988, is the 48th day preceeding the date of the election of April 5, 1988.

The record, by way of the pleadings with exhibits attached thereto, together with the documents entered into evidence at the hearing demonstrate the following chronology:

1. Respondent Leenhouts nominating petition was submitted and received by Dorothy Carpo, Barnegat Township Board Secretary on February 11, 1988.

2. On February 16, 1988, at 4:00 p.m., the Board Secretary conducted the drawing for position on the ballot for the annual school election the results of which were, in part, as follows:

   1 YEAR UNEXPIRED TERM

   1. Janice Leenhouts
   2. Anthony J. Muttillo

3. The results of the drawing for position on the ballot was confirmed in writing to the candidates by letter from the Board Secretary dated February 17, 1988.

4. Respondent wrote a letter to the Board Secretary dated September 25, 1987, in which respondent supplied information concerning her residency in the Township of Barnegat.

5. Ocean County Board of Elections Supervisor Kaplan's first certification is dated February 26, 1988 (P-2).

6. On February 27, 1988, petitioner Muttillo forwarded his letter complaint and Petition of Appeal to the Commissioner.

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7. On March 1, 1988, Supervisor Kaplan submitted her second certification with respect to the names on respondent's nominating petition and their eligibility to vote in the Barnegat school election by virtue of their valid registration on the Ocean County Board of Election registration books (R-1).

8. On March 1, 1988, respondent submitted her Answer to the Commissioner to the Petition of Appeal.

This chronology of events clearly demonstrates that no defect was found in respondent's nominating petition on or before the 49th day (February 17, 1988) preceeding the date of the election which is scheduled for April 5, 1988. Nor was respondent notified of the defect or provided her right to remedy the defect no later than the 49th day preceeding the election. Consequently, as the statute provides, "A nominating petition not so found to be defective shall be, as of the 48th day preceeding the election, conclusively valid for the purpose of this chapter." Chapter 14 of Title 18A, Annual and Special School Elections was enacted by the New Jersey Legislature as a scheme to separate elections of school districts from the local municipal governing body the latter of which is governed by Title 19 - Election Laws. (See: Botkin v. Mayor and Borough Council of Westwood, 52 N.J. Super., 416 (1958) app'l dismissed 28 N.J. 218 (1958). See also; DuFour v. State Superintendent of Public Instruction, 72 N.J.L. 371 (1905), which stands for the proposition that the State Superintendent (now Commissioner) has jurisdiction to adjudicate school election matters.

I **CONCLUDE**, therefore, that pursuant to statute and under the circumstances of this matter, respondent Janice I. Leenhouts' nominating petition is conclusively valid for the purpose of her to stand for election to the Barnegat Board of Education for a one year, unexpired term.

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I **CONCLUDE**, therefore, that petitioner has failed to carry his burden and prove, by a preponderance of the credible evidence, that respondent's nominating petition was executed under circumstances other than absolute good faith or that it is do defective as to remove her name from the ballot of the annual school election to be held on April 5, 1988.

I further **CONCLUDE** that the Petition of Appeal of Anthony J. Muttillo is without merit and, accordingly, is hereby **DISMISSED**.

ORDER

It is hereby **ORDERED** that the Secretary of the Barnegat Township Board of Education proceed with the 1988 annual school election, pursuant to N.J.S.A. 18A:14-1 et seq.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby FILE my Initial Decision with **SAUL COOPERMAN** for consideration.

14 March 1988
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

3-17-88
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 17 1988
DATE

Ronald L. Rubin
OFFICE OF ADMINISTRATIVE LAW

dho

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IN THE MATTER OF THE SCHOOL BOARD	:	
CANDIDACY OF JANICE I. LEENHOUTS,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF BARNEGAT, OCEAN COUNTY.	:	
	:	

The record and expedited initial decision have been reviewed. Petitioner filed timely exceptions pursuant to N.J.A.C. 1:1-18.4. Respondent's reply exceptions were also timely filed.

Petitioner's exceptions first recite his version of the testimony taken at hearing, followed by his legal arguments. Those arguments are summarized in pertinent part below.

Petitioner reiterates those contentions raised at hearing averring that the nominating petition of Janice I. Leenhouts was defective in that:

1. One of the names on the petition was printed, not signed, therefore in violation of N.J.S.A. 18A:14-9 and N.J.S.A. 19:13-5;

2. The nominating petition in question was signed by five persons who were not legally qualified voters, specifically, Carolyn Fay, Randy Dragovcic, Lorraine Fasso, Lynn Davis and Bill Leenhouts, in violation of N.J.S.A. 19:13-5;

3. One such petitioner, Carolyn Fay, who is registered to vote under the name Carolyn Gunn and who has voted under the name Gunn in 1984 and 1985, was in violation of N.J.S.A. 19:31-13, in signing Ms. Leenhouts' nominating petition as Carolyn Fay instead of as Carolyn Gunn. Moreover, Ms. Fay, who verified Ms. Leenhouts' petition was in violation of N.J.S.A. 19:13-7 in that she did not personally observe the signing by the other petitioners of Ms. Leenhouts' nominating petition;

4. Ms. Leenhouts was in violation of N.J.S.A. 19:13-7 and N.J.S.A. 18A:14-11 in that she knew that the verifying voter, Ms. Fay, did not personally observe the signing of the nominating petition, thus challenging the ALJ's conclusion that the petition was filed in good faith by Ms. Leenhouts; and

5. Notwithstanding the above alleged defects, the Board Secretary, in contravention of N.J.S.A. 18A:14-12, failed to detect defects in a timely manner in the nominating petition and to apprise petitioner of the need for correction of such defects before the 49th day preceding the election. Further, an individual other than the Board Secretary is not precluded by said statute from

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challenging the validity of said nominating petition beyond the 49th day preceding the election, which he, Mr. Muttillo, has done.

Petitioner challenges the ALJ's conclusion wherein he relies on N.J.S.A. 18A:14-12 that since the Board Secretary never found a defect in the respondent's nominating petition on or before the 49th day before the election, the petition is to be considered valid. Instead, petitioner claims that such statute has no "bearing to a challenge by anyone other than a board secretary, and anyone other than a board secretary is not governed by N.J.S.A. 18A:14-12, and is entitled to challange (sic) a nominating petition of any candidate at any time." (Exceptions, at p. 3)

Moreover, petitioner contends that "after the respondent Janice Leenhouts being notified of the defects in the nominating petition, and having ample time to correct said defects, and failing to do so, in accordance with law, further acknowledges such defects and her unwillingness to correct same, if possible, and after time limit has expired, should render the nominating petition null and void." (Exceptions, at pp. 3-4) Petitioner suggests that the nominating petition of Respondent Leenhouts be considered null and void and that her name be removed from the ballot of the April 5, 1988 Barnegat Township School Board Election.

Respondent Leenhouts' reply exceptions concur with the ALJ's determination. She excepts, however, to Mr. Muttillo's exceptions in that they are "simply a restatement of what he had apparently hoped, but failed, to prove in court." (Reply Exceptions, at p. 1) She further argues that the ALJ repeatedly admonished Mr. Muttillo at hearing to refrain from referring to Title 19, Election laws, in regard to the instant matter, "unless he could show where N.J.S.A. 18A deferred to N.J.S.A. 19. Mr. Muttillo was unable to do so during the hearing." (Reply Exceptions, at p. 2) She therefore objects to his iterating said arguments in his exceptions.

Moreover, respondent objects to the language in Mr. Muttillo's exceptions averring that since she did nothing to correct the defects in her petition, after the time limit had expired, the nominating petition should be rendered void. She claims that the burden is on Mr. Muttillo to prove the petition fatally defective and that Mrs. Kaplan's certification of March 1, 1988 verified that eleven of her petitioners were registered. Therefore, she avers, he failed to prove his case. Further, respondent states she did make every attempt to advise those who signed her nominating petition of the confusion resulting from the earlier certification from the County Board of Elections Office and encouraged her petitioners to resign the petition. She avers that this argument is a "new and unique allegation contained in Mr. Muttillo's letter of Exceptions and Objections." (Reply Exceptions, at p. 3) She urges the Commissioner to adopt the ALJ's initial decision.

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Upon careful and independent review of the record before him, the Commissioner affirms the initial decision for the reasons stated therein, as amplified below.

Initially, the Commissioner notes that the record before him does not include either a voice-activated tape of the hearing below, nor transcripts of said proceedings. Thus he will rely upon those credibility determinations established in the record by the ALJ. N.J.S.A. 52:14B-10. Moreover, based upon R-1, the certification from Ms. Joan Kaplan, Supervisor of the Ocean County Board of Elections, dated March 1, 1988, and his independent review of the record, the Commissioner affirms the ALJ's finding of fact that "[r]espondent had at least ten registered and qualified voters as petitioners who endorsed her candidacy for election to the Board." (Initial Decision, ante) He thus dismisses as being without merit petitioner's exceptions arguing to the contrary.

Moreover, he finds, as did the ALJ, that the controlling statute with respect to alleged defective nominating petitions at the school elections is N.J.S.A. 18A:14-12. The Commissioner is in accord with the ALJ that based on the circumstances in this matter, Ms. Leenhouts' nominating petition is conclusively valid for the purposes of her standing for election to the Board of Education on April 5, 1988. See Initial Decision, at pp. 9-10. He so determines notwithstanding the fact that Ms. Fay did not personally observe the petitioners' signing such nominating petition. The Commissioner concurs with the ALJ that there is no evidence in the record before him to suggest fraud. Further, while the Commissioner in no way sanctions Ms. Leenhouts' failure to conform with the letter of the law in gathering petitioners for her nominating petition, the Commissioner does not find such failure to constitute a defect fatal to her running for election on April 5, 1988 in the absence of fraud.

As to petitioner's argument that anyone, not just the Board Secretary, may challenge a nominating petition's validity, his right to file such a Petition of Appeal is not at issue herein. However, his challenge was not brought to the Commissioner's or the Board's attention before the 49th day before the election. As noted by the ALJ, ante:

> This chronology of events clearly demonstrates that no defect was found in respondent's nominating petition on or before the 49th day (February 17, 1988) preceeding (sic) the date of the election which is scheduled for April 5, 1988. Nor was respondent notified of the defect or provided her right to remedy the defect no later than the 49th day preceeding (sic) the election. Consequently, as the statute provides, "A nominating petition not so found to be defective shall be, as of the 48th day preceeding

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(sic) the election, conclusively valid for the purpose of this chapter."

Moreover, on the merits of the matter, petitioner has not demonstrated fraud, nor has he presented any convincing arguments that would meet his burden of proof in this matter that respondent's nominating petition was fatally defective. Accordingly, the Commissioner adopts as his own the findings of fact and legal determinations of the ALJ that pursuant to statute and upon review of the facts of this matter, Respondent Janice I. Leenhouts' nominating petition is conclusively valid for the purpose of her to stand for election to the Barnegat Board of Education for a one year, unexpired term.

The Petition of Appeal is dismissed, with prejudice.

COMMISSIONER OF EDUCATION

April 5, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3438-87
AGENCY DKT. NO. 119-5/87

BOARD OF EDUCATION OF THE
CITY OF NEWARK, ESSEX COUNTY,
Petitioner,

V.

GLORIA JACKSON,
Respondent.

Denise A. Cobham, Esq., for the Board
(Vicki A. Donaldson, Esq. General Counsel, attorney)

Arnold S. Cohen, Esq., for respondent
(Oxfeld, Cohen, Blunda, LeVine and Brooks, attorneys)

Record closed: February 2, 1988 Decided: March 7, 1988

BEFORE **JAMES A. OSPENSON,** ALJ:

The Board of Education of the City of Newark, Essex County, by majority vote of its full membership, determined on April 28, 1987 to certify tenure charges against Gloria Jackson, a tenured teaching staff member in its employ, under the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq. The charges specified five incidents of alleged corporal punishment contrary to N.J.S.A. 18A:6-1; and the same incidents, it was alleged, constituted unbecoming teacher conduct. A certificate of determination was

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filed with the Commissioner of the Department of Education on May 1, 1987, as required by N.J.A.C. 6:24-5.1. Respondent was suspended without pay on April 28, 1987. Respondent's answer in general denial and with affirmative defenses was filed with the Commissioner on May 18, 1987. Accordingly, the Commissioner transmitted the matter to the Office of Administrative Law on May 19, 1987 for hearing and determination as a contested case in accordance with N.J.S.A. 52:14F-1 et seq.

On notice to the parties, the matter came on for prehearing conference in the Office of Administrative Law on June 18, 1987 and an order was entered establishing, inter alia, hearing dates beginning October 19, 1987. At issue in the matter generally, it was determined, were the following:

1. Whether the Board shall have proven by a preponderance of the credible evidence tenure charges of unlawful corporal punishment upon pupils and/or unbecoming teacher conduct arising from the same alleged instances of corporal punishment;

2. Whether respondent's affirmative defenses raising the bar of the equitable doctrines of laches and unclean hands are sustained; and

3. If charges are sustained and defenses not sustained, whether respondent shall be subject to removal or other appropriate sanction under N.J.S.A. 18A:6-10 et seq.

On motion by the Board at prehearing conference, and for good cause shown, respondent's separate defenses nos. 1 and 2 were **DISMISSED** by the administrative law judge.

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TENURE CHARGES

There were two general tenure charges against respondent: in count I, the first was unlawful use of corporal punishment in disciplining students, contrary to N.J.S.A. 18A:6-1 and Board policy, which were specified as having occurred on five separate incidents on January 7, 1983 (4a), June 6, 1983 (4b), September 21, 1984 (4c), November 15, 1984 (4d), and January 7, 1985 (4e). In count II, the second tenure charge was conduct unbecoming a teacher of pupils, more specifically, her consistent and deliberate use of physical force in disciplining her students (3a), her consistent and deliberate use of physical force in disciplining her students (3b), leading children committed to her charge with a bad example of use of physical force and abusive language (3c), and failure to demonstrate a sympathetic understanding of feelings and needs of students (3d).

Proofs in support of charges and specifications centered about the five alleged instances of use of corporal punishment. Each instance will be referred to herein by designations 4a, 4b, 4c, 4d and 4e, as those designations appeared in the tenure charges as filed.

EVIDENCE AT HEARING

Called by the Board, Vivian Lampkin, a long-time employee of the Board as teacher and administrator, testified she has been assistant executive superintendent since July 1984. Among her duties are to receive reports of principals concerning instances of corporal punishment, which must be made within 24 hours of occurrence. Her duties include reviewing the data and if necessary calling for additional investigation and reporting to the Division of Youth and Family Services. District policy concerning prohibition of use of corporal punishment parallel that in N.J.S.A. 18A:6-1. Such policy is given to staff by their principals. P-1 in evidence is a booklet outlining policy concerning

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corporal punishment; teachers are made aware of the policy on orientation date and in other ways, including circulars designed for the purpose and known as circulars no. 124 and 135 (P-2 and P-3 in evidence).

Lampkin identified an incident report form from school records (P-4) concerning a parental complaint that respondent had hit her child, T.P., twice in discipline on September 21, 1984, which detailed a confrontation before the principal between the parent and respondent, who denied the act. The incident referred to specification 4c of the tenure charges.

An incident report form by principal George A. DeMarco (P-5) reported an incident of January 7, 1983, when the principal observed respondent dismissing her class in the school playground and walking with a long board in her hand, seemingly angry and irrational. Incident report form dated January 10, 1983 (P-6) dealt with the aftermath of the January 7, 1983 incident and reported a parental complaint of a pupil D.S., who was said to be one of those whose hand was bruised by respondent the previous Friday on January 7, 1983. The incidents dealt with specification 4a of the tenure charges. [D.S.was not called by the Board as a witness.]

P-7 in evidence was a memorandum from principal DeMarco to respondent on March 8, 1983 cautioning her that corporal punishment in the form of use of a wooden pointer or stick was not to be inflicted and that a copy of the memo would be placed in her school personnel file. P-8, an incident report form from an incident on June 6, 1983 was a report of principal William H. Brown concerning a security guard report that in breaking up a fight respondent used strong blows to her pupil J.P. The incident referred to tenure charge specification 4b; attached to the exhibit was a report of the school nurse who treated J.P. on June 7, 1983 for a swelling on the forehead, with a history of a confrontation with his teacher, respondent. Brown, formerly respondent's superior, died in 1985.

In a memorandum from Lampkin to the deputy executive superintendent on January 14, 1985, she reported respondent had been involved in three incidents of alleged

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corporal punishment in the past two school years. Lampkin reported that in a conference on October 1, 1984, respondent was advised the use of corporal punishment could not be condoned or justified.

An incident report form of November 15, 1984 (P-10) by principal Brown noted a fifth grade student, Z.R., in respondent's class had complained she was victim of beatings from respondent and that other pupils had been so victimized. The reference was to specification 4d of the tenure charges. [Z.R. was not called by the Board as witness.]

In a letter to respondent on November 16, 1984, Brown noted that several students in her class had reported on several occasions that she resorted to corporal punishment as a means of achieving discipline, and also that she used abusive language, choked and slammed pupils into chairs. Respondent was cautioned that under no circumstances would such teacher behavior be tolerated for any reason whatever. She was ordered to cease and desist from use of such corporal punishment.

A memorandum from a special investigator for the Board to Lampkin on December 11, 1984 (P-12) noted his investigation of various incidents with pupils involved as well as an interview with respondent, who, while claiming her pupils were very disruptive at times, denied hitting the children with a ruler or digging her nails into their flesh. He noted a teacher's aide who assisted respondent at time had not witnessed any physical force used by respondent.

A report of Brown to Lampkin on December 21,1984 (P-13) concluded that respondent had apparently lost control of her classroom and that her demeanor in general appearance had become both strange and inappropriate. There was considerable evidence, he said, respondent was physically abusing her students, two incidents of which were presently then being investigated by the Department of Youth and Family Services. He sought corrective action.

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An incident report form of January 8, 1985 by principal Brown (P-14 in evidence) contained an allegation to Brown by pupil J.E. that respondent had grabbed him by the right hand, pulled and pushed him, caused a bleeding injury to the hand and ripped his pants. The incident concerns specification 4e of the tenure charges. [J.E. was not called by the Board as a witness.]

P-15 was Brown's report to Lampkin concerning the incident. P-16 was Brown's report to Lampkin on January 9, 1985, concluding that respondent should be removed from Bergen Street School immediately for her good and for the good of the school. P-17 was Brown's memorandum to Lampkin on January 11, 1985, advising he had a conference with respondent and reviewed with her Board policy and guidance concerning prohibition of corporal punishment, noting respondent had not responded to his questions. P-18 was a Board's investigator's report of interview with the parties on the January 7, 1985 incident, which noted that respondent had denied all allegations. Students involved had been interviewed in the presence of the principal and other administrative officers.

P-19 in evidence was a copy of the Teachers' Handbook circulated about 1982, reviewing problems in motivating proper classroom behavior by proper discipline, without use of corporal punishment. P-20 through 22 were Board policies nos. 5131.5 and 5144 dealing with violence and vandalism and student discipline. Purpose of policy on the latter was to insure the physical and mental health, safety and welfare of students in the schools in an orderly environment, conducive to learning. The policy imposed on teachers administrative guidelines and categories for effectively but safely, lawfully and progressively disciplining students.

Lampkin testified that after a October 18, 1984 conference with respondent, she was transferred from Marcus Garvey School to Bergen Street School as a result of an administrative reorganization. She said respondent's feelings of administrative harassment and harassment by children were considered. Asked her opinion as teacher, as

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supervising administrator and as an assistant executive superintendent what impact a loss of classroom control would have on educational environment, Lampkin said such loss of control was detrimental to the overall program, to students and to teachers. Its effect was to heighten a teacher's inability properly to discipline students. Striking a student was wrong discipline, unprofessional conduct and unlawful, she said. In respondent's case, as outlined in her report to the deputy executive superintendent on January 14, 1985, Lampkin testified she believed there was a substantive basis to institute tenure charges against respondent. She reached a conclusion then, she said, there was no basis for respondent's counter-charge of harassment.

Called by the Board, J.P., age 15 years, testified he is presently a sophomore at West Side High School. When in the fifth grade at age 12, he was in respondent's class in Marcus Garvey School. He recalled an incident in school that year, which is the subject of specification 4b (P-8) of the tenure charges. There were about 17 members in the class one afternoon (June 6, 1983). He was sitting in class doing his work. He raised his hand when another boy annoyed him. Respondent rose from her desk at the back of the room and came over to him. She had an angry face, he said. She pushed him around and shook him, putting his left arm behind his back. He said respondent kept pushing his arm, which hurt and caused him to cry. He called her a "bald-headed b. . . ." She pushed him into the hallway and began hitting him in the head with her closed right fist. She hit him several times and he fell to the ground. A security guard came and pulled her away from him. He said she kept hitting him. He was taken to the nurse's office and, he said, had knots or bumps on his forehead. After the incident, he said, he never returned to respondent's class but was transferred elsewhere.

P-8 confirmed the nurse's treatment of J.P. and the history he then reported: treated for swelling of the forehead, ice pack applied, child stated he was in a physical confrontation with teacher.

Called by the Board, C.J., mother of J.P., testified her son was a student in respondent's fifth grade at Marcus Garvey School, where George A. DeMarco was

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principal. At DeMarco's request she went to the school for a conference concerning the June 6, 1983 incident (specification 4b). She saw her son at home on the day of the incident. He had knots and lumps on his forehead, one on the back of his head, and scratches on his arm. He was upset and nervous and had been crying. When she asked the principal to let her speak to respondent, she was informed respondent refused. She later filed an institutional abuse complaint with the Division of Youth and Family Services.

Called by the Board, T.P., a pupil now in the eighth grade at Alexander Street School, age 13 years, was in respondent's fifth grade class in Marcus Garvey School, where the principal was DeMarco. Concerning an incident of September 21, 1984 (specification 4c; incident report form P-4), T.P. said she asked permission of respondent to borrow a pencil from another pupil. She said he hit her with his hand. Playfully she hit him back. Respondent, however, apparently saw only that she had hit him and back-handed her with a blow to the face, causing her lip to bleed. She stayed at her desk but was upset and cried. She was embarrassed and frightened. She said respondent told her to leave and not come back after the incident; she did so and went to another class. The next day, she said, she told her mother, who later came to school.

P.P., mother of T.P., testified her daughter told her of the incident. She observed her daughter's lower lip was split on the right side. She said her daughter reported respondent had slapped her on the mouth the day before. In a conference at school later with respondent and principal DeMarco, she asked respondent why she had slapped her daughter. Respondent's answer was that T.P. was lying. There was a scene. Her daughter was reassigned to another class, she said, for the rest of the fifth grade.

Called by the Board, Louis Fonolleras, an investigator employed in the institutional abuse unit of the Division of Youth and Family Service, testified he was assigned to investigate allegations of physical abuse of pupils by respondent at Bergen Street School. His report of investigation is P-25 in evidence, admitted conditionally and limited to reports of his interview with respondent herself. P-24 in evidence was the cover letter of the unit supervisor to a deputy superintendent on February 25, 1985

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investigator's report. P-24 was admitted conditionally only to show the fact of transmittal and not any conclusions by the investigator or the unit supervisor. Fonolleras said he interviewed principal Brown, and pupils Z.R., J.E., S.R., G.H. and Vera Allen, an administrative assistant to Brown. In his interview of respondent on November 29, 1984, Fonolleras said he introduced himself and outlined allegations concerning her. Respondent denied the allegations, called the children liars and said they attempted physically to harm her. She appeared agitated and angry at interview.

Called by the Board, George A. DeMarco, a principal now retired after 36 years service, was principal at Marcus Garvey School from 1982 to 1985. District policy concerning student discipline and prohibition of use of corporal punishment to maintain discipline was formally disseminated to teaching staff at orientation at the start of the school years 1982, 1983 and 1984. The written policy in booklet form is P-1. Shown P-5, an incident report he made concerning an incident on January 7, 1983, he described observing respondent dismissing her class in the school playground and walking with a long board in her hand. She appeared angry and quite irrational. When he approached her, respondent said she had been orally and physically abused by two boys. She said she "got one" already and was going to "get" the other. She continued to walk to the buses carrying the board looking for the boy. At DeMarco's urging, he said, she returned to the building. Later in a conference, he reminded respondent of her professional responsibilities to report the children to him or the vice-principal when incidents occurred. DeMarco said he understood respondent to mean she had used physical force with the stick on the boy. In DeMarco's view, what respondent did was unprofessional teacher conduct. The incident in P-5 is the subject of specification 4a of the tenure charges.

DeMarco identified a teachers' handbook (P-19), which was given to all teachers and contains on page 17 guidelines on administration of student discipline. The subject was discussed generally and specifically with respondent.

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Incident report form dated January 10, 1983 (P-6) was DeMarco's report of a parental complaint by the mother of D.S., one of the boys that respondent "got" the previous Friday. A stormy conference ensued with respondent; security personnel were needed to assist DeMarco in keeping the parent and respondent separated. He later had a conference with respondent and informed her he felt her conduct was inexcusable; respondent apologized. P-7 was DeMarco's confidential memorandum to respondent on March 8, 1983, in which he noted it had come to his attention again that corporal punishment in the form of a wooden pointer or stick was being used by respondent to maintain discipline. She was again advised to cease that form of punishment; a copy of the confidential memorandum was placed in her school personnel file.

P-8 was DeMarco's incident report of June 6, 1983, in which he noted a security guard told him the security staff had broken up a fight between respondent and her pupil, J.P. The guard said "strong" blows were being administered to the boy by respondent. The boy was sent to the nurse by the vice-principal who had been summoned. There DeMarco saw J.P. lying on a couch, upset, and holding his head. The nurse reported swelling on his forehead. He told DeMarco respondent hit him. He admitted calling her abusive names. He was taken to the hallway by respondent and a fight began; the boy hit back. When DeMarco saw respondent later, she confirmed the incident and appeared upset and quite incoherent. The boy's mother was called; respondent refused to talk to her, saying she was not a cooperative parent. The incident is specification 4b of the tenure charges.

Annexed to P-8 is a copy of the nurse's report of treatment of J.P. on June 7, 1983 for swelling on the forehead: it contains a history by J.P. that he was in a physical confrontation with respondent.

Concerning specification 4c of the tenure charges, DeMarco identified P-4 as his incident report form dated September 21, 1984. A parent reported to his office to complain her daughter T.P. had suffered a split lip. In a conference with the parent and respondent, respondent denied touching T.P. She said the child was lying if she reported

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otherwise. Respondent became loud and upset. DeMarco assured the parent that T.P. would be removed from respondent's class immediately. That was done, he said. In a later conference with respondent, DeMarco said her decorum was inappropriate and reflected badly in presence of a parent in his office. He told respondent not to use physical force, if she had.

DeMarco said he observed and evaluated respondent in June 1983; her overall rating was satisfactory. R-1.

DeMarco testified about a conference in October 1984 with respondent and Vivian Lampkin, assistant executive superintendent. The latter had wanted to review discipline policy with respondent in her office. Respondent was told of the policy and that there were too many instances of corporal punishment reported. DeMarco said he made a decision to transfer respondent in October 1984. The decision was made for several considerations, including a reduction in force on the fifth grade level and the chance for some teachers to be more suitably placed.

The Board rested.

RESPONDENT'S MOTION TO DISMISS

Respondent moved for partial judgment of dismissal of specifications 4a, 4d, and 4e on the ground the Board had failed to call pupil witnesses, D.S., Z.R. or J.E. in support of a prima facie case. After oral argument, the motion was granted by the administrative law judge for reasons set forth in transcript, October 21, 1987 at 15-29. Essentially, it was ruled the Board's evidence against respondent in the three questioned incidents was equivocal as to guilt. Respondent had the right to be confronted with witnesses against her and was not, in contrast to the Board's proofs in testimony from pupil witnesses in support of specifications 4b and 4c. Granting all inferences favorably to the Board's case, it was ruled the Board had failed to make out its prime facie case in the three

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specifications. The case was ordered to proceed against respondent on specifications 4b and 4c. Cf. Tibbs v. Bd. of Ed. Franklin Twp., 114 N.J. Super. 287, 300-4 (App. Div. 1971), aff'd 59 N.J. 506 (1971) (right to confront and cross-examine critical witnesses is a fundamental constitutional precept).

EVIDENCE AT HEARING, CONTINUED

Called by respondent, T.R., age 16 years, presently a tenth grade student at Vailsburg High School, testified she was in respondent's class at Marcus Garvey School in fifth and sixth grades in 1983 and 1984. She knew pupil J.P., mentioned in specification 4b of tenure charges. One day, in June 1983, J.P. put his feet on the desk of another pupil. A fight broke out, which respondent tried to break up. J.P. hit respondent with his fist on her arm. She did not do anything except to tell the pupil not to hit. J.P. walked out of the class and said he would report the matter to principal DeMarco. T.R. and two other pupils later went to report the matter to DeMarco. She said respondent would use a pointer to teach the class but never used it to hit pupils in the class.

Called by respondent, M.F., age 14 years, now an eighth grade student in Irvington, was in respondent's fifth grade class in Marcus Garvey School in 1983. He testified principal DeMarco had once hit him while on a field trip. Purpose of the testimony, respondent argued, was an attempt collaterally to impeach DeMarco's testimonial credibility in denying he had ever struck his students.

Respondent Gloria Jackson testified she was first employed by the Board in 1968 and assigned then to Bergen Street School as a permanent pool teacher for grades 1 through 6. In 1969-70 she took over a kindergarten class. She worked at Bergen Street School for twelve years until June 1981. She then was transferred to Clinton Avenue School. In 1982 she was transferred to Marcus Garvey School and assigned to the fifth grade, where she remained during 1982-83 and 1983-84. In October 1984 she was transferred back to Bergen Street School and assigned to a fifth grade where she remained

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until January 29, 1985 when she was suspended with pay from teaching duties because of instances of alleged child abuse.

She said she received evaluations from principals during all of her tenure until suspension; she never received an unsatisfactory evaluation in that time, however, she said.

Concerning specification 4b of the tenure charges, an incident of June 6, 1983, respondent said she recalled it. She was sitting at her desk working in the middle of the day, with the children working quietly, when suddenly A.G. asked her to tell J.P. to leave him alone and stop hitting him. Respondent did so. When the activity continued and A.G. again complained to her, J.P. called her a bad name, "A g. . . - d. . . , bald-headed, black b. . . . " By this time the two pupils were fighting and respondent had to separate them. J.P. continued to call her bad names. When she went over to him, respondent said, he picked up a chair. Respondent held him and took him outside and told another student to get the security task force. She took J.P. into the hallway and released him. He then kicked her about 30 times in her vagina, she said, and fell to the floor. She could not get him up from the floor. Within minutes, a security guard came and picked the student up.

Respondent, who stands 5 feet 8 inches tall and weighed 145 lbs. in 1983-84, said she hit J.P. with her open hand twice on his arm because he had kicked her over 30 times. The guard took him to the principal. Respondent said she was injured and visited her doctor the following week. She said he prescribed a douche solution. J.P. later returned to her class and asked if he could stay in her room. She instructed him to talk to the principal. He left and was ultimately transferred to another class. Respondent said J.P. was a disciplinary problem before June 6, 1983. He frequently cursed her and put his feet on the desk. He often would not reply to questions without using four-letter words. She was forced to call his mother three times about his conduct. She reported the conduct to principal DeMarco.

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Concerning specification 4c of the tenure charges, an incident of September 21, 1984, respondent said she recalled she was sitting at her desk with the children working quietly. T.P., a girl, got up from her seat, went over to another pupil and hit him. Respondent said she cautioned T.P. not to do that. But T.P. disobeyed and repeated the act. Respondent said she again warned her to stop because she was too small to bother a boy that big; he could harm her. T.P. said she was going to tell her mother; respondent said she let the matter go at that and forgot about it. Respondent said she stayed in class and did not go to the school nurse. Respondent denied she had a stick in her hand. That was the sum total of the incident, according to respondent.

On the afternoon of the next day, respondent said, principal DeMarco saw her in his office. T.P.'s mother was there. DeMarco introduced them and told respondent the parent reported her daughter said respondent had hit her. Respondent described what happened, as above recited. The parent insisted her daughter did not tell stories. Respondent again denied hitting T.P. The interview became loud; angry charges were exchanged. T.P. was transferred to another class the next day. Respondent was transferred to Marcus Garvey School the next month in October 1984.

In a lengthy and rambling recitation, respondent said she took four students with her, S.T., J.L., C.J. and T.J., to the office of executive assistant superintendent Lampkin on September 21, 1984. Respondent transported the students in her car, after school. Her purpose was to inform Lampkin what the four had told respondent that afternoon. According to respondent, one student told her principal DeMarco was telling the students to do bad things to respondent in class. By that, parental complaints would ensue and the principal would support disciplinary action against respondent. According to respondent, the students said DeMarco offered them money.

Respondent said Lampkin would not see her and the students but instructed her to return the children to school where their parents were waiting.

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Respondent said she had an interview with Lampkin at her office two weeks later. There were no students present. Lampkin accused her of being a child abuser, according to respondent; respondent said she had only "tapped" a student one time. She said she was shocked and walked out of the interview. Lampkin had refused to let respondent relate that there was a conspiracy against her.

R-1 in evidence was identified by respondent as her satisfactory annual teacher evaluation report of June 1983.

On cross-examination, respondent again admitted she had hit pupil J.P. twice on the arm because he had kicked her 30 times in the vagina. When asked whether that was in punishment, she said she hit him because he had kicked her 30 times. It was not really an effort to discipline the student, she said; it was merely her retaliation.

When asked why she did not instead retreat from the student, she replied it would not have looked good to see him stay on the floor. She stayed still holding him and trying to pull him up. She insisted she wasn't really angry; she just did not like him kicking her. She was upset; she sent for help. She never filed an assault complaint against J.P. or a grievance against principal DeMarco. She never reported the incident in her version to DeMarco, the executive assistant superintendent, or any union representative.

When asked what her understanding of the definition of corporal punishment was, respondent replied that was when a teacher abuses a student. Abuse is when the student is hurt so badly they have to be hospitalized. If there is no hospitalization, there is no corporal punishment. That, said respondent, was what she meant when she said she had never employed corporal punishment on her students. [See transcript, October 23, 1987, at 119-16 to 120-3.] She freely admitted she tapped D.S. (specification 4a) with a pointer but not to punish or discipline him. She did it because of his past behavior in calling her names, spitting and punching her. Her purpose in that, she said, was to make him leave her alone. She told her students to catch him so that she could tap him with a pointer in order to make him leave her alone.

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In her interview with a DYFS investigator, respondent said she believed she told him about the conspiracy against her. She admitted another administrator and principal DeMarco gave her satisfactory evaluations even though they were, in her words, in a conspiracy against her.

Called by respondent, C.J., age 14 years, one of respondent's fifth grade students for a month and half, from September to October 1984, recalled the T.P. incident, specification 4c of the tenure charges. He said he was sitting by respondent's desk when T.P. got up and hit him for no reason. Respondent told T.P. to sit down because he was bigger than she. When T.P. hit him again, respondent said, for the last time, leave him alone. C.J. said respondent never touched T.P.; she yelled but did not use curse words. T.P. had chapped lips that morning, he said; by the afternoon, her lip was "busted." He did not know how that happened.

Although he never talked to principal DeMarco about respondent, he heard others do so. DeMarco tried to bribe them with money to get rid of respondent, whom they wanted out of the school system. DeMarco would pull bad students out of class, bribe them with money to pull off respondent's wig and act up in class, in order to provoke respondent into hitting them.

C.J. said respondent had brought him to the hearing that day; his mother, he said, knew he was present.

Called by respondent, C.W., age 13 years, was one of respondent's students in the fifth grade. He recalled that T.P. would mess around with everyone in the class. He said T.P.'s lips would be chapped in the winter time but he never saw them split. She had an accident once on the playground, he said, when she split her lip. He recalled the incident of September 21, 1984 but denied that respondent had ever touched T.P. or cursed at her.

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Called by respondent, J.L., age 14 years, was one of respondent's pupils in the fifth grade at Marcus Garvey School for about a month until October 1984. Although he said he never talked to principal DeMarco about respondent, he overheard him talk to others in the playground, giving them money and telling them to provoke respondent in class. He once saw money handed out by a gray-haired man in the presence of principal DeMarco. Later he and another student, S.T., took half the money from the children "because we wouldn't let kids do anything to respondent." He never saw the gray-haired man again.

He said he and other students with respondent talked to executive assistant superintendent Lampkin, who asked them all sorts of questions. They told her what they had heard and had told respondent. [The testimony contradicted both respondent and Lampkin.] J.L. did not recall the names of the other students offered money by DeMarco. The unnamed gray-haired man who offered the money in DeMarco's presence must have been an investigator, he said, because he looked suspicious.

Called by respondent, S.T., age 15 years, was in respondent's fifth grade class at Marcus Garvey School for two months in 1984. About a week after school started that year, he said, principal DeMarco told him near the second floor bathroom that he did not like respondent and asked him, S.T., to act up so as to reflect badly on respondent. He wanted him and other students to provoke respondent. He said he never saw principal DeMarco with money in his hand.

He said he never saw or heard respondent hit anyone or curse in class.

He recalled the money-giving incident and recalled taking money from other students. [His recollection of amounts and denominations differed, however, from a previous witness. He said the bills totaled $15, a five dollar bill and ten singles. The previous witness had said the total was $15 but consisted of a $10 bill and five singles.]

Both sides rested.

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DISCUSSION AND FINDINGS

Respondent argued generally that the Board had not met its burden as to merits of charges and specifications of corporal punishment, in 4b and 4c; and that the charges and specifications are so stale as to require dismissal under due process considerations. While there is no plausible reason present on this record for the lapse of time from respondent's suspension with pay on January 29,1985, and the time when tenure charges against her were certified by the Board on April 28, 1987, there nevertheless appears no critical prejudice to respondent sufficient to support her staleness contention. In the final analysis, it may be seen, respondent has been confronted by student witnesses against her on the remaining charges in 4b and 4c and has had the opportunity to cross-examine them. As the hearing developed, moreover, it may be seen respondent has been able to call in her own defense other student witnesses. The delay between suspension and certification, however, is much less inimical to respondent's interests than to interests of the public. The Board should be cautioned to take action to certify charges against teaching staff members promptly as soon as its investigations have received thorough and careful preparation, something of which in this case there was an apparent lack, at least in proofs the Board offered in support of specifications 4a, 4d and 4e. It is obvious that Board interests, and those of the public, have suffered because of the time lapse and the resulting apparent inability to call student witnesses in support thereof.

To respondent's contention the Board has failed to establish sufficient evidence in support of specifications 4b and 4c, however, it is my view they have been more than preponderately proven. Although there appeared contradictory versions by student witnesses for the Board and those called by respondent, I am satisfied the balance of credibility can be seen readily to lie with the former. My conclusion in that respect is buttressed by clear documentary evidence in the record in P-8 that the school nurse treated student J.P. on June 7, 1983 for visible signs of injury, a swelling of the forehead,

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in face of a then reported history that the "child stated that he was in a physical confrontation with his teacher, Ms. Jackson." Likewise, documentary evidence in support of the incident in specification 4c, on September 21, 1984, is readily supportive of the Board's version that respondent struck T.P. Neither respondent's denials nor the disavowals of students who testified for her are worthy of credence. Similarly, testimony that principal DeMarco was engaged in a conspiracy with others to foment disruption that would force respondent from the district is unbelievable. In the contest of credibility, in my view, DeMarco has easily prevailed.

Based on the foregoing, I **FIND** and **DETERMINE** the Board has proven by a preponderance of the credible evidence in testimony and documentation that respondent was guilty of the acts specified in 4b and 4c of the tenure charges. I **FIND** specifically as in 4b that respondent on June 6, 1983 in an effort to discipline J.P., a fifth grade student, engaged in a fight with the student, as result of which student was taken to the nurse's room for treatment of an injured and swollen forehead. I **FIND** and **DETERMINE** further as specified in 4c of the tenure charges that respondent on September 21, 1984 in an effort to discipline student T.P. struck the student both with a closed fist and a stick, causing injury to the student's lower lip.

The question results, then, whether such proven specifications constitute unbecoming teacher conduct and/or unlawful corporal punishment, contrary to N.J.S.A. 18A:6-1, within the meaning of N.J.S.A. 18A:6-10.

Use of corporal punishment of students, it has been said, has been prohibited by a century-old statute, now N.J.S.A. 18A:6-1:

> No person employed or engaged in a school or educational institution, whether public or private, shall inflict or cause to be inflicted corporal punishment upon a pupil attending such school or institution. . .

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In Tenure Hearing of Lomakin, School District of Orange-Maplewood, Essex County, 1971 S.L.D. 331, the Commissioner of Education noted:

> While the Commissioner understands the exasperations and frustrations that often accompany the teacher's functions, he cannot condone resort to force and fear as appropriate procedures in dealing with pupils, even though those whose recalcitrance appears to be open defiance. The Commissioner finds in the century-old statute prohibiting corporal punishment (N.J.S.A. 18A:6-1) an underlying philosophy that an individual has a right not only to freedom from bodily harm but also freedom from offensive bodily touching even though there be no actual physical harm. . . . such a philosophy with its prohibition of the use of corporal punishment or physical enforcement does not leave a teacher helpless to control his pupils. Competent teachers never find it necessary to resort to physical force or violence to maintain discipline or compel obedience. If all other means fail there is always a resort to removal from the classroom or school through suspension or expulsion. The Commissioner cannot find any justification for, nor can he condone the use of, physical force by a teacher to maintain discipline or punish infractions. . . . Thus when teachers resort to unnecessary and inappropriate physical contact with those in their charge they must expect to face dismissal or other severe penalty. . . .
>
> . . . Corporal punishment has been defined . . . as any punishment causing or intended to cause bodily pain or suffering. The legal philosophy underlying the prescription of such disciplinary measures is that "an individual has a right to freedom from bodily harm or any impairment whatever of the physical integrity of his person by the infliction of physical pain by another. There is also a right to freedom from offensive bodily touching by another although no physical harm be done . . . ." [Citations omitted; 1971 S.L.D. at 334-5].

CONCLUSION

Applying the standard, I am satisfied respondent's conduct in the incidents of June 6, 1983 (4b) and September 21, 1984 (4c) require the conclusion, which I draw, that respondent's conduct was indeed such form of proscribed corporal punishment as

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constituted not only intrusion upon those pupils' right to freedom from offensive bodily touching but, more importantly, unlawful punishment causing or intended to cause bodily pain or suffering. I **FIND** no excuse whatever for respondent's conduct and reject her contentions in denial as well as those in justification. In the one instance admitted by respondent, her conduct was clearly retaliatory, deliberate and injurious with no thought of retreat. Her conduct was reprehensible. That it was likewise unbecoming a teacher is plain. I **FIND** and **DETERMINE** tenure charges in count I, 4b and 4c, as well as tenure charges in count II, 3a, 3b, 3c and 3d, fully **SUSTAINED**. Affirmative defenses nos. 3, 4 and 5 are **DISMISSED.**

Respondent has shown no contrition. Lack of it, and a self-confessed misapprehension of the nature of corporal punishment deplorable in a teaching staff member of her years of experience, dictate removal from her teaching position, an extreme but the only suitable sanction. Continued employment in the district is unthinkable. Cf. Redcay v. State Bd. of Ed., 130 N.J.L. 369, 370 (Sup. Ct. 1943) (an unfit teacher may do great damage). Respondent is ordered **REMOVED** from her tenured employment position as a member of the teaching staff of the school district of the City of Newark, Essex County, as of date of final agency decision herein. Under N.J.A.C. 6:11-3.7(b)(1)(ii), the matter is ordered **REFERRED** to the State Board of Examiners for appropriate consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN** , who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

March 7, 1988
DATE

JAMES A. OSPENSON, ALJ

3-9-88
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

MAR 10 1988
DATE

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FOR OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE TENURE	:	
HEARING OF GLORIA JACKSON, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF NEWARK,	:	DECISION
ESSEX COUNTY.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Respondent's exceptions were timely filed pursuant to N.J.A.C. 1:1-18.4.

Respondent's exceptions are a nearly verbatim reiteration of her post-hearing submission to the ALJ which is incorporated herein by reference. The essence of the arguments not contained in the post-hearing submission concerns the ALJ's finding in the initial decision, ante, which reads:

> To respondent's contention the Board has failed to establish sufficient evidence in support of specifications 4b and 4c, however, it is my view they have been more than preponderately proven. Although there appeared contradictory versions by student witnesses for the Board and those called by respondent, I am satisfied the balance of credibility can be seen readily to lie with the former. My conclusion in that respect is buttressed by clear documentary evidence in the record in P-8 that the school nurse treated student J.P. on June 7, 1983 for visible signs of injury, a swelling of the forehead, in face of a then reported history that the "child stated that he was in physical confrontation with his teacher, Ms. Jackson." Likewise, documentary evidence in support of the incident in specification 4c, on September 21, 1984, is readily supportive of the Board's version that respondent struck T.P. Neither respondent's denials nor the disavowals of students who testified for her are worthy of credence. Similarly, testimony that principal DeMarco was engaged in a conspiracy with others to foment disruption that would force respondent from the district is unbelievable. In the contest of credibility, in my view, DeMarco has easily prevailed.

With regard to this, respondent avers that it is clear that the two students, J.P. and T.P., fabricated the claims against her and that impartial students in class on both occasions testified that neither event occurred. She further contends that the

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testimony of these "impartial" students was only contradicted by documents and the purported victims' testimony leading her to argue that:

> ***The Initial Decision, then, made its credbility (sic) finding based on documentary evidence, not the testimony of the victims. The unbiased student witnesses certainly are superior witnesses. And, Ms. Jackson strongly disagreed with the recounting of events by J.P. and T.P. Clearly, the testimony of Ms. Jackson was more credible.
>
> Interestingly, the credibility findings of the Initial Decision rest entirely on documentary evidence, and the testimony of Mr. DeMarco, who did not witness any of the alleged incidents of corporal punishment. This demonstrates the invalidity of the Initial Decision***.
>
> (Exceptions, at p. 13)

Upon a thorough, independent review of the record in this matter including the transcripts of the proceedings, the exceptions and the post-hearing submissions, the Commissioner is in full agreement with the ALJ's findings and conclusion as to respondent being guilty of inflicting corporal punishment and of conduct unbecoming a teacher. Despite respondent's arguments to the contrary, there is no doubt in the Commissioner's mind that the ALJ was absolutely correct in his credibility determinations in this matter. Moreover, respondent's argument that the ALJ's credibility determination rested upon documentary evidence is meritless. As can be seen in the initial decision cited by respondent, ante, the ALJ made a specific finding in favor of the Board's student witnesses and not those on behalf of respondent, a finding which he determined was buttressed and supported by documentary evidence, not one which relied solely on such evidence. With regard to the incident involving T.P., the ALJ found as incredible the testimony of both respondent and the students called by her, a finding amply supported by the transcripts of that testimony. Finally, the Commissioner finds as completely unbelievable the testimony with respect to a conspiracy which respondent claims she first learned of at the Clinton Avenue School even before her transfer in 1982 to Marcus Garvey, the school where Mr. DeMarco was principal. (Tr. VI-142-149) Moreover, the testimony of J.L. and S.T. is so racked with grossly blatant inconsistencies as to be deemed patently absurd. (Tr. VI-48-96) As correctly stated by the ALJ regarding the conspiracy allegation, in the contest of credibility, Mr. DeMarco has easily prevailed. (Initial Decision, ante)

Accordingly, the Commissioner adopts as his own the findings and conclusion of the ALJ that the Board has proven by a preponderance of credible evidence Charge I, corporal punishment (Count 4b and 4c) and Charge II, conduct unbecoming a teacher (Count 3a, b, c, d) and the recommended penalty of dismissal from

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respondent's tenured teaching position in the Newark School District for the reasons so well expressed by the ALJ which read:

> Applying the standard, I am satisfied respondent's conduct in the incidents of June 6, 1983 (4b) and September 21, 1984 (4c) require the conclusion, which I draw, that respondent's conduct was indeed such form of proscribed corporal punishment as constituted not only intrusion upon those pupils' right to freedom from offensive bodily touching but, more importantly, unlawful punishment causing or intended to cause bodily pain or suffering. I FIND no excuse whatever for respondent's conduct and reject her contentions in denial as well as those in justification. In the one instance admitted by respondent, her conduct was clearly retaliatory, deliberate and injurious with no thought of retreat. Her conduct was reprehensible. That it was likewise unbecoming a teacher is plain. I FIND and DETERMINE tenure charges in count I, 4b and 4c, as well as tenure charges in count II, 3a, 3b, 3c and 3d, fully SUSTAINED. Affirmative defenses nos. 3, 4 and 5 are DISMISSED.
>
> Respondent has shown no contrition. Lack of it, and a self-confessed misapprehension of the nature of corporal punishment deplorable in a teaching staff member of her years of experience, dictate removal from her teaching position, an extreme but the only suitable sanction. Continued employment in the district is unthinkable.*** (Id.)

A thorough review of the record makes it abundantly clear that respondent cannot and must not be allowed to continue as a teacher. In addition to her deplorable actions with respect to corporal punishment and unbecoming conduct, serious questions arise as to respondent's stability, i.e., the description of the behavior observed by the DYFS investigator during his interview with her (P-25, Tr. III-28-30) and by Mr. DeMarco (P-5; P-6, Tr. III-8-9, 31-34, 40-44) and by her own sometimes rambling and incoherent testimony during these proceedings with respect to the alleged conspiracy.

As to respondent's arguments that the charges against her are stale and should not be considered, the Commissioner is in agreement with the ALJ that no critical prejudice to respondent resulted from the lengthy period of time from her suspension with pay until tenure charges were ultimately filed with the Board and certified to the Commissioner. As correctly recognized by the ALJ, due process rights were accorded to her, i.e. the right to confront witnesses against her, the right to call witnesses on her own behalf, etc. Moreover, the Commissioner is in complete agreement

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with the ALJ's observation that "[t]he delay between suspension and certification, however, is much less inimical to respondent's interests than to interests of the public." (Id.) Along with the ALJ, he admonishes the Board to assure that such delays do not occur again in the future for it is obvious that "the Board interests, and those of the public, have suffered because of the time lapse and the resulting apparent inability to call student witnesses in support [of the charges which were dismissed for lack of student testimony 4a, d, e]." (Id.)

Lastly, for the record the Commissioner wishes to make it clear that DYFS reports and investigator testimony may and should be included in tenure proceedings where they touch upon the specific charges certified against the staff member. The relative weight and probative value may then be determined by the ALJ and the Commissioner. See In re Tenure Hearing of Lynn Jenisch Tyler, School District of Sussex-Wantage Regional, remanded by the Commissioner September 2, 1987, decision on remand February 10, 1988; In re Tenure Hearing of Ralph M. Thomas, School District of Livingston, remanded by the Commissioner March 14, 1988.

Accordingly, the Commissioner adopts the initial decision for the reasons expressed therein and as indicated above. Respondent is hereby dismissed from her tenured teaching position as of the date of this decision. A copy of the decision is to be transmitted to the State Board of Examiners for consideration of revocation of certification as prescribed by N.J.A.C. 6:11-3.7(b)(ii).

COMMISSIONER OF EDUCATION

April 18, 1988

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IN THE MATTER OF THE TENURE	:	
HEARING OF GLORIA JACKSON, SCHOOL	:	STATE BOARD OF EDUCATION
DISTRICT OF THE CITY OF NEWARK,	:	DECISION
ESSEX COUNTY.	:	
	:	

Decided by the Commissioner of Education, April 18, 1988

For the Petitioner-Respondent, Vicki A. Donaldson, Esq., General Counsel, Newark Board of Education (Denise A. Cobham, Esq., of Counsel)

For the Respondent-Appellant, Robert T. Pickett, Esq.

The decision of the Commissioner of Education is affirmed for the reasons expressed therein, with one modification: Since the Office of Administrative Law and Commissioner of Education are not "courts" within the meaning of N.J.S.A. 9:6-8.10(b)(6), the contents of a confidential Division of Youth and Family Services ("DYFS") report may not be released or disclosed in proceedings before such tribunals without a court order. In the Matter of the Tenure Hearing of Lynn Jenisch Tyler, decided by the State Board, November 1, 1988. Insofar as there was sufficient credible independent evidence to support the findings of the Commissioner herein, we need not determine whether, in this particular case, the conditional admission into evidence of the DYFS report and the testimony of the DYFS investigator, which was limited to his independent recollection of the Respondent's demeanor and the substance of her statements to him during his investigatory interview with her, were proper.

November 1, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5020-87
AGENCY DKT. NO. 182-6/87

BOARD OF EDUCATION OF THE SCHOOL DISTRICT
OF HIGH POINT REGIONAL, SUSSEX COUNTY,
Petitioner,

V.

JAMES SAMILJAN,
Respondent.

Lester Aron, Esq., for the Board
(Sills, Cummis, Radin, Tischman, Espstein & Gross, attorneys)

Robert M. Schwartz, Esq., for respondent

Record closed: February 2, 1988 Decided: March 9, 1988

BEFORE JAMES A. OSPENSON, ALJ:

The Board of Education of the School District of High Point Regional, Sussex County, filed and certified to the Commissioner of the Department of Education tenure charges of unbecoming teacher conduct and/or insubordination against James Samiljan, a tenured teaching staff member. It was alleged the charges and specifications, if proven, were sufficient to warrant respondent's removal from his teaching staff position, pursuant to the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq. Charges were filed in the Division of Controversies and Disputes of the Department of Education on June 11,

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1987. Respondent's answer, in the form of his statement of position in response to tenure charges filed, was filed there on July 22, 1987. The Commissioner transmitted the matter to the Office of Administrative Law on July 21, 1987 for hearing and determination as a contested case in accordance with N.J.S.A. 52:14F-1 et seq.

On notice to the parties, the matter came on for prehearing conference in the Office of Administrative Law on September 2, 1987 and an order was entered establishing, inter alia, a hearing dates beginning November 23, 1987. The parties agreed at prehearing conference there were no procedural irregularities in filing and certification of tenure charges under N.J.A.C. 6:24-5.1 et seq.

On October 21, 1987, respondent filed a motion for an order granting opportunity to take the depositions of two school administrators. The administrative law judge in a written decision on motion dated November 21, 1987 denied the motion. By letter dated November 6, 1987, the Commissioner declined interlocutory review.

As provided in the prehearing conference order, at issue in the matter generally was whether the Board shall have proven the charges and specifications against respondent were true; and, if so, whether they were sufficient to warrant respondent's removal or other sanctions.

Hearing was conducted on November 23 and 24, 1987. Thereafter, time for transcripts and posthearing submissions having elapsed, the record closed.

EVIDENCE AT HEARING

Called by the Board, Dr. Robert Godfrey, assistant superintendent in charge of department supervisors, now in his sixth year in the district, described his duties as including supervision, curriculum development and monitoring. High Point Regional

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school district comprises a single school building, 9-12, with approximately 1,000 students and a staff of one hundred, about 75 of which are teaching staff members and with some six administrators and ten supervisors and specialists. High Point receives students from three sending districts in five nearby municipalities.

At a meeting on March 17, 1987, which began at noon and was attended by principal John Killoy and respondent in Killoy's office, Godfrey said Killoy was seated behind his desk, he was seated at the corner of the desk to respondent's right and respondent sat across from Killoy. The office was about 17 feet by 12 feet with a desk, bookcase, credenza and chairs. From desk to wall was some six to seven feet. An office door to a conference area was closed. Purpose of the meeting was an interim conference to review respondent's management objectives. The inquiry was how respondent was progressing. The management objectives referred to were those in P-1, a yearly evaluation report of management objectives for 1986-87, signed by Godfrey, the superintendent, principal Killoy and respondent in October 1986. Paragraph I(c) of the objectives dealt with the obligation of the supervisor, respondent, to construct a plan for review that included assignment of responsibility for specified courses to individual staff members and a time table to monitor the results. Killoy asked respondent whether the plan was done. Respondent replied it had been done. Interjecting, Godfrey asked how it was done, seeking concrete evidence that the monitoring had proceeded. He wanted assurance, for example, from the teachers supervised that they had signed off on the time tables imposed. Godfrey said respondent became agitated. He said the course review was a directive to respondent and must be accomplished and documented. Godfrey said respondent became so agitated that he finally retorted that Godfrey had "f. . . ed up" and that everyone knew Godfrey was an incompetent. Though he remained seated, Godfrey said, respondent's voice was loud. Godfrey denied responsibility for plan failure and, by standing up, did so forcefully by bending over towards respondent. Godfrey informed respondent the meeting was over and ordered him to leave. Respondent rose, Godfrey said, continued to scream and move towards him and not towards the door. The two came face-to-face. Godfrey brought his hands up to create a space between them, he said, but his hands were open. By this time, respondent was wide-eyed and furious.

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Godfrey said respondent then punched suddenly with his right fist, striking flush in the nose. His nose was broken; there was blood on his clothes, on his face and on the rug. He kept his feet. No other punches were thrown. Killoy ushered respondent out of the office. The time was about 12:45 p.m.; the conference had by then lasted but 15 to 25 minutes.

Godfrey said he left school and drove to a nearby hospital but decided not to be treated there and returned to school. About 2:30 p.m. that afternoon, he said, he saw his family physician, Dr. Frank Marchese, at his office. His nose was x-rayed; the nasal bones were manipulated by the doctor, who prescribed pain-killers. The bleeding was stopped. Godfrey was there about 45 minutes and then returned to school. He lost no time from his work, he said. A bandage was removed the next week. P-2, P3- P-4 and P-5 in evidence are the doctor's certificates of office records and notations of history, treatment and diagnosis. The doctor's records show that on March 17, 1987 his patient Godfrey reported a history of having hit his nose on another teacher's head at about 1:15 p.m. that day. The diagnosis was non-displaced fracture of the nasal bone. Treatment was ice and cleansing. Godfrey testified the history he reported to the doctor was not true but, he said, he was reluctant to put the true details into the doctor's record.

On cross-examination, Godfrey insisted respondent hit him with a straight right hand, fist to nose.

Called by the Board, John Killoy, principal of the high school now in his 26th year of service, said among his duties were responsibilities to assist all department supervisors and to monitor their work and evaluate their progress. At the meeting of Godfrey, himself and respondent on March 17, 1987, he opened it by inquiring of respondent what progress he had made in reviewing course proficiencies. Respondent said it was all done or in progress of being done but did not say how. Thus, he said, Godfrey and respondent began talking methodology. Godfrey noted there were problems in past

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years and concern about how to review and update course responsibilities of teachers on a regular basis. There was a disagreement; discussion became spirited. Respondent insisted all his work was done; his word should be accepted. Godfrey asked for evidence that teachers had signed off on their course proficiencies. Respondent replied he would not do that because no other supervisors had been required to compel that of their teachers. Godfrey, Killoy said, felt the refusal amounted to insubordinantion in face of a direct order. Finally, Killoy said, respondent said the reason for embarrassment was because Godfrey had "f. . . ed up." For the first time, Killoy said, obscenities were introduced into the conference. Killoy rose to close the door, saying the meeting was over. Godfrey rose from his seat and went to respondent's side. He leaned over, put a finger near respondent's face and replied that he had not "f. . . ed up, [respondent] had." As Killoy closed the door, Godfrey and respondent were on their feet, closely face-to-face. Godfrey's hands were raised, open palm, near respondent's lapels. As Killoy turned from the door, he saw respondent's closed fist fly into Godfrey's face causing his glasses to fly. Godfrey's nose exploded; blood blossomed. Killoy leaped between the two, shoved them apart with as much force as he could muster. He stayed between them but escorted respondent out of the office.

Killoy said there was no doubt the blow was intentionally struck by respondent. There was no provocation for it. Respondent was never in danger of an assault by Godfrey. Killoy said in his twenty seven years as a disciplinarian and principal he had seen many fights. Again, he said, there was no provocation for the blow.

Later, Killoy said, in the superintendent's office respondent declared that once Godfrey had put his hands on him, he, respondent, had a right to do anything he wanted to. Respondent never denied throwing the punch, he said. In witnessing the blow struck, Killoy said, he never received the impression that anything physical was about to happen. Godfrey, he was certain, never knew the blow was coming, it was a short, straight, right hand shot.

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Called by the Board, Arthur R. Smith, school superintendent for the past sixteen years, testified that on March 17, 1987, Killoy asked him to meet urgently about Godfrey and respondent. He found Godfrey bleeding from the nose, with blood on his jacket, in Killoy's office. Godfrey was upset and in obvious need of medical attention. He was directed to see his doctor immediately. Smith and Killoy found respondent in the business education office and asked him to come to the superintendent's office. Smith said respondent said Godfrey had put his hands on him in an argumentative state, so he, respondent, punched him. Respondent said he had a "right" to hit Godfrey. Later, in a follow-up meeting, with Godfrey, Killoy, Smith and respondent, about an hour later, where the matter was discussed, respondent offered no apology and appeared unremorseful, even disinterested. The following day, Smith informed respondent he was under suspension until a report could be made to the Board president and the Board attorney.

The Board rested.

Respondent James Samiljan is age 40 years, stands six feet tall and weighs 185 lbs. Divorced, he is a resident of Wantage; he has two sons. He holds a B.S. degree in business administration from Adelphi University in 1972; a master of education degree in administration from Montclair State College in 1978; and has twenty additional graduate school credits generally. He holds certificates of teacher of business, supervisor and principal. He was employed by the Newton school district in its business department from 1972-75. He was an area coordinator in Vernon Township in 1975-76. He came to High Point Regional in September 1977 as department chairman of the business department. He taught several courses in accounting, typing and office procedures. He was in charge of five teaching staff members of the department, responsible for budgeting to his supervisor, Killoy, and for formulation of curriculum. He was also responsible for evaluating members of his department; the evaluations were passed on to Killoy and the superintendent. Most recently, Killoy and Smith evaluated his performance; Godfrey last evaluated him in 1986-87.

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He is in good physical condition, works out regularly on a nautilus, is coach of field hockey and has refereed hockey, baseball and softball, all interscholastic sports.

Course proficiency outlines, respondent said, were an index of what happens in courses, who should take them, and dealt with course subject matter. In 1984-85, when the outlines were required to be revised for State monitors the following year, he began handing them in a rough draft, for example, in January 1985, for accounting I, to Godfrey. On sign-out sheets at the end of school in June 1985, all teachers were required to attest to having completed their work before going on summer vacation. At the time, he said, he presented to Godfrey personally all his course proficiencies on the last day of school; Godfrey signed them off. Everyone, respondent said, was handling the proficiencies the same way. In September 1985, he received a memo from Godfrey listing course proficiencies needing revisions. He met with Godfrey on September 13, 1985 after Godfrey's memo to him of September 10, 1985 (R-2). According to respondent, Godfrey felt the teachers concerned in the proficiencies had never been allowed any input. Respondent replied they were worked on all year; Godfrey had accepted them but waited four months for a review. Godfrey felt respondent was not doing his job and wanted him to obtain more teacher involvement. Respondent received a memo from Godfrey later, which went to the superintendent, in which Godfrey gave his opinion of the course proficiencies as "worthless." Respondent wrote a letter challenging the opinion. Ultimately, in a yearly evaluation report for management objectives for 1984-85 (R-3), respondent received an evaluation from the superintendent noting he had "successfully completed the objectives set forth in this school year as stated by his management objectives." But the report noted areas needing improvement as including a need to "provide leadership to the department in curriculum planning and closer coordination with the curriculum directive."

For the rest of 1985-86, respondent said, he met several times with Godfrey concerning course proficiency outlines. Discussions were routine. Godfrey voiced no concerns about them, he said. In 1986-87, he met with Killoy and Godfrey and ultimately

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signed the yearly evaluation report for management objectives for 1986-87 on October 1, 1986. He insisted he completed his obligations under the plan by way of course review, as outlined in P-1, at page 2. The fateful meeting of March 17, 1987 was scheduled to review progress in fulfillment of required objectives in P-1.

Respondent said he attended the conference with Godfrey and Killoy carrying a folder and some carnations. He seated himself and put the carnations down. After about ten minutes, when the discussion reached course proficiency outlines, Godfrey accused him of giving dates for meetings with teachers when in fact no such meetings had taken place. He was accused of handing in outlines as to which teachers had no input or part in making. There were recriminations dealing with the exchange of memoranda, as in R-4 and R-5. Ultimately, as the exchange became louder, respondent told Godfrey, "You f. . . ed up on this." Godfrey, he said, became angered, raised his voice and denied the charge. Respondent asked what other chairmen were required to do this. Godfrey turned to Killoy and said either respondent requires the teachers to initial course revisions or he would. Respondent replied "Fine,Bob, you do it." Godfrey rose from his seat, approached respondent, bent down and put a hand in his face, saying in a loud voice "Listen, sonny boy, I didn't f. . . up. You did." Godfrey didn't touch him, respondent said. Killoy rose from his desk, walked past the two, saying the meeting was over. Godfrey told him to get out in a loud voice. Though set to leave, he said, Godfrey pushed him back on the shoulders. He stepped back, dropped his folder and the carnations. Respondent said he felt he had a right to stop Godfrey. He said he raised his closed right fist up and brought it down to break Godfrey's grip. "I believe my fist hit his nose, on the left side," he said. Respondent said he did not intend to hit him on the nose, only to knock his arm away. Godfrey stepped back, hands to his nose. There was blood. Killoy stepped between them. Respondent's blow was downward, he said; Godfrey's glasses were askew. He hit him with his fist and knuckles.

On cross-examination, respondent insisted he was a victim of Godfrey's physical and verbal attack. He believed Killoy saw everything but also believed he is lying in his

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version. He insisted he had nothing to apologize to Godfrey for. Asked by the administrative law judge whether he could have left the room without hitting Godfrey, respondent replied he could have been injured if he hadn't protected himself. Godfrey, he said, offered to apologize to him. Respondent declined to accept any apology, feeling an exchange of apologies would have signified he had done something wrong.

Called by respondent, Linda Fliedner, an eight-year Board employee, secretary to an assistant principal whose office adjoins Killoy's, testified she was working in her office on March 17, 1987 about 12:00 p.m. and heard voices, including the loud voice of Godfrey. She could not discern what was said; she recalled only that respondent left carrying a folder and carnations.

Called by respondent, Ronald Hoffman, a business education teacher for the past thirteen years, one of those whom respondent supervised, testified he had met with respondent concerning the requirement for revision of course proficiencies in 1984-85, 1985-86 and 1986-87. The working relationship between him and a presently acting supervisor is no different from that between him and respondent formerly, he said.

Called by respondent, Robert Abraczinskas said he has been employed as teacher of business education and coordinator of cooperative office education for some twenty-two years in the district. He said he did course proficiency outlines in 1984-85 and 1985-86. In 1986-87 he revised the proficiency for accounting I again because of a new textbook. He and respondent had agreed the revision would not be done until the new textbooks arrived. His relationship too with a presently acting supervisor has seen no change from the relationship existing between him and respondent formerly.

Both sides rested.

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DISCUSSION AND FINDINGS

Tenure charges against respondent were two in number: count I charged conduct unbecoming a member of the supervisory and teaching staff and specified respondent's assaultive conduct toward an assistant superintendent on March 17, 1987 during an administrative conference; count II charged insubordination and specified that respondent on the same day deliberately refused direct orders of the principal and an assistant superintendent, his superiors, to furnish evidence of fulfillment of obligations under pre-established management objectives.

It is clear from evidence the alleged assaultive behavior was culmination of a defiance of administrative authority by respondent of long-standing. A first focus of inquiry, therefore, ought sensibly to consider whether and how in fact the assaultive conduct alleged actually occurred. Describing it as a mere physical altercation, respondent argued his fist or his elbow only inadvertently struck Godfrey in the nose, that his action was only reflexive and designed to break Godfrey's grip on his clothing, and that respondent's "range of motion to break Godfrey's grip" only incidentally resulted in a strike to Godfrey's face breaking his nose. (Rm. at 7-10). In testimony, respondent insisted that once Godfrey touched him, he was free to do what he wanted in self-defense. Although he denied he had a chance to retreat, it seems obvious the chance was there. I am more than satisfied from the testimony of Godfrey, Killoy and respondent, however, that respondent's blow was neither accidental nor merely reflexive, neither light nor non-injurious, and neither defensive nor anything less than deliberate, sudden and unprovoked. The assault was by closed fist by a taller, heavier man upon the person of a superior employee wearing glasses. Forceful enough to fracture the nose and draw blood, the blow was within a fraction of an inch of enucleation of the victim's eye. The blow came without warning and with intent to harm. It was not struck in self defense. It was a sucker punch.

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That the blow was a flagrant act comes not alone from the victim's mouth. It was struck in presence of the principal, whose corroborating evidence I find persuasive and conclusive. I **FIND** and **DETERMINE** without hesitation, therefore, that the tenure charge of unbecoming assaultive conduct by respondent upon a member of the supervisory staff, as in the first count, is **SUSTAINED.** Equally well sustained, in my view, is evidence of respondent's long-standing defiance to authority over fulfillment of his management objectives, an unfortunately fractious course of behavior that seems, in retrospect, destined to have reached its unfortunate climax on March 17, 1987, at an official administrative conference in the principal's office in the school building. I **FIND** the tenure charge of insubordination in the second count, therefore, fully **SUSTAINED.** What respondent may not realize even today is that the Commissioner has considered charges of physical abuse by professional employees of a school district against their fellow professionals to be no less grave and no less "meritorious of administrative review" than are charges of unlawful corporal punishment by a teacher upon a pupil. A single instance of either sort of violence, if sufficiently flagrant, or if other peaceful means to avoid violence are eschewed, may become sufficient cause for removal. Cf. Redcay v. State Bd. of Ed., 130 N.J.L. 369, 371 (Supreme Ct. 1943), aff'd o.b. 131 N.J.L. 326 (E. A. 1944); and Dennis v. Bd. of Ed. of Long Branch, 1976 S.L.D. 14, 17.

The questions results, therefore, whether, given the sustaining of charges as specified, respondent should be removed from his tenured position or sanctioned in a manner less extreme. I have considered evidence of respondent's long-standing service in the district as teacher and administrator without, apparently, other blemish on his record. I have considered in general the stresses and strained relationships that may exist in any employment relationship whether in the public or the private sectors. I have considered the conduct here was not in the classroom in presence of pupils, but I have also considered the prospect of respondent's return to what is an unhealthy educational environment. I have considered his proud lack of contrition. He was unapologetic on March 17, 1987; he remains unapologetic today. In his own mind, he was victim not aggressor. His superior was the menace, he the innocent. In such state of the case, the prospect of his continued employment in the district is insupportable.

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CONCLUSION

Based on the foregoing, therefore, having heard testimony and viewed documentary evidence, having considered arguments of counsel, and having found tenure charges of unbecoming teacher conduct and insubordination fully sustained, I **ORDER** respondent **REMOVED** from his tenure employment as a member of the teaching staff of the High Point Regional High School District, Sussex County, as of date of final agency decision herein.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN** , who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

March 9, 1988
DATE

James A. Ospenson
JAMES A. OSPENSON, ALJ

3-11-88
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

MAR 14 1988
DATE

Mailed To Parties:
FOR OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE TENURE	:	
HEARING OF JAMES SAMILJAN,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF HIGH POINT	:	DECISION
REGIONAL, SUSSEX COUNTY.	:	
	:	

The Commissioner has reviewed the record of this matter including the findings, conclusion and recommendations set forth in the initial decision rendered by the Office of Administrative Law.

It is observed that respondent's exceptions to the initial decision as well as the Board's replies to those exceptions were filed with the Commissioner pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

In his exceptions respondent maintains that the ALJ failed to accurately describe Dr. Godfrey's actions and demeanor pertaining to the incident that occurred on March 17, 1987, giving rise to the Board's certification of tenure charges against him.

Respondent argues that the ALJ completely ignored those glaring inconsistencies in Dr. Godfrey's and Mr. Killoy's testimony and the written reports dated March 18, 1987, which they submitted to the school authorities describing his actions in connection with the incident which took place on March 17, 1987.

Respondent maintains that the inconsistencies in Dr. Godfrey's testimony when compared with his earlier written statements upon which the Board relied in its certification of tenure charges against respondent clearly establish that Dr. Godfrey may not be considered to be a credible Board witness. Respondent claims that the contrasting written comments made by Dr. Godfrey on March 18, 1987 reveal that he instigated the confrontation of March 17, 1987, and therefore Dr. Godfrey must share the blame of the outcome of the incident. Furthermore, respondent rejects those statements and testimony of Mr. Killoy and Dr. Godfrey which claim that on March 17, 1987 he delivered a short, right-handed punch to Dr. Godfrey's face. If this were true, respondent maintains, Dr. Godfrey would not have been able to "keep his feet" but rather he would have fallen backwards by the sheer force of such a blow.

In rejecting these findings of the ALJ, respondent avers that he did not throw a direct, right-handed punch to Dr. Godfrey's face but rather that in his efforts to disentangle himself from the grip that Dr. Godfrey had on his jacket, he raised his hand and then forcefully brought his arm and hand down on Dr. Godfrey's arm. In the process, respondent maintains, either his elbow or a portion of his arm struck Dr. Godfrey's nose. With regard to the penalty of respondent's dismissal from tenured employment recommended to the

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Commissioner by the ALJ, respondent urges the Commissioner to reject such penalty for the following reasons:

1. Respondent had an unblemished teaching record in the Board's employ prior to the incident of March 17, 1987.

2. Dr. Godfrey was equally if not more culpable than respondent for the incident that occurred on March 17, 1987.

3. While respondent regrets his use of profanity in connection with the incident of March 17, 1987, he also points out that Dr. Godfrey used profanity on that occasion in replying to him.

4. Respondent maintains that while he is apologetic to the physical pain brought to Dr. Godfrey, he also maintains that he did not intend to strike or hurt him.

5. Respondent claims that in other more threatening situations the Commissioner has elected not to impose the penalty of dismissal from employment on other tenured teaching staff members. In this regard respondent relies on: In the Matter of the Tenure Hearing of H. Evelyn Cohn, School District of the City of Trenton, 1983 S.L.D. 633; In the Matter of the Tenure Hearing of Thomas Tiefenbacher, School District of the City of East Orange, 1982 S.L.D. 142, aff'd State Board with modification as to penalty 157, remanded to State Board, N.J. Superior Court 1983 S.L.D. 1648, aff'd State Board September 5, 1984, aff'd N.J. Superior Court, Appellate Division, December 30, 1985 (A-594-84T6) and In the Matter of the Tenure Hearing of Portia Williams, School District of the Borough of Red Bank, 1981 S.L.D. 931, aff'd State Board 1982 S.L.D. 1592, aff'd N.J. Superior Court, Appellate Division 1982 S.L.D. 1594.

The Board in its reply to respondent's exceptions categorically rejects those arguments advanced by respondent which attempts to discredit the testimony of either Dr. Godfrey or Mr. Killoy. The Board also rejects respondent's arguments which attempt to cast the blame for the incident of March 17, 1987 upon the Assistant Superintendent, Dr. Godfrey, who was the victim of the blow from respondent's fist which fractured Dr. Godfrey's nose.

With respect to the factual inconsistencies in the record and in the ALJ's findings in the initial decision claimed by respondent, the Board replies as follows:

> Counsel [for respondent] makes great effort in attempting to show that there are substantial disparities of fact between hearing testimony and original written statements of the incident filed by Messrs. Godfrey and Killoy on March 18, 1987. In reality, such claims are either nonexistent or insignificant.
>
> The statements drafted on March 18, 1987 were of three pages in length for Dr. Godfrey and one page for Mr. Killoy. These short reports in

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> response to an inquiry from the Superintendent of Schools are obviously not intended, or likely to be, the length of hearing testimony.
>
> It is true that Petitioner relied, in part, upon these documents in order to file the original charges. Thus, counsel was fully able to utilize these documents to cross-examine if, in fact, factual inconsistencies existed between the original evidence and the hearing testimony. No such inconsistencies were unmasked at trial. Hence, the record, as developed, is the appropriate basis for the court's decision.
>
> (Board's Reply to Exceptions, at pp. 2-3)

Additionally, the Board rejects respondent's argument that the descriptions of the incident of March 17, 1987 given through the testimony of Dr. Godfrey and Mr. Killoy lack credibility solely on the basis that his testimony describing the incident differs. The Board avers that the ALJ, as trier of the fact, had an opportunity to observe the testimony and the demeanor of these three witnesses and to arrive at a determination as to the credibility of these witnesses. The Board maintains that it is evident from the record of these proceedings that the ALJ did not accept respondent's version of what occurred with regard to the meeting respondent had with Dr. Godfrey and Mr. Killoy on March 17, 1987. Consequently the ALJ found and concluded that the Board's charges of insubordination and unbecoming conduct against respondent were supported by a preponderance of credible evidence and should be sustained.

Finally with respect to respondent's claim in his exceptions that he was apologetic for his actions pertaining to the incident of March 17, 1987, the Board's reply reads in pertinent part as follows:

> Counsel [for respondent] repeatedly states in his exceptions that Mr. Samiljan is sorry for any actions of his which led to this terrible incident. Unfortunately, counsel's good advocacy is belied by the reality of Mr. Samiljan's attitude. For Judge Ospenson specifically found that: "I have considered his proud lack of contrition (emphasis added). He was unapologetic on March 17, 1987; he remains unapologetic today."
>
> This from a man whose actions were described by the Judge in the following manner:
>
> > The assault was by closed fist by a taller, heavier man upon the person of a superior employee wearing glasses. Forceful enough to fracture the nose and draw blood, the blow was within a fraction of an inch of an enucleation of the victim's eye. The blow came

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> without warning and with intent to harm. It was not struck in self defense. It was a sucker punch. [Initial Decision, at p. 10]
> (Board's Reply, at p. 5)

The Commissioner has reviewed the respective opposing arguments advanced by the parties pertaining to the findings of fact and conclusions set forth in the initial decision. Having reviewed and considered the positions taken by the parties, the Commissioner finds and determines the arguments advanced by respondent to be without merit for the reasons set forth below.

Initially, it is apparent that respondent seeks to persuade the Commissioner that both Dr. Godfrey's and Mr. Killoy's testimony is incredible by virtue of the fact that their testimony was diametrically opposed to his own testimony given at the hearing and also because their testimony conflicts with their earlier written statements of the incident which took place on March 17, 1987.

The Commissioner however, cannot ignore the fact that respondent has not produced any evidence to support his claims made with respect to his arguments that the testimony of Dr. Godfrey or Mr. Killoy is not credible. In this regard the Commissioner observes that although respondent attempts to impeach that testimony of Dr. Godfrey and Mr. Killoy, he has failed to follow the admonition of the court in In re Morrison, 216 N.J. Super. 143, 158 (App. Div. 1987) which requires that he provide and cite the specific portions of the transcripts of the testimony adduced at the hearing for the Commissioner's review and consideration. Similarly, respondent had not sought to place into evidence at the hearing those written statements of either Dr. Godfrey or Mr. Killoy, with which he now takes issue, regarding the March incident.

While it is apparent that the Board did, in fact, rely on certain written statements of those witnesses in order to determine the sufficiency of the tenure charges against respondent at the time the charges were certified to the Commissioner, it was under no obligation to move them into evidence at the time of the hearing inasmuch as it produced the authors of those written statements to give direct testimony at the time of the tenure hearing.

Consequently, absent any evidence to the contrary which was required to be produced by respondent with respect to the tenure charges against him, the Commissioner finds and determines that respondent's exceptions to the ALJ's findings of fact are totally without merit. Moreover, the Commissioner finds that the ALJ properly concluded that there is no evidence to establish that respondent was contrite with regard to the physical attack upon Dr. Godfrey on March 17, 1987, which resulted in a serious and painful injury requiring professional medical attention.

Finally, the Commissioner rejects as being without merit respondent's attempt to rely on previous school law decisions in urging the Commissioner to reject the ALJ's recommended penalty that

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he forfeit his tenured position. In particular, one of the prior school law decisions upon which respondent relies, In re Tiefenbacher, supra, to mitigate his penalty of dismissal from tenured employment cannot be used to support his claim of a lesser penalty by virtue of the fact that respondent in that case was ultimately dismissed from tenured employment by the State Board of Education.

Accordingly, based upon the Commissioner's independent review of the record and for the reasons set forth above, the Commissioner adopts as his own those findings and conclusions set forth in the initial decision. Additionally, the Commissioner also concurs with those legal conclusions set forth on page 11 of the initial decision which are grounded on Redcay, supra, to reach a finding and determination that respondent's actions of unbecoming conduct and insubordination, of which he has been found guilty herein, require that he forfeit his tenured position of employment with the Board as of the date of this decision. The Commissioner so orders.

It is further ordered that pursuant to N.J.A.C. 6:11-3.7, a copy of this matter be forwarded to the State Board of Examiners for its review and, in its discretion, any further action deemed appropriate.

COMMISSIONER OF EDUCATION

April 18, 1988

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IN THE MATTER OF THE TENURE	:	
HEARING OF JAMES SAMILJAN, SCHOOL	:	STATE BOARD OF EDUCATION
DISTRICT OF HIGH POINT REGIONAL,	:	DECISION
SUSSEX COUNTY.	:	
	:	

Decided by the Commissioner of Education, April 18, 1988

For the Petitioner-Respondent, Sills, Cummis, Radin, Tischman, Epstein & Gross (Lester Aron, Esq., of Counsel)

For the Respondent-Appellant, Robert M. Schwartz, Esq.

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

November 1, 1988

Pending N.J. Superior Court

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5468-87
AGENCY DKT. NO. 226-7/87

CONSTANCE SMITH,
Petitioner,
v.
BOARD OF EDUCATION OF HAMILTON TOWNSHIP, MERCER COUNTY,
Respondent.

Andrew M. Mellk, Esq., and **Ezra D. Rosenberg,** Esq., for petitioner (Katzenbach, Gildea & Rudner, attorneys)

Barbara Barbash Kalish, Esq., for respondent (Sills, Beck, Cummis, Zuckerman, Radin, Tischman & Epstein, attorneys)

Record Closed: February 9, 1988 Decided: March 9, 1988

BEFORE **NAOMI DOWER-LA BASTILLE,** ALJ:

Constance Smith, a tenured teaching staff member employed by the Hamilton Board of Education (Board), claimed that the Board had belatedly and thus illegally denied her increment for the 1987-1988 school year and had denied it not for the seven reasons given, but because she had exercised "her academic freedom" and other constitutionally protected rights during an incident designated by the Board as the fifth reason for increment denial. On August 11, 1987, the Commissioner transmitted the matter to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

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The first prehearing scheduled for October 29, 1987 was adjourned due to scheduling conflicts. A prehearing was held on October 16, 1987 and five days of hearing were scheduled to commence on January 6, 1988. On January 4, 1988, petitioner requested and obtained twelve signed subpoenas, of which nine were for school board members. At the beginning of the hearing on January 6, petitioner's counsel announced that he would not need any of the subpoenaed witnesses, including all nine school school board members, who had appeared in response to process, and that petitioner would dispute only the question of the Board's right to "rescind" petitioner's contract salary which included an increment for 1987-88. The hearing was concluded on January 6, 1988. A list of exhibits entered into evidence is appended to this decision. The record closed on February 9 with receipt of the last responsive brief.

Respondent's Request for Witness Expenses

The undersigned hearer, as well as respondent's counsel, were surprised when, after subpoenaing all the school board members, petitioner's counsel did not advise these individuals that they would not have to appear before they did so. I suggested sua sponte that in these circumstances, those subpoenaed should perhaps be paid for their time. They were released by 9:30 a.m. on the day of hearing, but even though they resided in Hamilton, which is near the hearing site in Mercerville, they must be assumed at the very least to have given up on one hour of their time. Petitioner's counsel claimed that subpoenaing these persons resulted from respondent's refusal to make them available voluntarily, in which event they would have been "on call" and that petitioner had an absolute right to determine at the "eleventh hour" that they would not be called, whereupon petitioner would be liable only for the customary witness fees of $2.00 each. I note that there is no bar to placing subpoenaed witnesses "on call" and it is often done as a matter of courtesy.

It was not explained to me why, in the course of timely case preparation, petitioner's counsel would not have known by the last business day before the hearing date that his trial strategy would be to address only one legal issue, that being one for which the subpoenaed witnesses were not needed and which could have been addressed by a motion for summary decision, since no facts were in dispute on the contract issue. To say that counsel's action was inconsiderate is inadequate, since in addition to the needless attendance of eleven people, and the needless scheduling of a hearing when a simple motion would have sufficed, petitioner caused the Board to expend public monies for hours

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of attorney time to prepare a five-day case, when timely preparation and communication by counsel would have prevented such waste of resources. While petitioner's counsel's conduct is not expressly prohibited by the rules of professional conduct, surprise strategies, in my view, have the capacity to prejudice the administration of justice (RPC 8.4).

In that regard, the surprising change in petitioner's position on January 6 did not give respondent opportunity to plan a different hearing and analyze the legal consequences of petitioner's new position. I consider such strategy to be unfair and memorialize it here to ensure that it does not recur. When court and counsel have set aside five days for hearing, it is common courtesy to advise prior to hearing of a change in issues which will reduce trial time from five days to two hours, unless, of course, counsel had good cause to lack knowledge of a change. I invited an an explanation of petitioner's actions, but the response was an assertion that petitioner was within her rights and that no action could be taken for remedy without a filed motion. I did not agree with that. I **FIND:**

1. The nine school board members could not have lost less than one hour of their time, having been before me for a half hour, and requiring time to travel to and from the hearing site.

2. Petitioner caused the school board members to attend without good cause, since an explanation constituting good cause was requested at the hearing, but none was given.

3. The lowest value of an hour of time per person equates with the minimum wage but the actual loss per person would be much higher, particularly for professionals or persons forced to take a half day or full day off from work to appear.

4. A reasonable average minimum loss per person is $25 or $225 total of witness expense.

5. No expense is allowed for the two employees of the Board since they are reimbursed by salary.

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It is therefore **ORDERED** that petitioner pay to the Board $225 for witness expense, which may be deducted from her salary if the Commissioner adopts this position in his final determination.

The Issues to be Decided on the Merits

Petitioner stated that all issues before the Commissioner were waived except for B1 of the prehearing order. That issue reads:

> Was the Board precluded from rescinding petitioner's contract salary offered to withhold her increments?

In the colloquy that followed, petitioner noted that she had made a "reservation of rights" in her petition, which said:

> Petitioner hereby reserves [her] right to bring a cause of action in the United States District Court for vindication of federal claims. See Migra v. Warren City School District, 465 U.S. [75], 104 Supreme Court at 898, n.7.

Not having been advised in advance that petitioner planned to limit the issues for litigation, neither respondent nor the Adminstrative Law Judge had an opportunity to consider the petitioner's representation of waiver in connection with the reservation of rights statement. I agreed with petitioner that the Commissioner has no jurisdiction to award 42 U.S.C. §1983 and §1985 punitive damages claims and attorney fees. I also noted, however, that the Commissioner had the jurisdiction and the duty to determine whether or not the Board had a reasonable basis under the standard of Kopera v. Bd. of Ed. of West Orange, 60 N.J. Super. 288, 295 (App. Div. 1960), for denial of an increment. I was concerned with the possibility of a remand if petitioner did not prevail on the issue of whether or not the Board could "rescind" the salary offered and deny the increment since if the Board could do so, the Commissioner would have to decide whether or not a reasonable basis for increment denial existed and if not, grant the remedy of restoration of the increment. Furthermore, there is considerable case precedent in New Jersey for the Commissioner to find arbitrary and unreasonable a denial which is retaliatory or based on conduct which was an exercise of a teacher's constitutional rights. The State administrative forum invoked is not authorized to grant damages other than the

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compensatory "damage" of restoring an increment improperly withheld. It cannot grant punitive damages and attorney fees as the federal and State courts can.

Petitioner asserted that there would be no remand because she waived all except her federal reserved rights claim. That claim concerns only one (number 5) of the reasons for increment denial given by the Board in its letter dated May 27, 1987 as stated in petitoner's certified petition. Petitioner claims that she had a constitutional right to academic freedom in the classroom as to her conduct cited under item 5 as follows:

> 5. The Observation Report of March 31, in which you were cited for having made materials available to a student, which were not previously approved by the district Family Life Education Committee (representing the Board of Education) prior to their usage in the classroom, nor had they been available for parental review as per the Board of Education Policy No. 213 and the New Jersey Administrative Code, Title 6, Education 6:29-1, Family Life Education.

There remain six reasons which specifically allude to conduct or professional evaluations of petitioner in 1986-87 school year, none of which have been controverted by petitoner and which, I **CONCLUDE,** on their face constitute a reasonable basis for increment denial under Kopera even if reason number five is eliminated from the list. These reasons are:

> 1. The Observation Report of October 9, 1986, in which you were cited for the mishandling of student discipline.
>
> 2. The Observation Report of March 2, 1987, in which you were cited for discussing one of your colleague's very personal and sensitive matters with your students.
>
> 3. The Observation Report of March 13, in which you were cited for reporting to school late on numerous occasions.
>
> 4. The Observation Report of March 26, in which you were cited for leaving the school without permission after you had signed in for duty.
>
> . . .
>
> 6. The Observation Report of April 6, 1987, in which you were cited for reporting your absence later than required and as a consequence, no substitute was available.
>
> 7. The Annual Performance Report of May 12, 1987 in which you were cited for poor teacher judgement and lack of professionalism.

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I do not determine, due to the reservation of rights, the question of whether or not these uncontroverted reasons which support the Board's discretionary action under New Jersey law can be vitiated by the inclusion of one reason for increment denial which condemns an action of the petitioner which she may have had a constitutional right to take. I find it troublesome, however, to split out a claim of this nature from the case when, in fact, the Commissioner does have jurisdiction to find the facts and conclude, if warranted, that the Board's actions were retaliatory or in controversion of petitioner's constitutional rights, since a compensatory remedy (restoration of the increment) is available in the administrative forum; only punitive damages and attorney fees cannot be granted. It would have been more efficient, in my view, to have either filed the entire controversy in the courts (State or federal) or to place the entire controversy before the Commissioner, reserving only the right to seek attorney fees and punitive damages in the courts, which have the authority to grant these remedies. New Jersey does adhere to the entire controversy doctrine. See, R. 4:27-1(b).

Migra, supra, holds only that the claim preclusive effect of a state court judgment has the same effect in a federal court as it would have in the state court. In New Jersey, there must be comparability of fora to invoke the entire controversy doctrine. Thornton v. Potamkin Chevrolet, 94 N.J. 1, 5 (1983). In Thornton, the court contrasted labor arbitration with an agency forum which could offer plenary hearing and expert fact-finding and was specifically entrusted by the Legislature with the duty of adressing the kind of claim sought. The Commissioner's jurisdiction here is very like that of the Division of Civil Rights which is characterized in Thornton. The difference is the Commissioner's inability to grant punitive damages and attorney fees (except, perhaps, in extraordinary circumstances not at issue here). The entire controversy doctrine is a "firm judicial policy which seeks to impel litigants to consolidate their claims arising from a 'single controversy' whenever possible." Id. at 5. I **CONCLUDE** that the doctrine should have been applied here to preclude petitioner from reserving any claim cognizable here, except for the right to seek remedies not available in the administrative forum. Due to the trial strategy of petitioner, it was not possible to consider that legal issue. As the law of this case, I therefore do not apply the doctrine to preclude "reservation" of rights. I do, however, recommend that the Commissioner consider whether the conclusion should be applied in the future and whether or not a rule might clarify the procedures. The public interest in such economy of litigation appears clear since two full litigations can only result in duplication of attorney expenditures from public funds intended for the education of children.

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The Issue Briefed

Petitioner claims that the Board, having passed a resolution on April 20, 1987 to reappoint her for 1987-88 school year at an annual salary which included increments, was precluded from acting on May 21, 1987 to withhold her increments. She was one of three staff members whose increments were denied on that date. A few additional facts should be noted. Petitioner's annual performance report which cited her for "poor teacher judgment and lack of professionalism" was dated May 12, 1987 and Superintendent Albert DeMartin, who testified, sent petitioner a statement of reasons for the increment denial on May 27, 1987. DeMartin testified that the procedure was the same each year: Before April 30, the Board gets a list of employees for reappointment together with their salaries for the following year, but the administration continues to evaluate personnel through May and then recommends denial of an increment if there is reason to do so. These facts were undisputed, and I **FIND** them to be true.

I **CONCLUDE** there is no contract issue here since the Board cannot bargain away its right to withhold an increment. Clifton Teachers Assoc. v. Bd. of Ed. of Clifton, 136 N.J. Super. 336 (App. Div. 1975). N.J.S.A. 18A:29-14 controls increment withholding "for inefficiency or other good cause." The Legislature has given the Commissioner of Education express authority to consider the appeal and either affirm the action of the Board or direct that the increments be paid.

There is extensive precedent that a Board may move to withhold increments prior to the start of the school year in which the denial is effective even if the teacher has been sent a notice of continuing contract at the anticipated salary prior to the Board's action to deny an increment. Van Houlen v. Middletown Township Board, decided by Commissioner (January 4, 1982). In Englewood Teachers Ass'n et al. v. Bd. of Ed. of Englewood, OAL DKT. EDU 11082-82 (Nov. 4, 1983), decided by Commissioner (December 22, 1983), the Board sent teachers notices of continuing contract on June 1 and voted to deny increments on July 29. The Commissioner held that since the petitioners never commenced actual employment service in the contract year, they were not protected by executed employment contracts at the incrementalized salary level before action to withhold was taken.

In Newark Teachers' Union, Robert Durkin, et al. v. Newark Bd. of Ed., OAL DKT. EDU 8418-84, decided by Commissioner (June 25, 1985), the Commissioner

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admonished the Board for last-minute actions to withhold increments but reiterated his holding in a 1984 case with the same parties that a Board may deny an increment as late as August 31 but must do so prior to September 1. The line of cases so holding goes back to 1972. Gersie v. Clifton Bd. of Ed., 1972 S.L.D. 462. In the 1985 Newark case, although the Board acted to withhold increments in August, it erroneously paid salaries including them in September, but the Board was permitted to recoup the erroneous overage. Robert Durkin appealed the 1985 Newark case. He had been advised of a proposed increment denial on July 21 which was acted upon on August 21, but did not receive notice of that fact until September 25. The State Board affirmed the Commissioner's decision which affirmed the Newark Board's action to deny an increment. (State Board decision, June 5, 1987.) Appeal is still pending before the Appellate Division of the Superior Court.

Despite this clear line of precedent, petitioner argues that the Board cannot act to withhold an increment before September 1 (in this case, on May 21) after it has given notice in April of a continuing contract and the salary to be paid for the following school year, even though the teacher subsequently receives an adverse annual performance report (on May 12, 1987). I **CONCLUDE** that there was no bar to the Board's action to withhold increments, that the uncontroverted adverse performance report alone would have been reasonable basis for denial and that the reasons given by the Board, excluding number 5, were clearly sufficient to support denial.

It is therefore **ORDERED** that the petition be **DISMISSED.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

March 9, 1988
DATE

Naomi Dower La Bastille
NAOMI DOWER-LA BASTILLE, ALJ

3-10-88
DATE

Receipt Acknowledged:
Seymour Weiss
DEPARTMENT OF EDUCATION

MAR 14 1988
DATE

Mailed To Parties:
Ronald L. Parks
OFFICE OF ADMINISTRATIVE LAW

ml/EE

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CONSTANCE SMITH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF HAMILTON TOWNSHIP, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner filed timely exceptions pursuant to N.J.A.C. 1:1-18.4.

Petitioner claims the ALJ did not address her rescission argument but rather predicated her analysis upon the "reasonable basis" theory of increment withholding. Noting that petitioner's annual performance report, dated May 12, 1987, was not marked into evidence in this case, petitioner avers that the ALJ based her upholding of the action by the Board of Education without a "residuum" of legally competent evidence to support her finding. She cites three New Jersey court cases in support of this proposition, among them Weston v. State, 60 N.J. 36 (1972). Petitioner claims that the testimony of Superintendent DeMartin on the issue of rescission was "simply not probative to the issue of rescission, and was hearsay within hearsay as to any 'reason' the Board may have had for its controverted action. Board members were certainly available to testify at trial but were not called by Board's counsel, only the Superintendent testified." (Exceptions, at p. 2)

Petitioner would distinguish the case law cited by the ALJ as being inapposite, because they deal with the right of a board to withhold an increment, an issue patently distinguishable from a board's right of rescission, she avers. Petitioner states that the one case cited by the ALJ "which is not suspect, Gersie v. Clifton Bd. of Ed., 1972 S.L.D. 462 stands for petitioner's proposition that a Board may not rescind a previously fixed salary. Id., at 468-9.***" (emphasis in text) (Exceptions, at p. 3)

Petitioner then reiterates in exceptions her version of the facts and the seven bases stated in the Superintendent's letter to Ms. Smith, dated May 27, 1987 for the alleged rescission. She claims that each of the items mentioned concerned events that occurred before the initial action of April 20 in which Ms. Smith had been granted her employment adjustment and increments. In addition, "the only negative comments in the Annual Performance Report of May 12, 1987 (which post-dated the grant of the increment) referred to the same events described in numbers 1 through 6 of the May 27 letter." (Exceptions, at p. 5)

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Citing Louis LiMato v. Bd. of Ed. of the City of Trenton, decided by the Commissioner September 22, 1983, petitioner contends the Board has the burden of proving that its initial grant of the increment was improper. She claims it is "impossible for the Board here to meet that burden because at the hearing in this matter the Board presented absolutely no evidence, testimonial or otherwise, upon which its second action was based which would detract from the presumption of validity of its first action." (Exceptions, at p. 6) In short, petitioner claims, as in LiMato, "the Board's action of April 20, 1987, was 'irrevocable, except for lawful cause ***' LiMato, supra, (Slip Opinion, at 14)." (Exceptions, at p. 8)

Citing Gulnac v. Freeholders of Bergen, 74 N.J.L. 543, 544 (E. & A. 1906) and Witney v. Van Buskirk, 40 N.J.L. 463 (Sup. Ct. 1878) among other cases, petitioner further avers that it is established in New Jersey that the right of a deliberative body to reconsider its vote on a matter affecting an individual's rights ceases when a final determination has been reached. Gulnac, supra Thus, claims petitioner, a "deliberative body has no power to rescind a resolution after a final determination affecting individual rights" has been taken. (Exceptions, at p. 8)

Petitioner contends that the case before the Commissioner is in the nature not only of a contract, but also of a statutory right, paying petitioner for work she would do in accordance with law. Further, she contends that the record of the vote was public and, accordingly, it can be presumed that petitioner was informed of the vote. Therefore, under Robert's Rules of Order (Newly Revised Edition 1971), the April 20, 1987 resolution could not have been rescinded or amended.

Citing Agnes D. Galop v. Bd. of Ed. of the Township of Hanover, 1975 S.L.D. 358, among other cases dealing with the Board's power to rescind a resolution, petitioner contends there is language directly applicable to this case and should control the Commissioner's decision. Galop, supra, quoted with approval Judge Kimmelman's unpublished opinion in Kawaida Towers v. City of Newark, Superior Court of New Jersey, Essex County, February 23, 1973, in this regard, as follows:

> In effect, we have an admission by elected officials that when they voted they were not in possession of all of the facts -- facts which they now deem material to the proper consideration of the issues.
>
> Unfortunately, a government, whether it be a city council, state legislature or congress, is not permitted to function in a loose or cavalier fashion . . . they are bound to investigate, know, appreciate and understand matters which come before them and require their vote. . . .

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> Once they have cast their vote upon a particular matter vested rights of parties have materialized. They are powerless to undo their deeds. . . .
>
> Kawaida Towers, quoted with approval, Galop, supra, at 361-362. (Exceptions, at p. 12)

Petitioner claims that the Board's action in purporting to rescind the increment was "an infringement of [her] contract and affected petitioner's 'individual' rights. The Board's 'rescission' was directed specifically at petitioner and served to prevent her from obtaining a benefit as determined by the Board on April 20." (Exceptions, at p. 12) Petitioner requests that the Commissioner reject the initial decision and direct the Board of Education of Hamilton Township to restore her increment.

Attached to said exceptions is a certification by petitioner's attorney objecting to the ALJ's grant of witnesses' fees. He suggests therein that if Board counsel had agreed to voluntarily produce Board members and other managerial employees or agents of the Board, he would not have had to subpoena them. He cites R.1:901 and R.4:14-2 as requiring such individual to be present by notice without the necessity of subpoena. He adds that if Board counsel had so complied on a voluntary basis, he would have been agreeable to placing said witnesses "on call."

Moreover, counsel for petitioner contends that it is not the ALJ's role to challenge his trial strategy. Petitioner's counsel suggests that while the Board's counsel may have been surprised by his choice of strategy, "the use of such 'surprise' is not in itself an improper strategy or tactic, absent lack of compliance with a discovery request or order of the tribunal.***" (Certification, at p. 3) He notes that no allegation can be made that petitioner failed to comply to discovery or failed to respond to any order of the ALJ.

Attorney for petitioner avers that the ALJ's recommendation to award witnesses' fees against petitioner constitutes an abuse of discretion, assuming she has the authority to do so under limited circumstances not present here pursuant to N.J.A.C. 1:1-11.2. Moreover, he suggests that because the decisions regarding trial strategy were ultimately his, not petitioner's, it is unfair to penalize his client. "If the Commissioner believes that the award of witnesses' fees should be unheld (sic), such award should be made against me and not against my client." (Certification, at p. 4)

The Commissioner begins his review of this matter by considering the merits of the sole issue briefed by the parties, that is, whether the Board, having passed a resolution on April 20, 1987 to reappoint her to a tenured position for the 1987-88 school year at an annual salary which included increments was thereafter precluded from acting on May 21, 1987 to withhold her increments.

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It is noted initially that the record does not include transcripts of the hearing below. The Commissioner will thus rely on the credibility determinations established by the ALJ below and adopts as his own those facts predicated upon said credibility determinations. N.J.S.A. 52:14-10(b) Petitioner's arguments challenging the testimony of the witnesses below are therefore dismissed as being without merit.

It is essential to this determination to establish exactly what is at issue. Petitioner argues that the ALJ did not address her "rescission" (Exceptions, at p. 1) argument, but rather applied the standard of review appropriate in withholding of increment cases. The Commissioner finds that the ALJ was entirely correct in so doing for the reasons that follow.

First, nowhere in statute or regulation is there a requirement that a board of education must reach a determination establishing a salary schedule for tenured teachers by April 30. The statute related to this matter pertains to renewal of contracts for nontenured teachers. See N.J.S.A. 18A:27-10. That the Board did so for all teaching staff members in this case can be construed as nothing more than a ministerial action, having no nexus to the evaluation process. The Commissioner finds that notwithstanding the Board's letter to petitioner dated May 21, 1987 using the word "rescission," no rescission is at issue since no board deliberation or determination was made at the April 20, 1987 meeting concerning petitioner's increment withholding. See P-1 which merely states:

> Special Public Session
> April 20, 1987
>
> On motion of Mr. Klein and seconded by Mrs. Barry that Personnel listed in Enclosure 1 be approved.
>
> I. APPOINTMENTS, PROMOTIONS, REAPPOINTMENTS
>
> ***
>
> REAPPOINTMENTS
>
> T. Data Processing Personnel
> U. Attendance Officer
> V. 3 Executive Secretaries
> W. Video Operations Specialist/Studio Manager
> X. Adult School Program Technician
> Y. Testing Specialist
> Z. Food Service Production Manager
> AA. Chief Medical Inspector
> BB. 5 School Physicians
> CC. Treasurer of School Monies
> DD. Secretarial Assistant
> EE. Video Technician

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FF. Salary list for Teachers, Social Workers, Speech Correctionists, and Nurses
GG. Salary list for Administrative/ Supervisory Staff
HH. Salary list for LDTC/Psychologist

See also initial decision, ante, in further support of this position wherein the ALJ summarized the Superintendent's testimony as follows:

> Petitioner claims that the Board, having passed a resolution on April 20, 1987 to reappoint her for 1987-88 school year at an annual salary which included increments, was precluded from acting on May 21, 1987 to withhold her increments. She was one of three staff members whose increments were denied on that date. A few additional facts should be noted. Petitioner's annual performance report which cited her for "poor teacher judgment and lack of professionalism" was dated May 12, 1987 and Superintendent Albert DeMartin, who testified, sent petitioner a statement of reasons for the increment denial on May 27, 1987. DeMartin testified that the procedure was the same each year: Before April 30, the Board gets a list of employees for reappointment together with their salaries for the following year, but the administration continues to evaluate personnel through May and then recommends denial of an increment if there is reason to do so. These facts were undisputed, and I FIND them to be true. (emphasis supplied)

The Commissioner adopts these findings as his own.

Moreover, there is no entitlement to any set salary figure until employment in the school year in question commences. See Newark Teachers' Union, Local 481 AFT/AFL/CIO v. Board of Education of the City of Newark, decided by the Commissioner June 13, 1984. See also O'Malley v. Board of Education of the Borough of West Long Branch, decided by the Commissioner July 15, 1980. (Notice of salary under a negotiated labor agreement for the next school year or academic year cannot be held as binding upon a board of education until the employee begins actual service in that period.) In O'Malley the Commissioner affirmed the ALJ's statement that:

> To hold otherwise would deny boards the ability to timely employ the powers expressly conferred upon them by the Legislature at N.J.S.A. 18A:29-14 above, for a significant part of the school year. (Slip Opinion, at p. 4)

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As noted by the Board in its post-hearing brief, "To rule otherwise would render a board powerless to react to poor performance or other misconduct rendered during the last months of a ten-month school year." (Brief, at p. 7)

The Commissioner concurs.

Finally, it is established in regulation that nontenured teachers must be observed and evaluated at least three times during each school year. N.J.A.C. 6:3-1.19 Tenured teaching staff members shall be observed at least once and have an annual evaluation. N.J.A.C. 6:3-1.21 Additionally, tenured teaching staff members shall have a Professional Improvement Plan developed including a "written statement of actions developed by the supervisor and the teaching staff member to correct deficiencies or to continue professional growth, timelines for their implementation, and the responsibilities of the individual teaching staff member and the district for implementing the plan***." N.J.A.C. 6:3-1.21(h)(3) With the exception of those nontenured teachers whose service in the district may have commenced at a time other than the beginning of the academic year, all such evaluation of nontenured teaching staff members must be concluded by April 30 in order to meet the notice requirements set forth in statute. Additionally, it is customary practice in most school districts to require development of a Professional Improvement Plan for nontenured as well as for tenured teachers.

Given this significant administrative burden, it is not unreasonable for an administrative staff to continue this evaluative process beyond April 30 of any given school year, as it applies to tenured teaching staff members, independent of any other Board actions taken concerning salary notifications. Case law is clear that the Board may resolve to withhold an increment so long as it does so before the beginning of the following school year.

Thus, the issue in this matter becomes whether the Board, when it did choose to consider petitioner's performance at its May 20, 1987 meeting, had before it sufficient information to make a reasonable determination concerning the withholding of her increments. That the ALJ in this matter did not admit petitioner's year-end evaluation is not a critical factor because it is the Board's responsibility to determine whether there existed a reasonable basis upon which to withhold her increments, not the ALJ's. The burden of proof in determining whether there existed a reasonable basis for withholding falls squarely upon petitioner, not the Board. Neither the ALJ nor the Commissioner may substitute his or her judgment for the Board in this regard. Kopera v. Bd. of Ed. of West Orange, 60 N.J. Super. 288, 295 (App. Div. 1960) Since petitioner presented no evidence or argument on this issue, the Board's determination must be presumed reasonable. See Thomas v. Morris Township Board of Education, 89 N.J. Super., 327, 332 (App. Div. 1965).

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Relative to the reasonableness of the bases for the withholding, the Commissioner, based on his independent review of the record before him, adopts as his own the findings of the ALJ as found on pages seven and eight of the initial decision, as amplified herein. He would add that petitioner's reliance on Louis LiMato v. Board of Education of the City of Trenton, decided by the Commissioner September 22, 1983 is inapposite in two ways. Instead, LiMato involved the board's having granted the petitioner an additional six steps on the salary scale, thereafter voting to deny him such credit. That matter was unrelated to a withholding of an increment. Moreover, in the instant matter, no issue of rescission is present in the matter currently before the Commissioner since the evaluation process of employees is a matter distinct from board actions related to establishing salary guides. Accordingly, the Commissioner adopts as his own those findings of the ALJ below which stated that "there was no bar to the Board's action to withhold increments, that the uncontroverted adverse performance report alone would have been reasonable basis for denial and that the reasons given by the Board, excluding number 5, were clearly sufficient to support denial." (Initial Decision, ante)

As to the matter raised by petitioner concerning her counsel's intention to "split out a claim" (Initial Decision, ante) of this case for disposition in a federal or state court based upon a constitutional issue, the Commissioner is in accord with the ALJ's comment made in the initial decision that New Jersey does adhere to the entire controversy doctrine. See R.4:27-1(b). However, he finds it unnecessary to make any further comment or ruling in this regard since petitioner chose to waive all rights to the issues originally brought for the Commissioner's consideration, save those related to the constitutional matter concerning academic freedom, and issue B-1, which has been discussed above. While the Commissioner understands the frustration Board counsel and the ALJ must feel at petitioner's counsel's unorthodox stratagems in the management of this case, the right he reserved was to appeal an aspect of this matter in a forum that is empowered to hear and grant the relief sought, a remedy the Commissioner is not authorized to grant. By choosing not to move forward on the other issues originally included in the Petition of Appeal, with the exception of B-1, petitioner has not reserved the right to raise such issues at a later time; such claims are forfeited unless a new cause of action arises. Thus, the Commissioner finds no basis for considering the suggestion of the ALJ, that is "whether the conclusion [to preclude the preservation of rights in favor of the whole controversy doctrine] should be applied in the future and whether or not a rule might clarify the procedures." (Initial Decision, ante) Petitioner's counsel was within his rights in moving forward on the limited basis that he did, albeit in a last-minute fashion.

Similarly, the Commissioner believes that petitioner was within her rights in requiring the attendance of the 11 adverse witnesses she subpoenaed, although, again, it was unquestionably inconsiderate to fail to apprise opposing counsel, the ALJ or the subpoenaed witnesses of the fact, if her counsel knew in advance,

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that they would not be called. The Commissioner's research revealed no provision either in the court rules or in the OAL regulations that would permit the ALJ to assess petitioner $225 for witness expenses. N.J.A.C. 1:1-11.2(b) provides that:

> Witnesses required to attend shall be entitled to payment by the requesting party at a rate of $2.00 per day of attendance if the witness is a resident of the county in which the hearing is held and an additional allowance of $2.00 for every 30 miles of travel in going to the place of hearing from his or her residence and in returning if the witness is not a resident of the county in which the hearing is held.

The Commissioner does not read this provision to extend that fee to $25 per witness on the basis that in the end, said witness were not called, or as a punitive measure against petitioner or her counsel for failing to so call said witnesses. Neither did the Commissioner's review of the court rules reveal any provision for sanctions against an attorney for abuse of subpoena power. Moreover, if either opposing counsel or the ALJ believes that petitioner's counsel did breach the Attorney's Rules of Professional Conduct, the Court Rules provide that such matter be addressed by a member of the New Jersey bar to the Office of Attorney Ethics. See R.1:20-3(a) and (h). Consequently, the Commissioner rejects that part of the initial decision assessing petitioner $225 for witness expenses. He does direct that petitioner or her counsel reimburse the witnesses the fees as delineated in N.J.A.C. 1:1-11.2, according to its provisions as applied to each witness' travel expense.

Accordingly, the initial decision is adopted in part and rejected in part. As this decision determines that the Board was within its power and, in fact, had a reasonable basis for withholding petitioner's increments for the 1987-88 school year, the Petition of Appeal is dismissed with prejudice.

COMMISSIONER OF EDUCATION

April 21, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8828-86
(On Remand EDU 3448-85 and
EDU 5046-85 Consolidated)
AGENCY DKT. NOS. 155-6/85
and 233-7/85

MYRNA ARNOLD and HELEN PAPPAS,
Petitioners,
v.
BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY,
Respondent.

Stephen E. Klausner, Esq., for petitioner Arnold (Klausner, Hunter & Oxfeld, attorneys)

Richard A. Friedman, Esq., for petitioner Pappas (Ruhlman, Butrym & Friedman, attorneys)

Daniel C. Soriano, Jr., Esq., for respondent (Soriano & Gross, attorneys)

Allison Accurso, Esq., for intervenor Hudec (Katzenbach, Gildea & Rudner, attorneys)

Record Closed: January 29, 1988 Decided: March 11, 1988

BEFORE **LILLARD E. LAW**, ALJ:

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STATEMENT OF THE CASE

This matter is remanded by the Commissioner of Education to the Office of Administrative Law (OAL) for clarification as to the exact nature of duties and job titles required for reading positions that have existed under the direction and control of the Board of Education of the Bridgewater-Raritan Regional School District (Board) since 1964. The Board took an action, pursuant to N.J.S.A. 18A:28-9, to abolish a reading specialist teaching position which resulted in a reduction in force (RIF), effective June 30, 1985. Petitioner Myrna Arnold, a tenured teaching staff member in the Board's employ, sought Declaratory Judgment concerning her seniority status and rights under N.J.S.A. 18A:28-11. Petitioner Helen Pappas, a tenured teaching staff member in the Board's employ subject to its RIF action, alleged by way of a Petition of Appeal, that she possessed more seniority in the reading specialist teaching position than those individuals assigned by the Board and requested the Commissioner to enter an order directing the Board to recognize her tenure and seniority rights to a full-time position as reading specialist. Intervenor Dolores Hudec, a tenured teaching staff member, claimed tenure and seniority to the position of reading specialist by virtue of her past experience and her then current assignment to the controverted position.

In an initial decision rendered by this tribunal, it found and determined that petitioner Arnold acquired seniority as a reading specialists commencing September 1974, however, she had not acquired seniority as an elementary teacher or as a reading teacher as she claimed. This court also found that petitioner Pappas' seniority credit as a reading specialist commenced September 1974 upon her assignment as a reading resource teacher following a 1973-74 sabbatical leave. This tribunal applied the equitable doctrine of estoppel and found that intervenor Hudec had accrued seniority as a reading specialist from 1968 by virtue of her service in positions which comported with the administrative code definition of reading specialist notwithstanding that she lacked the reading specialist certificate or endorsement until 1981.

PROCEDURAL ASPECTS

The Commissioner transmitted his decision on remand to the OAL on December 19, 1986. Thereafter, on March 9, 1987, a prehearing conference was convened by the undersigned with all parties represented. It was agreed, by way of stipulation of the

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parties, to submit only those job descriptions of the positions in dispute in the herein matter to the Somerset County Superintendent of Schools for his consideration and determination, despite the fact that the Commissioner required clarification of nine positions. The stipulations as set forth in the March 9, 1987 prehearing order are as follows:

STIPULATIONS:

A. None of the parties to the herein action held positions enumerated in the Footnote on page 4 of the Initial Decision. Consequently, those positions are not in dispute and, therefore, are not to be submitted to the Somerset County Superintendent of Schools for his determination as to the appropriate endorsement and/or certification required. Those positions not in dispute nor at issue in the instant matter are:

1. Reading Supervision
2. Reading Helping Teacher
3. Reading Coordinator
4. Communication Arts Coordinator, Reading Coordinator, Language Arts Coordinator

B. The parties stipulate that the following Job Descriptions are to be transmitted to the Somerset County Superintendent of Schools, together with a copy of the Initial Decision and the Commissioner's Decision, for his determination consistent with the Commissioner's Order of Remand. In addition, the parties respectfully request the County Superintendent to specify which certificate (or endorsement) was/is required for each Job Description prior to and subsequent to the enactment of N.J.A.C. 6:11-12.20. The Job Description for review and consideration (copies enclosed) are set forth below as follows:

1. Reading Resource Teacher dated 7-72 (H-1)
2. Reading Resource Teacher Rev. 9-74 (H-2)
3. Reading Resource Teacher Bulletin No. 6-12 Rev. 7-75 (H-3)
4. Curriculum Reading Specialist (CRS) Rev. 8-76 (H-4)
5. Curriculum Reading Specialist September 1979 (H-5)

On April 2, 1987, the undersigned wrote to Dr. Donald H. Vansant, Somerset County Superintendent of Schools to advise him of the Commissioner's order of remand and the prehearing order. This tribunal submitted the four job descriptions in controversy together with a copy of the Initial Decision and the Commissioner's Decision for his review and consideration with instructions from the Commissioner to determine the appropriate endorsement and/or certificate required for the controverted positions, pursuant to N.J.A.C. 6:11-3.6.

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The undersigned was taken ill on April 10, 1987 and subsequently hospitalized on April 21, 1987 and did not return to duty until May 18, 1987. On May 14, 1987, the County Superintendent submitted his opinion to the court which was received on May 18, 1987. A second prehearing conference was held on September 14, 1987, where, among other things, it was determined that a hearing was not necessary and that the parties would rely upon briefs of law. Thereafter, the record in this matter was considered closed on January 29, 1988.

ISSUES TO BE DETERMINED

Pursuant to the Commissioner's order of remand and the prehearing conference held on September 14, 1987, the following issues to be determined by this tribunal are as follows:

1. Where, on the Board's Reading Specialist preferred eligibility list petitioners should be placed for the purposes of their seniority?

2. Whether petitioner Arnold should be placed on the Board's Reading Teacher preferred eligibility list and, if so, where for purposes of seniority?

3. Whether petitioner Arnold is entitled to be placed on the Board's elementary teaching seniority list and, if so, where?

4. Whether there is a teaching position presently held by a less senior Reading Specialist than petitioner(s)?

5. Whether petitioners are entitled to be placed in a full-time Reading Specialist position and/or advanced on the Board's seniority list?

6. Whether the seniority of Dolores Hudec was erroneously calculated based upon improper certification?

7. Whether any teaching staff member should acquire seniority credit as a Reading Specialist prior to the effective date of the Reading Specialist certification requirement?

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a) Is the Board collaterally estopped from raising this issue?

FINDINGS OF FACT

Those Background Facts set forth in the Initial Decision at pages 4 through 6, are adopted by reference here and need not be repeated in full. However, the employment and certification history of the litigants as found in the Initial Decision at pages 5 and 6 are reproduced hereinbelow as follows:

Intervenor Hudec

Years Assigned	Position
September 1964-June 1968	Teacher-Sixth Grade
September 1968-June 1970	Corrective Reading-Elementary
September 1970-June 1972	Corrective Reading-Middle School
September 1972-August 1976	Reading Resource Teacher
September 1976-June 1985	Curriculum Reading Specialist

Certificate	Date Issued:
Elementary Teacher (provisional)	January 18, 1965
Elementary Teacher (permanent)	May 19, 1967
Reading Specialist	February 1981 (J-1)

Petitioner Arnold

Years Assigned	Position
September 1974-August 1976	Reading Resource Teacher
September 1976-June 1986	Curriculum Reading

Certification	Date Issued
Elementary Teacher	December 12, 1966
Teacher of Reading	November, 1967
Reading Specialist	August, 1974
Supervisor	October, 1980 (J-1)

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Petitioner Pappas

Years Assigned	Position
September 1965-June 1966	Elementary Teacher
September 1966-June 1973	Developmental Reading Teacher
September 1973-June 1974	Sabbatical Leave
September 1974-June 1975	Reading Resource Teacher
September 1975-June 1981	Reading Coordinator
September 1981-June 1985	Curriculum Reading Specialist

Certification	Date Issued
Elementary Teacher	August 19, 1983
Reading Specialist	May, 1975
Supervisor	November, 1976
Teacher of Reading	June, 1983
Teacher of English	November, 1984 (J-1)

Subsequent to its action to abolish a reading specialist position the Board assigned the litigants to this action the following teaching positions in its employ:

Intervenor Hudec was not riffed and, therefore, continued in the position of Curriculum Reading Specialist for the 1985-86 school year. Hudec admits she was not eligible for a Reading Specialist certificate on June 20, 1978, however, she was issued such a certificate in February 1981.

Petitioner Arnold was assigned as a half-time kindergarten teacher under her elementary certificate and served one half-time as Curriculum Reading Specialist for the 1985-86 school year.

Petitioner Pappas, pursuant to an agreement with the Board (P-1), was assigned as a teacher of English at the Board's High School-West for 1985-86 school year.

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THE COUNTY SUPERINTENDENT'S DETERMINATION

In accordance with the Commissioner's order of remand, in part, and the parties stipulation, in part, the undersigned communicated by letter dated April 2, 1987 with the Somerset County Superintendent of Schools and submitted for his consideration and determination, as directed by the Commissioner, the only Job Descriptions available (H-1 through H-5) under which petitioners and intervenor were employed and assigned their respective duties and responsibilities by the Board. In addition, Somerset County Superintendent Vansant was sent this court's Initial Decision dated November 10, 1986 and the Commissioner's Decision dated December 15, 1986. On May 18, 1987, the undersigned was in receipt of the County Superintendent's opinion letter wherein he stated:

> I have carefully reviewed the Job Descriptions submitted for my review pursuant to NJAC 6:11-3.6 and NJAC 6:11-12.20 (H-1, H-2, H-3, H-4, H-5).
>
> In my opinion, based on the job descriptions submitted, both positions required the Reading Specialist endorsement prior and subsequent to the enactment of NJAC 6:11-12.20.
>
> I hereby assign that endorsement as a requiremnt for each position.
>
> However, these are poorly written job descriptions lacking in clarity and succinctness. In my judgment, had they been submitted in a timely manner, they would have been revised to reflect more accurately the roles actually carried out.
>
> The result would have been the elimination of these non-approved titles and the replacement of the Reading Resource Teacher title with that of Teacher of Reading and the Curriculum Reading Specialist title with that of Reading Specialist.

Thus, it is the opinion and determination of the Somerset County Superintendent of Schools, whose province it is to determine and approve job titles and the concomitant certification requirements which attach thereto (N.J.A.C. 6:11-3.6), that the Board's Reading Resource Teacher title was equivaslent to the approved title of Teacher of Reading (H-1, H-2, H-3) and that the Board's job title of Curriculum Reading Specialist was more accurately that of Reading Specialist, N.J.A.C. 6:11-12.20 (H-4, H-5). However, he assigned the endorsement of Reading Specialist to both positions (Reading Resource Teacher and Curriculum Reading Specialist) as a requirement prior to and subsequent to enactment of N.J.A.C.. 6:11-12.20.

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As stated in the Initial Decision at pages 7 and 8, and repeated here in part, the rule governing the Reading Specialist certificate is found at N.J.A.C. 6:11-12.20 and were first proposed on December 7, 1972 by proper notice and for comment at 4 N.J.R. 301. On January 5, 1973, the State Board adopted the rule on the certification for reading specialist, N.J.A.C. 6:11-12.20, effective January 10, 1973, as R. 1973 d. 20. See: 5 N.J.R. 36. Subsequently, by published notice of July 16, 1984 (16 N.J.R. 1842), and pursuant to Executive Order No. 66 (1978) which provided for the expiration of the rules under Chapter 11, subchapter 12 of Title 6 of the Administrative Code within five (5) years of adoption or amendment, the State Board on September 5, 1984, readopted N.J.A.C. 6:11-12.20 with two (2) amendments. (16 N.J.R. 2528). The amendments were technical in nature which did not alter the substance of the rule. Under subsection (a) the word "endorsement" was substituted for the word "certificate", while under subsection (c) the phrase "effective for new applicants after July 1, 1975" was omitted. With the exception of these two technical amendments, the remainder of the text is identical to that as adopted by the State Board on January 5, 1973, effective January 10, 1973.

DISCUSSION AND CONCLUSIONS

Given the Somerset County Superintendent's determination as to the application of N.J.A.C. 6:11-12.20 to the Board's classification, albeit unapproved, and the job titles of Reading Resource Teacher and Curriculum Reading Specialist coupled with those facts as set forth in the Initial Decision in this matter, the following conclusions can be fairly drawn:

PETITIONER ARNOLD

Petitioner Arnold's initial entry employment with the Board was in September 1974 where she was assigned as a Reading Resource Teacher. In the Initial Decision in this matter, I found and concluded that petitioner Arnold had acquired seniority status only in the category of Reading Specialist in the Board's employ. That finding and conclusion was in error.

Pursuant to the Somerset County Superintendent's determination together with the application of N.J.A.C. 6:3-1.10(f) amended effective September 1983, I now **FIND** and **CONCLUDE** that petitioner Arnold commenced to acquire seniority status in the classification of Reading Specialist and Reading Teacher as of September 1974. This

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finding and conclusion is supported by the Commissioner's decision wherein he applied the provisions of N.J.A.C. 6:3-1.10(f) for the acquisition of a full year's seniority in more than one category or subject area endorsement taught in In the Matter of the Seniority Rights of Certain Teaching Staff Members Employed by the Old Bridge Township Board of Education and the Edison Township Board of Education, Middlesex County, 1984 S.L.D. _____ (decided August 6, 1984) (not appealed on this issue) aff'd State Board 1985 S.L.D. _____ (January 2, 1985), aff'd Appellate Division (Docket No. A-2241-84-T6). See also, Bartz v. Green Brook Board of Education, 1985 S.L.D. _____ (decided May 24, 1985), aff'd State Board 1985 S.L.D. _____ (decided November 6, 1985), appeal pending.

This disposes of Issue 1, in part, Issue 7 in part (See petitioner Pappas, post), and Issue 2 in full. As to Issue 3, a complete review of the record demonstrates that petitioner Arnold was engaged in a variety of activities at the elementary level, i.e., kindergarten reading and learning readiness, "Quill" program, "Young Authors' Festival", Gifted and Talented program, all of which involved more than a reading program. And, although the testimony of Maxine L. Pearce-McElroy (Pearce) and petitioner Pappas suggests that petitioner Arnold taught all of the elementary subjects on a regularly scheduled basis, there is nothing in the record to demonstrate that Arnold was assigned and had complete control of a contained elementary classroom or that she was assigned to teach all of the elementary subject areas to a particular class. Having again reviewed and considered the record herein, I cannot conclude that petitioner Arnold fulfilled the duties and responsibilities of an elementary teacher. Therefore, I do not find or conclude that petitioner Arnold acquired any seniority in the category of elementary teacher.

Accordingly, it is hereby **DECLARED** that petitioner Arnold acquired seniority with the Board as a Reading Specialist and Reading Teacher commencing with September 1, 1974.

PETITIONER PAPPAS

The herein record is corrected to show that the parties stipulated that Pappas' seniority in the category of Reading Specialist began accruing in September 1974. This tribunal erroneously stated in the Initial Decision at 18, that petitioner Pappas acquired seniority as a Reading Specialist as of May 1975 by way of stipulation of the parties. This initial decision now corrects that error.

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Pursuant to the determination of the Somerset County Superintendent with respect to the applicability of N.J.A.C. 6:11-12.20 to Pappas' assignment as a Reading Resource Teacher commencing in September 1974 and her subsequent acquisition of the Reading Specialist certificate or endorsement in May 1975, I **CONCLUDE** that petitioner Pappas' seniority as a Reading Specialist in the Board's employ commenced with September 1, 1974.

This finding and conclusion disposes of Issues 1, 5 and 7.

INTERVENOR HUDEC

Having now considered the Somerset County Superintendent's determination that Reading Specialist certificate and/or endorsement was required for the Board's Job Description in positions of Reading Resource Teacher and Curriculum Reading Specialist, the herein record demonstrates that intervenor Hudec did not acquire the required certificate or endorsement until February 1981. It is now evident that Hudec's seniority as a Reading Specialist could not and did not commence to attach until February 1981, or presumably in September 1980 had she made the appropriate application therefore. Jeanne Fulton v. Bd. of Ed. City of Long Branch, 1980 S.L.D. _____ (unpublished) (decided October 20, 1980) aff'd State Board (February 4, 1981) (unpublished); John J. Kane v. Bd. of Ed. City of Hoboken, 1975 S.L.D. 12. Notwithstanding the lack of clarity as to what and when the appropriate certificate was required when the original Initial Decision was executed, it is now clear that the Reading Specialist certificate or endorsement was the requirement for intervenor Hudec to perform duties as a Reading Resource Teacher and/or a Curriculum Reading Specialist. She did not possess the appropriate certificate or endorsement until February 1981. Accordingly, I **FIND** and **CONCLUDE**, contrary to my former holding, that intervenor Hudec's seniority as a Reading Specialist commenced on or about February 1981.

This court was also in error to apply the doctrine of estoppel as it did in the original Initial Decision with respect to intervenor Hudec's argument and claim for earlier seniority status. Seniority is governed by statute (N.J.S.A. 18A:28-11 et seq.) and regulation (N.J.A.C. 6:3-1.10) rather than by contract and, therefore, may not be acquired by estoppel. Upperman v. Bd. of Ed. of Twp. of Quinton, 1984 S.L.D. _____ (decided April 23, 1984; Accord., Lachman v. Bd. of Ed. of Twp. of Cherry Hill, 1985 S.L.D. (decided

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October 18, 1985). Accordingly, I **CONCLUDE** that intervenor Hudec acquired seniority credit commencing in or about February 1981, that point in time where she actually held the Reading Specialist certificate or endorsement.

ORDER

Accordingly, it is hereby **ORDERED** that the Board of Education of the Bridgewater Raritan Regional School District apply the seniority credits to petitioners Arnold and Pappas and intervenor Hudec as corrected and outlined in this initial decision on remand.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

3-11-88
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

3-14-88
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

MAR 16 1988
DATE

Ronald M. Pappas
OFFICE OF ADMINISTRATIVE LAW

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MYRNA ARNOLD AND HELEN PAPPAS,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BRIDGE-WATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

The record and initial decision on remand have been reviewed. Petitioners, the Board and Intervenor Hudec filed timely exceptions pursuant to N.J.A.C. 1:1-18.4. The Board also filed timely reply exceptions to the exceptions filed by the parties and Intervenor Hudec.

Petitioner Pappas concurs with the ALJ's decision with one exception. She concurs that her seniority as a reading specialist began at least as of September 1, 1974. However, she objects to the ALJ's resolution of Issue 7, that is whether any teaching staff member acquired seniority credit as a reading specialist before the effective date of the reading specialist certification requirement. Petitioner Pappas avers the ALJ did not deal with this issue. She suggests that if the Commissioner concludes that no teaching staff member could obtain seniority as a reading specialist until the certification requirement existed, the issue is moot. However, if the Commissioner concludes that reading specialist seniority could be acquired for periods of service before the reading specialist certification was required by State regulations, then she asserts that "the ALJ failed to properly assess her seniority claim for service rendered prior to 1974." (Pappas' Exceptions, at p. 2) She avers that the ALJ relied on the County Superintendent's review of various certificates as dispositive of all seniority claims. However, before 1974 she held the position of developmental reading teacher, for which no job description existed. Thus, since the County Superintendent did not consider this position, the ALJ's decision relative to other certificates cannot govern Petitioner Pappas' seniority claim, she argues. In support of this position, she harkens back to an exception filed in response to the ALJ's earlier initial decision. Therein she averred that "although Petitioner Pappas did not perform a few duties that corrective reading teachers performed, she substantially performed the duties of a reading specialist, and therefore should have acquired reading specialist seniority at least retroactive to September 1969." (Id., at p. 3)

Petitioner Pappas claims that based upon the record of the prior hearing, lack of review by the County Superintendent of her duties, and the arguments posited in her brief, the Commissioner

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should modify the ALJ's decision to provide that if reading specialist seniority could be acquired by any teaching staff members for service rendered prior to September 1, 1974, then "Petitioner Pappas acquired seniority as a reading specialist retroactive to September 1, 1969." (Id., at p. 3)

Finally, Petitioner Pappas concurs with the ALJ's decision regarding Intervenor Hudec and refers the Commissioner to Hughes v. Bd. of Ed. of West Orange, decided by the Commissioner December 21, 1987, in support of her accord with the ALJ's determination in this regard. Under separate cover, as an additional exception, Petitioner Pappas would correct an apparent typographical error in the ALJ's initial decision, ante. Petitioner Pappas recites the ALJ's decision as suggesting that the initial decision reflects that she was assigned from September 1965 through June 1966 as an elementary teacher. "Both the initial ALJ's decision and the current ALJ's decision state that elementary certification was issued to Petitioner Pappas on August 19, 1983. The 1983 date is in error." (Pappas' Exceptions, dated March 25, 1988) She contends that both initial decisions should reflect that her elementary certification was issued August 19, 1963, rather than August 19, 1983. Said error is noted and hereby corrected.

Petitioner Arnold excepts to that portion of the Initial Decision on Remand that denies her claim for elementary seniority. Petitioner Arnold's counsel annexed to said exception a copy of relevant portions of her post-hearing brief in support of her argument in this regard. Said brief is incorporated herein by reference.

The Board's exceptions take issue with the County Superintendent's determination that "***[t]he result would have been the elimination of these non-approved titles and the replacement of the Reading Resource Teacher title with that of Teacher of Reading and the Curriculum Reading Specialist title with that of Reading Specialist." (Initial Decision, ante, quoting County Superintendent's Letter of May 18, 1987) The Board excepts to the ALJ's reliance upon this determination and therefore also excepts to the ALJ's conclusion "that petitioner Arnold commenced to acquire seniority status in the classification of Reading Specialist and Reading Teacher as of September of (sic) 1974." (Board's Exceptions, at p. 1, quoting Initial Decision, ante)

The Board queries:

> Under what rationale could either the position of Reading Resource Teacher or the position of Curriculum Reading Specialist require the Reading Specialist endorsement "prior" to the enactment of N.J.A.C. 6:11-12.20, which became effective on January 10, 1973? If the position of Reading Resource Teacher required the Reading Specialist endorsement from and after January 10, 1973, how then can the position equate to the position of Teacher of Reading, which did not require the

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Reading Specialist endorsement? This is a non sequitur. (Board's Exceptions, at p. 2)

The Board further argues that since Petitioner Arnold was employed in September 1974, in the assignment of Reading Resource Teacher, and because she possessed the Reading Specialist endorsement, it is "unnecessary to determine the proper endorsement for the position of Reading Resource Teacher prior to January 10, 1973." (Id.) The Board claims it agrees with the County Superintendent that the Reading Specialist endorsement should have been required for the position of Reading Resource Teacher from and after January 10, 1973 and further that the title of the position was a "non-approved" title. "However, it disagrees with the County Superintendent that the correct title was Teacher of Reading and submits that the correct title was Reading Specialist." (Id., at p. 2) Thus, the Board claims, Petitioner Arnold served under one endorsement and in but one category through June 30, 1985, that of Reading Specialist, and further that her tenure and seniority rights should be limited to that endorsement and category. Moreover, the Board argues that Petitioner Arnold should not acquire any tenure and seniority rights in the position of Teacher of Reading and should only begin accruing tenure and seniority rights under her elementary certificate from the time she was assigned as a half-time kindergarten teacher in September of 1985.

The Board requests the Commissioner of Education to accordingly modify the initial decision of Judge Law.

Intervenor Hudec excepts to that portion of the initial decision on remand denying her claim for seniority as a reading specialist from 1968 or, alternatively, from 1968 until 1979 and from February 1981 forward, and declining to apply the equitable doctrine of estoppel in the instant matter. In support of her position, Intervenor Hudec relies on her brief submitted to the ALJ.

The Board's reply exceptions counter each petitioner's exceptions as well as those of Intervenor Hudec. As to Petitioner Pappas, the Board agrees that the seventh issue should be addressed: Whether any teaching staff member should acquire seniority credit as a Reading Specialist prior to the effective date of the Reading Specialist certification requirement. The Board alters its position in this regard somewhat in reply exceptions. While it argued in its brief that no one should receive seniority credit in the category of Reading Specialist prior to the creation of the position of Reading Resource Teacher in July 1972, now the Board is of the opinion that "no one should receive seniority credit as a Reading Specialist until the position became a separate seniority category on January 10, 1973." (Reply Exceptions, at p. 1) Before then, the Board argues, Reading Specialist was classified as a teaching assignment and was not an educational services position. "This would also obviate any determination of whether Petitioner Pappas performed the duties of a Reading Specialist during the years she was assigned as a Developmental Reading Teacher", the Board claims. (Reply Exceptions, at p. 1)

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As to Petitioner Arnold's claim for elementary seniority from September 1974, the Board urges the Commissioner to adopt the factual finding and conclusion of the ALJ at page 9 of the initial decision. The Board claims that Ms. Arnold's testimony at Tr. II-11-19 made plain that "the duties performed by her were directly related to the purposes of the position of Reading Specialist." (Id., at p. 2)

Concerning Intervenor Hudec, the Board argues that since she was not eligible for a Reading Specialist endorsement on June 30, 1978, and further, since she was not issued said endorsement until February 1981, the Board agrees with the ALJ's determination made on reading that "Intervenor Hudec did not begin accruing seniority credit in the category of Reading Specialist until 'in or about February 1981'***." (Reply Exceptions, at p. 2, quoting Initial Decision, ante)

The Board requests that the Commissioner modify the initial decision in accordance with the Board's exceptions and objections dated March 28, 1988, and its reply.

The Commissioner cannot express strongly enough his dissatisfaction that the ALJ and the parties would take it upon themselves to stipulate around the express directive of the Commissioner as to the disposition of the panoply of unrecognized titles in reading that have existed in this district. In directing that the nine unrecognized titles mentioned at page 4 of the initial decision, dated December 15, 1986, be forwarded to the County Superintendent's office pursuant to N.J.A.C. 6:11-3.6, the Commissioner sought resolution of this situation not only for these particular petitioners but also as a directive to the Board and the County Superintendent to assure that all past and existing unrecognized titles in the area of reading comport with the law. Added to this impropriety, and with the accord of the ALJ, on page 9 of the initial decision on remand, the parties stipulated as to Petitioner Pappas' seniority in the category of Reading Specialist in a manner that is starkly illegal. The Commissioner will comment and make further directives on these two actions later in this decision.

In reviewing the letter from the County Superintendent dated May 14, 1987 the Commissioner finds another illegality in Dr. Vansant's conclusion that:

> [I]n my opinion, based on the job descriptions submitted, both positions required the Reading Specialist endorsement prior and subsequent to the enactment of N.J.A.C. 6:11-12.20. (emphasis supplied)

It is clearly established in law that accrual of seniority is determined within a specific category delineated in N.J.A.C. 6:3-1.10(1). See also N.J.A.C. 6:3-1.10(b). It follows from this that one cannot accrue seniority in a category or under an endorsement before it comes into existence. "To interpret the

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seniority regulations in any other manner would constitute an inappropriate reconstruction of the regulations, the language of which is quite clear." Mary R. Walton v. Board of Education of the Borough of Shrewsbury, decided by the Commissioner August 6, 1984, aff'd State Board January 2, 1985. In the instant matter, it has been established that the Reading Specialist endorsement, under an Educational Services certificate, became effective January 10, 1973. The Commissioner therefore finds and determines that no individual accrued seniority under this endorsement before January 10, 1973, notwithstanding the suggestion of the County Superintendent to the contrary. The Commissioner finds, therefore, that Issue No. 7, whether any teaching staff member should acquire seniority credit as a Reading Specialist prior to the effective date of the Reading Specialist certification requirement is answered in the negative. How this determination impacts on the individual petitioners and the intervenor will be discussed below.

Moreover, the Commissioner's review of the County Superintendent's evaluation of H-1, H-2, H-3, H-4 and H-5 comports with Dr. Vansant's determination that "both positions required the Reading Specialist endorsement***", but finds, contrary to the County Superintendent, that seniority attaches only after the enactment of N.J.A.C. 6:11-12.20. Moreover, he shares the County Superintendent's belief that "these are poorly written job descriptions lacking in clarity and succinctness." (Initial Decision, at p. 7, quoting Letter from Dr. Vansant dated May 14, 1987) and heartily agrees that these description need to be "revised to reflect more accurately the roles actually carried out." (Id.) The Commissioner hereby directs unequivocally that every single position that has existed in the Bridgewater-Raritan District since 1964 in the area of reading, both at the elementary and the secondary level, including the nine mentioned at page 4 of the decision rendered in this matter on December 15, 1986 plus that of Developmental Reading Teacher, be reviewed by the Board forthwith, and that job descriptions be developed. He directs further that said job descriptions be forwarded to the County Superintendent and for him to assign recognized titles and appropriate endorsements and/or certificates required for each of these positions, so that the utter state of confusion that exists in this area shall be concluded for all time.

With the above directive and findings serving as a predicate, the Commissioner will now proceed to the remaining issues before him in this matter, addressing the seniority entitlements of the two petitioners and the intervenor in the same order as did the ALJ in his initial decision on remand.

PETITIONER ARNOLD

The record is clear that Petitioner Arnold acquired a reading specialist certificate in August 1974. She therefore acquired seniority in that category commencing on September 1, 1974. The Commissioner finds that she is entitled to seniority from September 1, 1974 only as a reading specialist instead of as a reading teacher or in both areas as found by the ALJ because he

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concurs with the County Superintendent that based on the job description for reading resource teacher submitted to him (H-1 and H-2), said job description requires reading specialist certification. See N.J.A.C. 6:11-12.20. In this regard he adopts as his own the ALJ's conclusion as to her seniority as reading specialist as found on page 8 of the initial decision on remand. He rejects, however, the ALJ's conclusion in the same sentence of the initial decision which concludes that Petitioner Arnold also commenced to acquire seniority status in the classification of reading teacher as of September 1974. She may not have it both ways. She performed in one position, not two for any year in question. She served under one title, Reading Resource Teacher, from September 1974 - August 1976, and then under the unrecognized title of Curriculum Reading Teacher from September 1976-June 1986, albeit that no job description has ever existed for the latter position.

N.J.A.C. 6:3-1.10(f) is inapposite to this inquiry since the County Superintendent has held and the Commissioner agrees that the endorsement required to serve in either of these titles was that of reading specialist. Thus, the Commissioner finds and determines that Petitioner Arnold accrued seniority in the area of reading specialist as of September 1, 1974, but not the area of Reading Teacher. This disposes in part of Issue No. 1, "Where, on the Board's Reading Specialist preferred eligibility list petitioners should be placed for the purposes of their seniority?" As to Issue No. 2, "Whether petitioner Arnold should be placed on the Board's Reading Teacher preferred eligibility list***" this issue is answered in the negative. As to Issue No. 5, "Whether petitioners are entitled to be placed in a full-time Reading Specialist position and/or advanced on the Board's seniority list," while petitioners and the intervenor are to be placed on the Board's Reading Specialist seniority list, the Commissioner cannot determine where they shall stand on said list, because the record before him does not include a full comparison of the categories, that is elementary and secondary, in which petitioner(s) and intervenor served for the years in question. Accordingly, the Board is directed, in calculating the seniority of petitioners and Intervenor Hudec, to consider the departmentalized nature of the middle schools in question in determining in which categories petitioners' and Intervenor Hudec's seniority accrues. Moreover, the Commissioner is unable to dispose of Issue No. 4, "Whether there is a teaching position presently held by a less senior Reading Specialist than petitioner(s)?" because the record before him does not explicate who else might be contending for any such position or their seniority entitlements.

As to Issue No. 3, "Whether petitioner Arnold is entitled to be placed on the Board's elementary teaching seniority list and, if so, where?" the Commissioner, based on his independent review of the record and the transcripts, is in accord with the ALJ that Petitioner Arnold did not, at any point in question herein, have complete control of a contained elementary classroom nor was she assigned to teach all of the elementary subject areas to a particular class. See for example Tr. I-149, 152-53, which

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testimony establishes that during the years in question, Petitioner Arnold generally stayed in the self-contained classroom of other elementary teachers for less than the full period, that only sometimes would the elementary teacher leave while she was working with small group instruction and, further, that she did not teach anything but reading, albeit sometimes in the content areas. Thus, the Commissioner finds, as did the ALJ below, that although "petitioner Arnold was engaged in a variety of activities at the elementary level ***," she did not fulfill the duties and responsibilities of an elementary teacher. (Initial Decision, ante) Accordingly, for the years in question, until 1985, when she assumed the position of part-time kindergarten teacher, Petitioner Arnold did not accrue seniority as an elementary teacher.

PETITIONER PAPPAS

As noted above, the Commissioner finds and determines as a matter of law and notwithstanding the stipulation of the parties to the contrary that Petitioner Pappas could not and did not accrue seniority in the category of Reading Specialist beginning in September 1974, because she did not obtain the certificate of Reading Specialist until August 1975. In light of this finding, and notwithstanding the County Superintendent's finding to the contrary, for the year 1974-75, Petitioner Pappas accrued seniority solely under her elementary certificate, not under that of Reading Specialist but that from school year 1975, she has accrued seniority in that area. The Commissioner notes that the transcripts reveal some question as to what seniority inures to Petitioner Pappas while she served as a Developmental Reading Teacher. While it would appear from the transcripts that the parties ultimately decided that that unrecognized title was not in question in the instant matter, the Commissioner finds and determines that the role in which Petitioner Pappas served during the years 1966-1973 as Developmental Reading Teacher appears to have been that of a teacher, requiring only an elementary certificate. However, he directs that this unrecognized title be included among the others for the Board's development of a job description, and be forwarded to the County Superintendent for an official determination of what endorsement and is required to perform the functions of Developmental Reading Teacher and to assign an appropriate recognized title.

Moreover, Petitioner Pappas enjoyed a sabbatical leave during the school year 1973-74. The Commissioner is unable to calculate how much or whether Petitioner Pappas should receive seniority for that year since it is not known from the record before him whether it was a paid leave or taken with Board approval in a program related to her teaching field. N.J.S.A. 18A:30-7; N.J.A.C. 6:3-1.10(b). Thus the Commissioner is unable to determine the remainder of Issue No. 1, that is, where exactly Petitioner Pappas shall be placed on the Reading Specialist seniority list. As to the remainder of Issue No. 5, that is, whether petitioners are entitled to be placed in a full-time Reading Specialist position or advanced on the Board's seniority list, that answer is to be determined by the Board in accord with this decision on remand.

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INTERVENOR HUDEC

It is undisputed that Intervenor Hudec did not acquire the required Reading Specialist certificate until 1981, which was required for the Board's position of Reading Teacher or Curriculum Reading Specialist. Thus, the Commissioner concurs with the ALJ's finding in the initial decision on remand, ante, that "***Hudec's seniority as a Reading Specialist could not and did not commence to attach until February, 1981, or presumably in September 1980 had she made the appropriate application therefore. *** Accordingly, I FIND and CONCLUDE, *** that Intervenor Hudec's seniority as a Reading Specialist commenced on or about February 1981." See Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982).

Moreover, the Commissioner rejects, as did the ALJ, Intervenor Hudec's estoppel argument. The Commissioner does not sanction the Board's laxity in failing to assure that each of the positions in question was held by a employee properly certified to perform the functions of the job. However, Intervenor Hudec knew or should have known of the newly enacted existence of the Reading Specialist certification, N.J.A.C. 6:11-12.20, by 1975 if not sooner. (See H-6.) See also Tr. III-46-47. That she failed to inquire into whether she need comply with the requirements for obtaining certification in that area is not solely the responsibility of the Board. She is also responsible for insuring that she is properly certificated. See James D. Hansen v. Runnemede Board of Education, 1983 S.L.D. 1240. See also, Sydnor v. Englewood Bd. of Ed., 1976 S.L.D. 113 where it was stated that:

> The procuring of certification is the primary responsibility of a teacher.*** (at 117)

Thus, the Commissioner finds that Issue No. 6, "Whether the seniority of Dolores Hudec was erroneously calculated based upon improper certification?" is answered in the affirmative. Properly, Intervenor Hudec is entitled to seniority as an elementary teacher from 1964 and entitled to reading specialist seniority from 1981.

Accordingly, the Commissioner adopts as his own that finding of the ALJ in the initial decision on remand, ante, which states, "***I conclude that intervenor Hudec acquired seniority credit commencing in or about February 1981, that point in time where she actually held the Reading Specialist certificate or endorsement."

Consequently, the Commissioner adopts in part and rejects in part the initial decision. It is hereby ordered that the Board of Education of the Bridgewater-Raritan Regional School District apply the seniority credits to Petitioners Arnold and Pappas and Intervenor Hudec as corrected and outlined in the Commissioner's decision on remand. Moreover, the Commissioner further directs that the Board of Education comply forthwith with his directive in this matter that all reading titles used by the Bridgewater-Raritan School District since 1964, inclusive of the nine mentioned on page 4 of the Decision in this matter dated December 15, 1986 plus that

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of Developmental Reading Teacher and any others not made a part of the hearings below, be reviewed and assigned concomitant job descriptions. Upon completion of this task, the Board is further directed to forward such descriptions to the County Superintendent for his determination as to appropriate endorsement and assignment of recognized titles. The Commissioner does not retain jurisdiction.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

April 25, 1988

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MYRNA ARNOLD,	:	
PETITIONER-APPELLANT,	:	
AND	:	STATE BOARD OF EDUCATION
HELEN PAPPAS,	:	DECISION
PETITIONER,	:	
V.		
BOARD OF EDUCATION OF THE BRIDGE-WATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY,	:	
RESPONDENT-RESPONDENT,	:	
AND	:	
DOLORES HUDEC,	:	
INTERVENOR/CROSS-APPELLANT.	:	

Remanded by the Commissioner of Education, December 15, 1986

Decision on remand by the Commissioner of Education, April 25, 1988

For the Petitioner-Appellant Arnold, Klausner, Hunter & Oxfeld (Stephen E. Klausner, Esq., of Counsel)

For the Petitioner Pappas, Zazzali, Zazzali, Fagella and Nowak (Richard A. Friedman, Esq., of Counsel)

For the Intervenor/Cross-Appellant Hudec, Katzenbach, Gildea & Rudner (Allison Accurso, Esq., of Counsel)

For the Respondent-Respondent, Soriano & Gross (Daniel C. Soriano, Esq., of Counsel)

These consolidated cases primarily involve the resolution of seniority rights following a reduction in force ("RIF") when the Board of Education of the Bridgewater-Raritan Regional School District ("Board") abolished a reading specialist position effective June 30, 1985.

Petitioner Myrna Arnold ("Arnold"), a tenured teaching staff member, sought Declaratory Judgment that she had accrued tenure and seniority rights as an elementary school teacher and reading teacher while also acquiring seniority as a reading

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specialist. Petitioner Helen Pappas ("Pappas"), a tenured teaching staff member subject to the RIF, alleged in a Petition of Appeal that she possessed more seniority in the reading specialist position than those individuals assigned by the Board and requested an order directing the Board to recognize her tenure and seniority rights to a full-time position as reading specialist. And Intervenor Dolores Hudec ("Hudec"), a tenured teaching staff member, also claimed tenure and seniority in the position of reading specialist.

On December 15, 1986, the Commissioner of Education remanded this matter to the Office of Administrative Law for a determination of the duties and job titles required for all of the reading positions existing in the Bridgewater-Raritan district since 1964 and for a determination by the County Superintendent as to the appropriate endorsement and/or certificate required for each position. On April 25, 1988, based upon the County Superintendent's determination assigning the reading specialist endorsement[1] to the positions of reading resource teacher and curriculum reading specialist in which the teaching staff members herein had served, the Commissioner held that insofar as that endorsement did not become effective until January 10, 1973, no individual herein could have accrued seniority under it before that date.

The Commissioner held that Arnold had accrued seniority as a reading specialist from September 1, 1974, when she had acquired the endorsement. However, he concluded that she had not accrued seniority as a reading teacher since she had performed in only one position, not two, for any year in question and the endorsement required for either of the job titles under which she had served was that of reading specialist. He also determined that she had not accrued seniority as an elementary school teacher in that although she had been engaged in a variety of activities as part of her duties at the elementary level, she had not had complete control of a self-contained elementary classroom nor had she been assigned to teach all of the elementary subject areas to a particular class.

The Commissioner held that Pappas had accrued seniority as a reading specialist from August 1975 when she had obtained the required endorsement and that Hudec had begun to accrue seniority as a reading specialist in February 1981 when she had acquired the endorsement. The Commissioner rejected Hudec's argument that the Board should be estopped from denying her seniority rights prior to 1981 when it had failed to assure that each of the positions in question was held by individuals who were properly certified. The Commissioner noted that Hudec knew or should have known of the existence of the newly-enacted reading specialist endorsement by 1975 and that it was also her responsibility to ensure that she was properly certified.

---

[1] We note that although N.J.A.C. 6:11-12.20, which became effective on January 10, 1973, originally referred to this endorsement as a certificate, the regulation was amended in 1984 substituting "endorsement" for "certificate." Therefore, all references to it herein are as an endorsement.

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Arnold filed an appeal from the Commissioner's decision, limited to the Commissioner's denial of her request for seniority as an elementary school teacher and reading specialist, and Hudec filed a cross-appeal maintaining that she had accrued seniority as a reading specialist from 1968 and not merely from 1981 as determined by the Commissioner. No other appeals were taken.

After a thorough review of the record, we affirm the decision of the Commissioner for the reasons expressed therein on the points of appeal currently before us.

We concur with the Commissioner's assessment of Arnold's seniority rights and do not find merit in Hudec's position that she is entitled to seniority as a reading specialist prior to acquiring her reading specialist endorsement in February 1981. We reject her assertion that she should, at a minimum, be entitled to accrue seniority as a reading specialist from the date when she began teaching as a corrective reading specialist in 1968 until June 30, 1978, the deadline for all persons employed under the title of reading specialist to actually obtain the reading specialist endorsement. In order to have been deemed appropriately certified during that grace period and to therefore have been eligible to accrue seniority for any period prior to June 30, 1978, it was necessary to acquire the endorsement by the established deadline. Since Hudec did not have the endorsement and, as she admits, was not even eligible for it by June 30, 1978, tr. 3/5/86, at 65, she cannot be deemed to have been appropriately certified as a reading specialist or to have begun to accrue seniority under the reading specialist endorsement for any period prior to that date. We therefore agree with the Commissioner that she is entitled to seniority as a reading specialist commencing in or about February 1981 and as an elementary teacher until that time.

Accordingly, we affirm the decision of the Commissioner on the points of appeal currently before us.

December 1, 1988

Pending N.J. Superior Court

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
ON MOTIONS FOR SUMMARY DECISION
OAL DKT. NO. EDU 8224-87
AGENCY DKT. NO. 348-12/87

MARION SACHAROFF,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWN OF GLEN RIDGE, ESSEX COUNTY,
Respondent.

Paul L. Kleinbaum, Esq., for petitioner
(Zazzali, Zazzali & Kroll, attorneys)

Lester Aron, Esq., for respondent
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed: March 4, 1988 Decided: March 18, 1988

BEFORE **JOHN R. TASSINI,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The petitioner, a tenured teacher on leave without pay the 1987-88 school year, seeks payment for 13 sick and/or personal days for that year. The respondent Board of Education (Board) submits that, based upon both the relevant State statute, N.J.S.A. 18A:30-2, and the parties' collective bargaining agreement, petitioner is not entitled to payment.

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A petition was filed with the Commissioner of Education on November 24, 1987, and the Board's answer was filed on December 9, 1987. See, N.J.S.A. 18A:6-9. The matter was then transmitted to the Office of Administrative Law where it was filed as a contested case on December 11, 1987. N.J.S.A. 52:14F-1 et seq.

On February 5, 1988, a prehearing order was entered in which the parties stipulated the basic facts and agreed to the admission of joint exhibits. (See, J-1, et seq.) Given the stipulated facts and exhibits, the parties also agreed to file cross-motions for summary decision. Those papers were received on March 4, 1988, and this decision disposes of the matter accordingly.

FACTUAL FINDINGS

The parties have jointly moved a number of exhibits into evidence from which I **FIND** the following **FACTS:**

The petitioner is a tenured teacher employed by the Board, whose rights are governed by a collective bargaining agreement (J-8) as well as the usual statutes.

On her doctor's advice, to insure a successful pregnancy, the petitioner requested a leave of absence for the 1987-88 school year (J-1 and J-2). On June 16, 1987, the Board approved petitioner's request and granted "Leave Without Pay" pursuant to the parties' Master Agreement (J-1, J-2 and J-8, Art. XIII, §1.13.6). Obviously, while on such leave, the petitioner is not "assigned" to any position, nor does she have "working days" or "regular school hours" for which she must report.

The agreement also provides that "employees" are entitled to "as many sick leave days each school year as provided by statute" and it provides that employees are entitled to a total of 13 sick and/or personal days each year. "Personal days" are for personal business which cannot be scheduled at any time other than regular school hours (J-8, Art. XIII, §1.13.2 and 13.3). Unused sick and/or personal days are accumulated and the Board will pay "departing (excluding leaves of absence) employees" for these accumulated days

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(J-8, Art. XIII, §1.13.3 and 13.4). The agreement defines "employee" and "teacher" as "regularly assigned" personnel (J-8, Art. II, §1.2.1).

On September 15, 1987, the petitioner requested payment for the sick days she had accumulated as of June 30, 1987, and for 13 sick/personal days for the 1987-88 school year (J-4). Although she was not a "departing" employee within the meaning of the agreement, the Board paid the petitioner for the accumulated days. Payment for the 1987-88 school year was denied because she would not be working any days during that school year (J-5).

DISCUSSION AND LEGAL CONCLUSIONS

Motions for summary decision provide an efficient means of disposing of a case where there is no genuine material issue of fact, N.J.A.C. 1:1-12.5. See, Judson v. Peoples Bank & Trust Co., 17 N.J. 67 (1954). This case is appropriate for such a ruling, given the stipulated facts.

A collective bargaining agreement will be preempted whenever the subject matter negotiated has already been addressed by the Legislature. New Jersey State College Locals v. State Board of Higher Education, 91 N.J. 18, 23 (1982). I **CONCLUDE** that N.J.S.A. 18A:30-2 preempts the parties' agreement relative to the petitioner's claim for sick days. It provides:

> All persons holding any office, position, or employment in all local school districts . . . who are steadily employed by the board of education or who are protected by tenure in their office, position, or employment . . . shall be allowed sick leave with full pay for a minimum of 10 school days in any school year. [emphasis added] N.J.S.A. 18A:30-2.

Since the sense of a statute should control over its literal terms, State v. Carter, 64 N.J. 382, 390-391 (1974), there is no reason why the Legislature would want to grant the

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same number of sick leave days to an employee who has worked only part of the school year as are guaranteed to employees who worked the full year, Schwartz v. Dover Public Schools, 180 N.J. Super. 222, 227 (App. Div. 1981). In Schwartz, a proportionate amount of sick leave was found reasonable for those employed less than a full school year. Following the logic of Schwartz, petitioner, who will not teach at all during the entire school year, is not entitled to paid benefits for that year under N.J.S.A. 18A:30-2.

Moreover, even if the statute did not control, the terms of the parties' agreement and the petitioner's own actions also compel rejection of her claim. At her own request, the petitioner was granted "Leave Without Pay" for the entire school year. (See, J-8, Art. VIII, §1.13.6.) Therefore, she is not entitled to payment for sick days for a school year where she has commenced and not returned from unpaid leave. See, Partus v. Bd. of Ed. of the Twp. of Belleville, OAL Dkt. No. EDU 8260-86 (July 10, 1987), Commissioner of Education (August 24, 1987) at 15. Further, because the petitioner was not "regularly assigned" to any position, she is not an "employee" as defined in the agreement. (See, J-8, Art. II, §1.2.1.) She therefore would not fall into the category of "employees" who are entitled to "sick" days. (See, J-8, Art. XIII, §1.13.1 et seq.)

Finally, "personal" days are defined in the agreement as days allowed for avoidance of "hardship," when the employee's personal business cannot be scheduled at any time other than "regular school hours." (See, J-8, Art. XIII, §1.13.4.) The petitioner's personal schedule cannot be said to conflict with regular school hours, so she would not be entitled to any personal days.

I **CONCLUDE** that the petitioner is not entitled to payment for any sick/personal days for the 1987-88 school year. Accordingly, I **CONCLUDE** that the petitioner's motion must be denied and the Board's motion must be granted.

ORDER

I **ORDER** that the Board's motion for summary decision be granted and the petitioner's motion be denied. I **ORDER** further that the petition be dismissed.

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This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **SAUL COOPERMAN** for consideration.

3/18/88
DATE

JOHN R. TASSINI, ALJ

Receipt Acknowledged:

3-23-88
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAR 23 1988
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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MARION SACHAROFF,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF GLEN RIDGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions were untimely filed pursuant to N.J.A.C. 1:1-18.4.

Upon his careful and independent review of the record of this matter, the Commissioner finds he need not reach any discussion pertaining to the negotiated contract terms, including whether for the year in question petitioner was an employee or not, in that the State Board decisions in Logandro v. Board of Education of the Township of Cinnaminson, 1980 S.L.D. 1511 and its progeny are dispositive of whether one on an unpaid leave of absence is entitled to be paid sick leave days. Under markedly similar facts, in Logandro the State Board held:

> The key issue in this controversy is whether the Board may refuse to pay sick leave for every kind of disability arising during an extended unpaid leave of absence. We believe the Board has this right. We find no statute or judicial decision to the contrary. As the amicus brief of the New Jersey School Boards Association correctly points out, the question of what benefits, if any, are to be paid or made available during unpaid leaves of absence is, except where governed by statute, left up to collective negotiations between the Board and the Teachers' Association or between the Board and individual employees. (at 1512)

See also Kathy Partus v. Board of Education of the Township of Belleville, Essex County, decided by the Commissioner August 24, 1987, wherein the Commissioner stated:

> ***Logandro, Tchir, supra, and others stand for the proposition that an employee on an unpaid leave of absence is ineligible to accrue or utilize sick leave benefits once an unpaid leave commences. (emphasis supplied)
> (Slip Opinion, at p. 14)

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Consequently, the Commissioner adopts as his own that part of the initial decision below which concludes that petitioner is not entitled to payment for any sick/personal days for the 1987-88 school year, but he adopts that finding for the reason stated above, not those expressed in the initial decision which were based on an analysis of the negotiated contract language in petitioner's district. Such scrutiny falls outside the ambit of the Commissioner's jurisdiction to hear and determine controversies pursuant to N.J.S.A. 18A:6-9 et seq.

Accordingly, the Commissioner directs that the Board's Motion for Summary Decision be granted and petitioner's Motion be denied. He further directs that the instant Petition of Appeal be dismissed with prejudice.

COMMISSIONER OF EDUCATION

April 29, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7489-87
AGENCY DKT. NO. 315-10/87

CALDWELL-WEST CALDWELL EDUCATION ASSOCIATION,

Petitioner,

v.

CALDWELL-WEST CALDWELL BOARD OF EDUCATION,

Respondent

Paul L. Kleinbaum, Esq., for petitioner
(Zazzali, Zazzali & Kroll, attorneys)

Brenda C. Liss, Esq., for respondent
(McCarter & English, attorneys)

Record Closed: March 14, 1988 Decided: March 21, 1988

BEFORE: **WARD R. YOUNG, ALJ:**

I.

Petitioner alleged the tenure rights of a former member were violated when the Board renewed his employment as a Consultant-Case Manager/Social Worker for the 1987-88 school year on a per diem bases.

The Board denied the allegation and seeks dismissal of the matter by reason of res judicata, untimeliness, and/or standing.

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The matter was transmitted to the Office of Administrative Law as a contested case on November 12, 1987, pursuant to N.J.S.A. 52:14F-1 et seq. A telephone prehearing conference was held on February 26, 1988, at which the respondent Board indicated its intent to file a Motion for Summary Decision and the matter was set down for plenary hearing on April 18, 1988 in the event the Board did not prevail on its Motion. The Board filed its Motion and the matter was briefed pursuant to N.J.A.C. 1:1-12.2, and the record closed on March 14, 1988, the date established for the filing of the final brief.

II.

A similar claim was filed by petitioner in April 1987 when the Board abolished the position of a school social worker which terminated the employee for the 1986-87 school year, but reemployed him for the 1986-87 school year as a social worker consultant on a per diem basis. It was docketed as EDU 2826-87 (Agency Dkt. 63-4/87). The Board moved for dismissal for lack of standing and an untimely filing in violation of N.J.A.C. 6:24-1.2. The Commissioner dismissed the matter with prejudice on September 10, 1987, wherein he found "no merit in the Association's argument that the instant circumtances constitute a continuing violation warranting relaxation of the 90-day rule . . ." (at slip opinion 10), and further noted at 12 "the absence of any indication whatsoever in the Petition of Appeal that the matter is currently pending in another forum as required by N.J.A.C. 6:24-1.3(b). . . . " The Commissioner did not reach either the matter of standing or the merits of the matter because he also determined the matter to be untimely filed. The Commissioner's decision is incorporated herein by reference.

III.

Petitioner argues this petition is not barred by res judicata, and distinguishes its current claim from its previous one on the basis that it now seeks to litigate the renewal of the consultant's position for the 1987-88 school year.

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IV.

I **FIND** the argument of petitioner to be without merit, and deem it to be a distinction without a difference. I further **FIND** the doctrine of res judicata to be applicable, as well as no compelling need to address the issues of untimeliness or standing.

I **CONCLUDE**, therefore, that summary decision is **GRANTED** to the respondent Board and **DENIED** to petitioner, and that the matter shall be and is hereby **DISMISSED WITH PREJUDICE.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Commissioner Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

21 March 1988
DATE

WARD R. YOUNG, ALJ

Receipt Acknowledged:

3-23-88
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAR 24 1988
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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CALDWELL-WEST CALDWELL EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CALDWELL-WEST CALDWELL SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Association's exceptions were untimely filed pursuant to N.J.A.C. 1:1-18.4. Consequently, the Commissioner has considered neither those exceptions nor the reply exceptions filed by the Board as part of the record before him.

Upon his careful and independent review of this matter, the Commissioner adopts the initial decision below as amplified herein.

The Commissioner concludes, as did the ALJ, that this matter is res judicata. On September 10, 1987, the Commissioner dismissed, with prejudice, the prior action between the Association and the Board regarding Mr. Spitaletta's employment, on the basis that the matter was untimely filed pursuant to N.J.A.C. 6:24-1.2. While the matter was dismissed on the basis of the running of the 90-day rule, such dismissals on the grounds of statute of limitations are decisions on the merits which bar subsequent actions on the same facts and issues between the same parties. See Atkinson v. Pittsgrove Tp., 193 N.J. Super. 23, 28 (Ch. Div. 1983) citing Mathis v. Laird, 457 F.2d 926 (5th Cir. 1972), cert. den. 409 U.S. 871 (1972) "that '[a] decision by a court of competent jurisdiction that the statute of limitations on a cause of action has run is a judgment on the merits for res judicata purposes.' [Emphasis supplied.]***"

The Commissioner rejects as being without merit the Association's contention that the issues herein are not the same as those brought earlier since separate Boards took separate action in two different school years to employ Mr. Spitaletta as a social worker consultant, thus creating two separate causes of action. The Association's Brief in Opposition to the Board's Notice of Motion for an Order dismissing the Petition or, in the alternative, Summary Decision, does not make clear, beyond this blanket allegation, which facts, if any, differ in the instant Petition of Appeal from those posited in its earlier Petition of Appeal, other than to suggest that the number of days of employment in said capacity would differ from the previous 75 days to 62. The Commissioner finds this distinction to be insignificant. Thus, the Commissioner finds that

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the facts and the parties in the matter for the 1987-88 school year do not differ from the facts and the parties as averred for the school year 1986-87. That a different Board acted to renew the earlier contract to employ Mr. Spitaletta for the 1987-88 school year in no way altered the status quo that existed in the preceding year, when the Association failed to timely file a Petition of Appeal before the Commissioner concerning this matter. Thus, res judicata applies. See Roberts v. Goldner, 79 N.J. 82, 85 (1979) wherein the Supreme Court of New Jersey elaborated on the doctrine of res judicata:

> A cause of action once finally determined between parties on the merits by a tribunal having jurisdiction cannot be relitigated by those parties, or their privies, in a new proceeding. (emphasis in text)

Moreover, in Paul Gordon v. Board of Education of the Township of Passaic, 1983 S.L.D. 1141, St. Bd. aff'd in part/rev'd in part, March 6, 1985, Superior Court, Appellate Division, aff'd May 27, 1986, the State Board concluded that N.J.A.C. 6:24-1.2 strictly applied in that case concerning a reduction in force and the Board's subsequently hiring someone other than petitioner, Paul Gordon. The State Board held:

> In the case before us, Petitioner-Respondent's cause of action accrued in December, 1982, when he became aware that the Board had created the vocal/instrumental position. His petition was not followed until May 17, 1983, well beyond the 90 day limit established by N.J.A.C. 6:24-1.2. No evidence was presented to justify the delay and we agree with the Initial Decision that relaxation of the rule was not warranted. As previously stated, we find that any and all relief to which Petitioner-Respondent may have been entitled was subject to the 90 day requirement of N.J.A.C. 6:24-1.2. The State Board therefore holds that Petitioner-Respondent's failure to comply with that requirement bars his claims to both retroactive and prospective relief. (Slip Opinion, at pp. 5-6)

In the instant matter, the Association failed to timely file a Petition of Appeal when the matter first came to its attention. (See Commissioner's decision dated September 10, 1987.) No additional personnel have been hired to assume the duties of the social worker position which was abolished. Neither has Mr. Spitaletta filed a petition concerning either the 1986-87 school year or the 1987-88 school year. Thus, no new cause of action has arisen for which a new 90-day rule timeline might attach. Where the parties remain the same and the issue remains the same, res judicata applies.

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Neither does the Commissioner find the Association's continuing violation argument to be of merit. In Carol Bocker et al. v. Board of Education of the Township of Wayne, decided by the Commissioner April 17, 1986, State Board aff'd September 3, 1986, N.J. Superior Court, Appellate Division, aff'd May 22, 1987, it was determined by the Court that placement on a salary guide does not constitute a continuing violation and therefore three petitioners' claims were time-barred.

> We find no difficulty in concluding that the only rational meaning of the words employed is that the 90 days began running at the time petitioners were first placed on the salary guide. To adopt petitioners' reasoning would assign the language to inutility since any claim could be asserted, no matter how late, by the making of a demand upon the local board and having the demand rejected. See North Plainfield Educ. Ass'n. v. Bd. of Educ., 96 N.J. 587, 594-95 (1984).
>
> Affirmed. (Slip Opinion, at p. 3)

Similarly, in the instant matter, were the Commissioner to agree with the Association that each new school year constitutes a basis for a new cause of action, any claim, no matter how late and no matter how similar the situation from year to year, could be brought before the new board demanding that the timelines be reestablished for filing a new petition of appeal. As noted by the Appellate Division in Bocker, supra, "Statutes of limitation and similar regulations are to be read liberally in favor of repose. See State v. Brown, 22 N.J. 405, 415 (1956)." (Id.)

Accordingly, the Commissioner finds no new cause of action has risen in the instant matter. Hence, res judicata is applicable, and he need not reach the issue of standing. Summary Decision is granted to the Board; the Petition of Appeal remains as it was as of September 10, 1987, untimely, and thus the matter is hereby dismissed with prejudice. This decision does not preclude the Association, however, from pursuing the matter before PERC, assuming that a petition was filed before that Commission in a timely fashion.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

May 2, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3987-87
AGENCY DKT. NO. 134-5/87

GREGORY SLATER,

Petitioner,

v.

BOARD OF EDUCATION OF THE RAMAPO-INDIAN HILLS REGIONALS HIGH SCHOOL DISTRICT,

Respondent.

Ezra D. Rosenberg, Esq., for petitioner
(Katzenbach, Gildea & Rudner, attorneys)

Allan P. Dzwilewski, Esq., for respondent
(Green and Dzwilewski, P.A.)

Record Closed: March 14, 1988 Decided: March 17, 1988

BEFORE **ELINOR R. REINER**, ALJ:

On May 13, 1987 petitioner, Gregory Slater, filed a petition of appeal with the Commissioner of Education requesting that he declare his suspension by respondent void and restore him to his position retroactive to April 14, 1987. On June 8, 1987, respondent filed an answer contending that its action in regard to petitioner was proper. On June 9, 1987, this matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. A

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prehearing conference was scheduled for August 7, 1987, and at the request of respondent's attorney it was adjourned to August 17, 1987, for hearing before the undersigned judge. At that time, the issues were isolated. The parties agreed to file a stipulation of facts and proceed on cross motions for summary decision. Subsequent to an extension of time being granted, the stipulation of facts was filed on October 16, 1987. Petitioner moved for summary decision on October 23, 1987. Respondent's notice of motion and supporting letter brief was filed on October 27, 1987. Petitioner's reply to respondent's brief was filed on November 9, 1987, and respondent's letter in lieu of a reply brief was submitted on November 13, 1987. As a result of conference calls held in this matter on December 18, 1987 and January 5, 1988, it appeared that a settlement could be reached in this matter. However, by conference call on January 12, 1988, it became apparent that a settlement could not be reached. At the request of this tribunal, and with the consent of counsel for petitioner, counsel for respondent submitted a letter, dated March 14, 1988 (J-2), which serves as an additional stipulation of fact, and the record closed on that date. It is clear, based upon the papers filed, that this matter is ripe for determination.

FINDINGS OF FACT

The parties have stipulated to the essential facts. The stipulation of facts filed by the parties is incorporated here and constitutes this tribunal's finding of facts. (J-1). See also, letter filed March 14, 1988 (J-2). Of particular import are the following facts: Petitioner is employed by respondent as a custodian and has tenure in that position pursuant to N.J.S.A. 18A:17-3. On April 13, 1987, as a result of charges filed by the Bergen County Narcotics Task Force, petitioner was arrested at Indian Hills High School and charged with distribution of a controlled dangerous substance (marijuana) to an undercover agent of the task force, in violation of N.J.S.A. 24:21-19a(1). On April 15, 1987, respondent passed a resolution suspending petitioner from his position without pay retroactive to April 14, 1987. As of the date of his suspension, petitioner had not been indicted for any crime. Petitioner has not received his pay since the date of his suspension. Tenure charges have never been certified against petitioner.

On July 28, 1987, petitioner was indicted by a Bergen County grand jury on two

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counts of distribution of a controlled dangerous substance (marijuana) in violation of N.J.S.A. 24:21-19a(1). The first count alleged that petitioner gave the undercover agent one marijuana joint, while the second count alleged that petitioner sold the undercover agent a half ounce of marijuana for $70. Subsequently, petitioner pled guilty to one count of distribution of a controlled dangerous substance, sale of one-half ounce of marijuana to the undercover agent for $70, in violation of N.J.S.A. 24:21-19a(1). The other count of the indictment was dismissed. Sentencing on the guilty plea was scheduled for November 6, 1987, and was to be considered under N.J.S.A. 24:21-19b(3), which is a high misdemeanor and a crime of the third degree. Petitioner was sentenced on November 6, 1987, and has forfeited his position of employment with respondent pursuant to N.J.S.A. 2C:51-2a(1). Respondent never suspended petitioner on account of the indictment.

DISCUSSION

At issue in the instant case is whether petitioner is entitled to back pay dating from the date of his suspension to the date of the forfeiture of his employment.[1] In resolving this issue, I am persuaded by petitioner's position. A review of the applicable law indicates that respondent could have availed itself of two different avenues to suspend petitioner without pay.

More particularly, respondent could have suspended petitioner in accordance with the Tenure Hearing Act. N.J.S.A. 18A:17-3 provides as follows:

> Every public school janitor of a school district shall, unless he is appointed for a fixed term, hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, except as a result of the reduction of the number of janitors in the district made in accordance with the provisions of this title or except for neglect, misbehavior or other offense and only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title.

---

[1] It is to be noted that the issue concerning whether respondent violated the Open Public Meetings Act by holding a public meeting without giving petitioner prior notice of it was withdrawn by the parties pursuant to the addendum to the stipulation of facts (J-1) deleting that issue.

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N.J.S.A. 18A:6-10 describes the general manner in which a janitor may be dismissed for neglect, misbehavior or other offense. It provides in part as follows:

> No person shall be dismissed or reduced in compensation . . . except for inefficiency, incapacity, unbecoming conduct or other just cause, and then only after a hearing held pursuant to this subarticle, by the Commissioner, or a person appointed by him to act on his behalf, after written charge or charges of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of the board of education, and filed and proceeded upon as in the subarticle provided.

Essentially, the charge and the statement of evidence supporting the charge must be in writing and filed with the secretary of the board of education. A copy of the charge and statement of the evidence must be provided to the employee, and the employee must be given the opportunity to submit a written statement of his position. The board of education will review all of this information and determine by a majority vote whether there is probable cause to support the charge. If the evidence is determined to support the charge, then the board will notify the employee in person or by certified mail and will also forward the charge and the certification of determination to the Commissioner for a hearing. N.J.S.A. 18A:6-11.

Once the charge is certified to the Commissioner, the board of education may suspend the employee, pursuant to N.J.S.A. 18A:6-14:

> Upon certification of any charge to the Commissioner, the board may suspend the person against whom such charge is made, with or without pay, but, if the determination of the charge by the Commissioner of Education is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person shall be paid beginning on the 121st day until such determination is made. . ..

In Asbury Park School Dist. and Donald Martin v. Bd. of Ed., Asbury Park, N.J. (N.J. App. Div., July 17, 1985, A-5503-83T6) (unreported), the court in determining the salary

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rights of a suspended tenured employee, clarified the meaning of N.J.S.A. 18A:6-14. The superintendent of schools had suspended Martin without pay effective November 30, 1981, after learning that Martin had been arrested and charged with weapons violations and was also the object of an ongoing investigation by the United States postal authorities regarding his involvement with materials that sexually exploited minors. On December 28, 1987, the board certified charges of conduct unbecoming a teacher to the Commissioner, and Martin was suspended without pay effective January 1, 1982. After Martin filed an answer to the charges, the matter was transmitted to the Office of Administrative Law as a contested case. After 120 days had elapsed after certification of the charges (basically due to discovery problems), Martin was restored to the payroll as of May 1, 1982, pursuant to N.J.S.A. 18A:6-14.

On November 5, 1982, Martin was indicted by the Monmouth County grand jury. A second set of tenure charges seeking dismissal was brought against Martin charging him with conduct unbecoming a teacher for placing pornographic material on school property and for using school property without authorization in conducting a business selling pornographic material. The local board certified these charges against Martin and suspended him without pay on December 17, 1982. On January 20, 1983, Martin pled guilty to the fifth count of the indictment, which charged him with second degree endangering the welfare of children. On January 28, 1983, the board moved for summary judgment, alleging that Martin's employment had been forfeited under N.J.S.A. 2C:51-2 and, in addition, seeking reimbursement of salary payments made to Martin from May 1, 1982 until December 16, 1982. Martin was sentenced on April 15, 1983, rendering the substantive tenure issue moot, but leaving open the payment issue.

In resolving the payment issue, the appellate division held that N.J.S.A. 18A:6-14 is clear and its meaning is plain. The salary of a suspended employee must resume if the case is not resolved within 120 days of the certification of tenure charges to the Commissioner. The court recognized that the only exception would occur if the suspended employee caused delays that made the 120-day period expire. Further, the court rejected the local board's suggestion that because Martin had pled guilty to a crime, an exception to the law should be carved out allowing salary reimbursement for the salary paid while he

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was suspended. The appellate division stated, "there is simply no authority for the proposition that teachers who are ultimately convicted of criminal charges must return salary paid to them while they were suspended pending criminal adjudication. On the contrary, the plain language of the statute leads to an opposite conclusion." Martin, at 8.

It is clear from a review of Martin that an employee against whom tenure charges were certified could be suspended without pay. The employee would begin receiving pay 120 calendar days after certification of the charges, if a determination by the Commissioner of Education had not been made.

However, it must be observed that if tenure charges were not certified against a tenured employee, the employee could also be suspended without pay, if suspended by reason of indictment. N.J.S.A. 18A:6-8.3 provides as follows:

> Any employee or officer of a board of education in this State who is suspended from his employment, office or position, other than by reason of indictment, pending any investigation, hearing or trial or any appeal therefrom, shall receive his full pay or salary during such period of suspension, except that in the event of charges against such employee or officer brought before the board of education or the Commissioner of Education pursuant to law, such suspension may be with or without pay or salary as provided in chapter 6 of which this section is a supplement [emphasis added].

Further clarification as to the meaning of this statute may be gleaned from Martin. Martin challenged the decision of the state board that he was not entitled to receive the salary paid to him after he was indicted. He claimed that the state board incorrectly determined under N.J.S.A.18A:6-8.3 that his right to salary terminated on November 5, 1982, the day of his indictment. The court, considering this argument, found that N.J.S.A. 18A:6-8.3 is applicable to suspensions under the tenure law. Thus, if a person is suspended from his or her employment "by reason of indictment" he will not receive the salary benefits contained in this scheme. The court held, however, that Martin was not suspended by reason of indictment, he was suspended by reason of his arrest. The court observed that Martin's indictment did not occur until more than 10 months after his

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arrest, and no action by the local board to suspend him because of the indictment took place at that time. Thus, N.J.S.A. 18A:6-8.3 did not prohibit him from receiving his salary when the indictment was handed down.

In so holding, the court pointed out that Romanowski v. Bd. of Ed. of Jersey City, 89 N.J. Super. 38 (App. Div. 1965), did not support a contrary view. In Romanowski, the employee was suspended for malfeasance in office following his indictment, without charges certified by the local board pursuant to the tenure law. Id. at 39-40. The court held that Romanowski stands for the proposition that an employee can be suspended for malfeasance independent of the tenure law, and that the charges, if proven, would result in forfeiture and would obviate the need for tenure proceedings. The court determined, however, that Romanowski did not support the contention that an indictment per se suspends application of the tenure law. The court concluded that, unlike the respondent in Romanowski, Martin was not suspended by reason of indictment and his suspension was for conduct unbecoming a teacher, not malfeasance. Thus, pursuant to the tenure law, the local board was required to pay him while he was suspended. When he was finally indicted, the local board did not act to suspend him by reason of indictment. Of import, the court held that, "[h]is indictment alone could not convert the suspension by reason of arrest into a suspension by reason of indictment when no specific action to that effect was taken by the Board." Martin, at 11.

Haddonfield Borough Bd. of Ed. v. Terence D. McGuire, OAL DKT. EDU 8413-84 (Sept. 5, 1985), Comm'r of Education's Decision (Oct. 21, 1985), aff'd State Bd. of Ed. (Feb. 5, 1986) lends additional support to this approach. In McGuire, the teacher was suspended with pay upon the board's receipt of a criminal charge on August 30, 1984. On September 25, 1984, the teacher was indicted. On October 11, 1984, the superintendent filed tenure charges against the teacher for conduct unbecoming a teacher and "other just cause." On November 1, 1984, charges of conduct unbecoming and "other just cause," including the indictment filed against respondent on September 25, 1984, were certified by the board. Respondent was suspended without pay.

Under these facts, the Commissioner determined that the board was not entitled to

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reimbursement for the salary paid to respondent from September 25, 1984 until November 1, 1984. Of import, the Commissioner distinguished the factual circumstances in McGuire from those in Martin. The Commissioner noted that while respondents in both cases were charged with conduct unbecoming a teaching staff member, Martin was suspended by reason of his arrest. The Commissioner found that the record supported the fact that McGuire's suspension without pay was by reason of indictment, coupled with conduct unbecoming a teacher. Thus, the "problem" present in Martin was not present in McGuire.

Of note, the Commissioner also indicated that a board of education is not faced with an "either/or" situation when taking action with respect to a suspension by reason of indictment; namely, either suspending by virtue of N.J.S.A. 18A:6-8.3 or by virtue of N.J.S.A. 18A:6-14. The Commissioner cautioned all boards, however, that when certifying tenure charges against a tenured employee already suspended pursuant to N.J.S.A. 18A:6-8.3 or under N.J.S.A. 18A:25-6, boards must include all pertinent statutory references, as well as the reasons justifying imposition of the relevant statutes, in all the documents filed with the Commissioner so as to preclude later litigation as to whether payment of salary is owing.

With this background, the Commissioner indicated that the board was obligated to continue paying respondent's salary until such time as it acted on his indictment. Since the board did not act on September 25, but rather waited until November 1 to do so, it was not a matter of discretion, but rather one of legal obligation that respondent receive his salary. The Commissioner held that unless and until a board indicates that it was preferring tenure charges pursuant to an indictment or the filing of tenure charges, payment of salary is obligatory, not discretionary.

It should be noted at this juncture that James T. Fridy v. Bd. of Ed., City of Long Branch (N.J. App. Div., Jan. 26, 1983, A-4470-80T3) (unreported) is inapposite. Although the court considered Fridy's back pay claim, the court actually found that appellant was not entitled to back pay because his claim was initiated in an untimely fashion pursuant to N.J.A.C. 6:24-1.2.

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In light of this tribunal's recognition that a tenured employee may be suspended without pay pursuant to the Tenure Hearing Act or by reason of his indictment pursuant to N.J.S.A. 18A:6-8.3, the result in the instant case seems clear. Slater was a tenured employee pursuant to N.J.S.A. 18A:17-3. As a tenured employee he could be suspended without pay for a 120-day period pursuant to N.J.S.A. 18A:6-14. Since petitioner never had tenure charges certified against him, however, N.J.S.A.18A:6-14 could not be utilized by him to reduce in any manner the amount of salary owed to him. Moreover, pursuant to N.J.S.A. 18A:6-8.3 petitioner can only be suspended without pay if petitioner was suspended because of his indictment. Here, petitioner was not suspended by reason of his indictment. He was suspended because of his arrest. That being so, Martin clearly controls the instant result. N.J.S.A. 18A:6-8.3 cannot serve to prohibit petitioner from receiving his salary when the indictment was handed down.

In sum, petitioner, having been suspended could have been denied the payment of salary if respondent had certified tenure charges at the time of petitioner's suspension. Respondent would then have had a 120-day grace period pursuant to N.J.S.A. 18A:6-14 during which it was not required to pay petitioner his salary. Respondent could also have suspended petitioner by reason of his indictment pursuant to N.J.S.A. 18A:6-8.3. Since respondent did not certify tenure charges, did not prefer charges pursuant to an indictment, and did not suspend Slater by reason of his indictment, salary payment to petitioner was obligatory, not discretionary.

In light of the above discussion, I **CONCLUDE** that petitioner is entitled to receive his back pay dating from his suspension until the forfeiture of his employment on November 6, 1987.

ORDER

For the foregoing reasons, petitioner's motion for summary decision is **GRANTED** and respondent's motion for summary decision is **DENIED**. In view of the forfeiture of employment, petitioner's motion for summary decision is **GRANTED** only in regard to the salary issue.

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This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

March 17, 1988
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

MAR 22 1988
DATE

Receipt Acknowledged:
Seymour Weiss
DEPARTMENT OF EDUCATION

MAR 22 1988
DATE

Mailed To Parties:
Ronald L. Plunkett
FOR OFFICE OF ADMINISTRATIVE LAW

jrp/e

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GREGORY SLATER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RAMAPO-INDIAN HILLS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions and reply exceptions were timely filed in accordance with N.J.A.C. 1:1-18.4 and are summarized below.

As a result of the ALJ's order for back pay, the Board seeks to supplement the findings of fact in this matter to include the fact that petitioner was incarcerated during the period back pay was awarded, April 14, 1987 through November 6, 1987. Incorporating the arguments contained in its letter briefs submitted to the ALJ, the Board avers that petitioner is not entitled to back pay. More specifically, it contends that if the ALJ's analysis is accepted, it would establish a guaranteed period of time during which a tenured employee must be paid even if jailed and not capable of performing duties, avowing that "[t]his result would occur since, under the Initial Decision, a board has to wait for either an indictment***or certification of tenure charges, to suspend without pay.***" (Board's Exceptions, at p. 2) The Board considers petitioner's alleged inability to render service a bar to recovery of back pay for to conclude otherwise would, in essence, bestow a gift of public funds.

The Board recognizes that when a board faced with an employee accused of a crime, the conviction of which will result in forfeiture, has two legal procedures available to it, the first process involves the certification of tenure charges as in Martin, supra, and McGuire, supra. The second involves suspension without pay while allowing for the criminal process to unfold eventually leading to automatic forfeiture. It is the Board's contention that when this latter option is selected, such as in the instant matter, the holdings in Romanowski, supra, and Fridy, supra, apply. As to this factor the Board argues:

> In interpreting the Martin decision, which did not over-rule or disagree with the Romanowski and Friday (sic) decisions, the A.L.J. misread and misapplied these principles by not recognizing that the Board in Martin utilized the tenure charge procedure and thereafter was restricted by

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suspension.***" (Board's Exceptions, at p. 4)

The Board further argues:

> The Initial Decision (p. 7) attempts to distinguish away both Romanowski and Friday (sic) and, citing Martin (at p. 11) concludes that "indictment alone would not convert the suspension by reason of indictment when no specific action to that effect was taken by the Board" (Initial Decision, p. 7). The ALJ however ignored the distinction noted by the Court that Martin was already suspended pursuant to the tenure law rather than due to arrest, indictment, etc. for a forfeitable offense. The Martin Court said:
>
> > Instead, the tenure laws are indeed applicable to the instant case. Unlike the respondent in Romanowski Martin was not suspended by reason of indictment and his suspension was not for malfeasance, it was for conduct unbecoming a teacher. Martin; pgs. 10-11.
>
> The Initial Decision also misreads the Friday (sic) holding in concluding that it simply found the back pay claim to be untimely. (Initial Decision, p. 8) Contrary to this reading by the ALJ, it clearly stated, in response to the Board's position on back pay:
>
> > We agree with the local Board's position (Slip Opinion, p. 10).
>
> As to the untimely filing, the Friday (sic) Court utilized it as a second basis of its determination:
>
> > We further conclude that appellant in this case is entitled to no back pay because his claim was initiated in an untimely fashion. (Slip Opinion, p. 10, emphasis added).
>
> (Board's Exceptions, at pp. 4-5)

Petitioner's reply exceptions aver that the Board's assertion that he was jailed during the period for which back pay was awarded is "simply untrue" and "a blatant inaccuracy." The exceptions aver, inter alia, that (1) petitioner was released on bail during the controverted period, (2) the factual issue of his incarceration was never addressed in the stipulation of facts because it was never raised by the Board, and (3) "[t]here is

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absolutely no evidence in the record that [his] bail was revoked or that he was incarcerated at any time until his sentencing on November 6, 1987." (Petitioner's Reply Exceptions, at p. 2) He further states that:

> The Board's references to the parties' and the ALJ's knowledge of Mr. Slater's incarceration during settlement negotiations refer to the period after November 6, 1987 when Mr. Slater was in fact incarcerated. As the ALJ states "as a result of conference calls held in this matter on December 18, 1987 and January 5, 1988, it appeared that a settlement could be reached in this matter. However, by conference call on January 12, 1988, it became apparent that a settlement could not be reached." (Initial Decision, at 2). This is the period during which Mr. Slater was incarcerated. However, this does not include any period of time as to which the ALJ has awarded backpay. Specifically, the ALJ awarded backpay only up to and through the date of Mr. Slater's sentencing, which resulted in his incarceration. (Reply Exceptions, at pp. 2-3)

Moreover, petitioner characterizes the Board's exceptions as devoid of merit and relies on the legal arguments contained in his submissions to the ALJ in support of this position, arguments which are incorporated by reference herein.

Finally, petitioner excepts to the fact that the ALJ neglected to award interest and urges that the Commissioner exercise his discretionary authority to grant that relief. The Board argues that the criteria for neither pre-judgment nor post-judgment interest has been met.

Upon careful and independent review of the record in this matter, the Commissioner is in complete agreement with the ALJ's thorough and well-reasoned analysis of the law on the suspension of tenured employees. Given the factual circumstances in this case, N.J.S.A. 18A:6-8.3 is controlling and bears repeating here. It reads:

> Any employee or officer of a board of education in this State who is suspended from his employment, office or position, other than by reason of indictment, pending any investigation, hearing or trial or any appeal therefrom, shall receive his full pay or salary during such period of suspension, except that in the event of charges against such employee or officer brought before the board of education or the Commissioner of Education pursuant to law, such suspension may be with or without pay or salary as provided in chapter 6 of which this section is a supplement. (emphasis supplied)

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Such wording is plain, clear and unequivocal that the suspension of any employee pending investigation or trial or appeal or hearing shall be with full pay or salary with two exceptions. The first exception arises when suspension is by reason of indictment, whereupon the employee is not entitled to full salary as occurred in Romanowski, supra. The second exception carved out in N.J.S.A. 18A:6-8.3 arises when tenure charges are brought against the employee, whereupon the suspension may be without pay to the extent permitted by N.J.S.A. 18A:6-14.

In the instant matter, petitioner was not suspended by reason of indictment, thus Romanowski is inapposite as the factual circumstances in this matter differ from that case. Rather his suspension was by reason of his arrest as was true in Martin, supra, as stated by the court which found N.J.S.A. 18A:6-8.3 applicable to suspensions even under the tenure law:

> ***The problem is that Martin was not suspended by reason of indictment, he was suspended by reason of his arrest. His indictment did not occur until over ten months after his arrest and no action by the Local Board to suspend him because of the indictment took place at that time***. Thus, the statute does not prohibit him from receiving his salary when the indictment was handed down. (emphasis supplied)
>
> (Slip Opinion, at p. 10)

On April 15, 1987, petitioner herein was improperly suspended without pay by the Board given that suspension was by virtue of his arrest which requires suspension with pay pursuant to N.J.S.A. 18A:6-8.3. At the time of his indictment, the Board could have but did not act to suspend him without pay just as the board did not in Martin, supra, thus petitioner was entitled to his salary even after his indictment was handed down. Martin, supra Moreover, the Board herein never availed itself of the second exception to suspension with pay contained in N.J.S.A. 18A:6-8.3, i.e., bringing petitioner up on tenure charges. Thus, the ALJ was entirely correct in ruling that petitioner was entitled to back pay from the day of suspension to the day of sentencing.

As pointed out by petitioner in his exceptions, there is not one scintilla of documentation in the record to support the Board's belated factual assertion that petitioner was in jail during the period back pay has been awarded. Moreover, even if he had been, the Board's arguments would be meritless absent any action consistent with the requirements of N.J.S.A. 18A:6-8.3 or 6-14.

Finally, the Commissioner finds unpersuasive the Board's argument that Fridy, supra, controls. While it is true that the Appellate Court decision in Martin, supra, did not disagree with Fridy, the fact remains it never even mentioned that case. More importantly, however, is the fact that the conclusions of the Martin court are diametrically opposed/contradictory to the Fridy decision. Therefore, that decision cannot be deemed implicitly

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accepting of the Fridy ruling which under N.J.S.A. 18A:25-6* found no impediment to Fridy's suspension without pay by the Board in that matter, as well as concluding the claim to back pay was untimely.

A review of the two decisions makes it starkly clear that the Fridy decision was (1) quite perfunctory, (2) totally lacking in any analysis, and (3) is simply conclusory in nature as opposed to the Martin decision which was decided after Fridy and which contains a thorough, detailed and searching analysis of the issue of suspension without pay. Thus, just as the Commissioner in Wilma Colella v. Bd. of Ed. of Elmwood Park, 1983 S.L.D. 160, aff'd State Board 172, aff'd N.J. Superior Court, Appellate Division, 1984 S.L.D. ____ (July 19, 1984), when confronted with two conflicting Appellate Court decisions relied on the one which was issued at a later date and contained a more indepth, analytical examination of the law, the Commissioner in this matter sees as controlling the Martin case and not Fridy.

Accordingly, for the reasons expressed by the ALJ and expanded upon herein, petitioner is granted summary decision and is to be promptly provided back pay as ordered in the initial decision. Interest, both pre- and post-judgment, is denied as none of the criteria contained in N.J.A.C. 6:24-1.18 has been met.

COMMISSIONER OF EDUCATION

May 5, 1988

---

* N.J.S.A. 18A:25-6 is not at issue herein in that it applies only to teaching staff members.

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GREGORY SLATER,	:	
PETITIONER-RESPONDENT.	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE RAMAPO-INDIAN HILLS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, May 5, 1988

For the Petitioner-Respondent, Katzenbach, Gildea & Rudner
(Ezra D. Rosenberg, Esq., of Counsel)

For the Respondent-Appellant, Green & Dzwilewski,
(Allan P. Dzwilewski, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

October 5, 1988

Pending N.J. Superior Court

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6298-87
AGENCY DKT. NO. 250-8/87

MICHAEL MARKOT,
Petitioner,
v.
EAST BRUNSWICK TOWNSHIP BOARD OF EDUCATION,
Respondent.

Nancy Iris Oxfeld, Esq., for petitioner (Klausner, Hunter & Oxfeld, attorneys)

David B. Rubin, Esq., for respondent (Rubin, Rubin & Malgran, attorneys)

Record Closed: February 16, 1988 Decided: March 23, 1988

BEFORE **DANIEL B. MC KEOWN,** ALJ:

Michael Markot (petitioner) a teacher with a tenure status in the employ of the East Brunswick Township Board of Education (Board) alleges that the determination of the Board to recoup monies it paid him in error is in violation of N.J.S.A. 18A:1-1, Education Law. He seeks an order from the Commissioner by which the Board would repay him all monies deducted from his salary or otherwise improperly denied him, prohibiting the Board from seeking to recover monies paid him in error, and he seeks an order by which his salary would be "frozen" at a certain amount until such time that he otherwise would be legally entitled to that certain salary. After the Commissioner transferred the matter to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq. a prehearing was conducted in the matter by telephone conference call

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November 24, 1987. The parties agreed that the matter could be adjudicated by way of cross motions for summary decision. The record closed on the cross motions for summary decision February 16, 1988 upon receipt of a signed stipulation of fact.

STIPULATED FACTS

The facts as stipulated by the parties and which form all relevant and material facts which give rise to this dispute are as follows:

1. Petitioner Michael Markot is a certified, tenured teacher of mathematics employed by the Respondent, Board of Education of the Township of East Brunswick.

2. During the calendar year 1986, the East Brunswick Education Association and the East Brunswick Board of Education entered into discussions concerning the use of funds allocated to the East Brunswick Board of Education under the minimum salary law. An agreement was reached as a result of those discussions in late December, 1986.

3. Pursuant to that agreement, the Respondent adopted a salary guide for the 1986-1987 school year for teaching staff members on January 12, 1987. The Petitioner's appropriate step on that salary guide for the 1986-1987 school year was step G. As Petitioner has a Masters Degree, his appropriate salary was the $26,000 set forth on that guide for teaching staff members at step G with an MA. Petitioner was also entitled to receive $250, by virtue of his status as a tenured teaching staff member, for a total salary for the 1986-1987 school year of $26,250.

4. On January 12, 1987, the Respondent adopted a salary for the Petitioner for the 1986-1987 school year of $27,920. This salary was adopted as the result of a good faith clerical error. The Petitioner was notified by Brenda Witt, the Assistant Superintendent for Personnel of the Respondent, by memorandum dated January 13, 1987, that his new salary for the 1986-1987 school year had been set by the Respondent at $27,920 and that it was expected that he would receive a check representing retroactive salary for the 1986-1987 school year during the month of February 1987.

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5. In February 1987, the Respondent determined that the Petitioner's appropriate salary for the 1986-1987 school year under the revised salary guide was actually $26,250, not $27,920 and determined to recoup the overpayment by means of deductions from the Petitioner's paychecks through June, 1987. Petitioner initially acknowledged the error and agreed to repay the overpayment, as proposed by Respondent.

6. On March 9, 1987, the Respondent voted to reduce Petitioner's salary for the 1986-1987 school year from $27,920 to $26,250.

7. On March 17, 1987, a grievance was filed by Rosalie Triozzi, President of the East Brunswick Education Association, with Brenda Witt, concerning the Respondent's attempt to reduce Petitioner's salary and recoup the overpayments through salary deductions. That grievance was processed through the grievance procedure in the collective negotiations agreement between the East Brunswick Education Association and the East Brunswick Board of Education.

8. On June 1, 1987, pursuant to that grievance procedure, Mrs. Triozzi requested that the Respondent review the grievance concerning the Petitioner.

9. On June 11, 1987, the Respondent voted to readjust the Petitioner's salary for the 1986-1987 school year from $26,250 to $27,920.

10. On June 16, 1987, Rosalie Triozzi was notifed by Mrs. Witt that at the meeting of Respondent on June 11, 1987, the Respondent had determined to uphold a determination of Dr. Joseph Sweeney, Superintendent of Schools, dated May 6, 1987 concerning the Petitioner. That determination, which was upheld by the Respondent at its meeting on June 11, 1987, was a determination to reinstate the Petitioner to a salary of $27,920 for the 1986-1987 school year, and to deduct the overpayments made to Petitioner by freezing his salary at $27,920 at which time as overpayments are recouped.

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11. On June 26, 1987, Petitioner received a check from Respondent in the amount of $901.50, representing payment of monies withheld from his salary plus additional monies, so that his total income for the 1986-1987 school year was $27,920.

12. At the start of the 1987-1988 shool year, negotiations had not yet been concluded between the East Brunswick Education Association and the East Brunswick Board of Education for the salary guides for the 1987-1988 school year. Employees of the Respondent including Petitioner, whose salaries are negotiated by the East Brunswick Education Association, remained at the same salary as they had received for the 1986-1987 school year. Petitioner continued to receive salary payments based on a salary of $27,920.

13. In November, the East Brunswick Education Association and the Respondent arrived at an agreement for salaries for the 1987-1988 school year. Under that agreement, employees remained at the same step of the guide for the first half of the 1987-1988 school year as their step for the 1986-1987 school year. In the second half of the school year, employees move to the next step of the salary guide.

14. The Petitioner's appropriate step on the salary guide for the first half of the 1987-1988 school year is step G on the Masters salary guide: $27,560. In addition, Petitioner is entitled to a $250 yearly stipend as a tenured teacher, for a total salary of $27,810. Since the salary of $27,810 is prorated for the first half of the school year (September through January), Petitioner is entitled to receive payments of $13,905 for the first half of the school year: September through January.

15. The Petitioner's appropriate step on the salary guide for the second half of the 1987-1988 school year is step F on the Masters salary guide: $29,150. In addition, Petitioner is entitled to a $250 yearly stipend as a tenured teacher, for a total salary of $29,400. Since the salary of $29,400 is prorated for the second half of the school year (February through June), Petitioner is entitled to receive payments of $14,700 for the second half of the school year: February through June.

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16. For the 1987-1988 and 1988-1989 school years, Respondent has determined to maintain Petitioner at a salary of $27,920 until such time as Respondent has recouped the overpayments to Petitioner. The overpayments Respondent intends to recoup are both those made in the 1986-1987 school year and those made during the first half of the 1987-1988 school year.

This concludes a recitation of all relevant and material facts of the matter.

PETITIONER'S ARGUMENT

Petitioner's essential argument is that the Board is authorized only to hold petitioner to the salary of $27,920 until such time as he would have been entitled to that amount under the Board's salary policy. Under this view, petitioner contends the Board "* * * has no right to recoup the overpayments [it] made to [him]." (Letter memorandum, P.2).

In this regard, petitioner relies upon Galop v. Bd. of Ed. of Hanover, 1975 S.L.D. 358 in which the Commissioner held that the board was not entitled to reduce Galop's salary to recover any portion of an erroneously established salary amount it paid her. Petitioner also relies upon Massa v. Bd. of Ed. of Kearney, 1980 S.L.D. 972 wherein the Commissioner held in part as follows:

> In the instant matter, the Commissioner does not suggest that recovery of the money paid petitioner through clerical errors be instituted by the Board. He directs the Board to correct its prior error by holding petitioner at the same step of the salary guide which he had previously attained until by reason of her continued service she attains her proper placement on that guide.
>
> 1980 S.L.D. at p. 979.

Petitioner, recognizing that the Board in this case relies upon Trenton Education Association v. Trenton Bd. of Ed., 1986 S.L.D. - (Oct. 6, 1986) as authority to recoup erroneous salary overpayments, claims this case is factually distinguishable from the Trenton case. Petitioner contends that in Trenton, the board did not officially set the erroneous salaries; only one paycheck was sent to teachers whose salaries were erroneously set; and, the Trenton case involved a large amount of money. Moreover, petitioner contends that the Commissioner reaffirmed in the Trenton case his rule that a

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board is not permitted to recoup through salary deductions monies erroneously paid teachers prior to the time of the discovery of the error. Finally, petitioner relies upon Conti and Cutler v. Bd. of Ed. of Montgomery, N.J. Sup. Ct. App. Div. Dkt. A-77-86T1, (Oct. 13, 1987) (unpublished), which merely affirms the Montgomery board's retention of appellants for a second year in order to correct the prior years erroneous salary guide placement by the superintendent. Petitioner emphasizes the following language in the Appellate Division unpublished opinion:

> We [the appellate division panel] can find no error in the decision of the State Board which permitted the local Board to correct its mistake in an manner that required no repayment from appellants, but placed them in their correct salary levels for the second year of their employment.

BOARD'S ARGUMENT

The Board's argument is reproduced here in full:

> The parties agree that the Board adopted an incorrect salary for [petitioner] on January 12, 1987.* The miscalculation was due to clerical error, which was discovered the following month. Petitioner Markot originally agreed to reduction of his salary to the correct amount during that school year — hence the Board's action on March 9, 1987 reducing his salary to the correct amount. Thereafter, the East Brunswick Education Association grieved the matter pursuant to the grievance procedure of collective negotiations agreement.
>
> When the grievance reached the level of the Superintendent, the Superintendent determined to restore petitioner Markot's salary to the originally calculated (but erroneous) amount for the duration of the 1986-87 school year, but to "red line" petitioner's salary during the 1987-88 school year until the overpayment had been recouped. This approach was affirmed by the full Board when the grievance reached their level.
>
> Thus, the dispute no longer involves a reduction in salary. The Board has simply determined to freeze petitioner's salary until the concededly erroneous overpayment has been recouped. In Trenton, the Commissioner held that "the appropriate step for the Board to take when the issue of erroneous salary level arises is to hold the salary level in place, not to reduce it through deductions." [Slip opinion at 24]. That is what the Board has done here. The petition should be dismissed.
>
> (Board's letter memorandum)

*The salary guide for the 1986-87 school year was adopted in January 1987, after conclusion of collective negotiations for that school year. Members of the negotiating unit were granted retroactive pay back to July 1, 1986.

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This concludes a recitation of the Board's arguments in support of its position.

DISCUSSION AND CONCLUSION

The error in this case is not of petitioner's making. The Board on January 12, 1987 erroneously fixed petitioner's 1986-87 salary at a level higher to which he was entitled. Therefore, petitioner's tenure status prohibits the Board of Education from thereafter reducing the salary it assigned petitioner for 1986-87. N.J.S.A. 18A:28-5 and 6.10. While it is clear petitioner was not entitled to certain monies paid him by the Board during 1986-87, the difference between $27,920 which he did receive and $26,250 to which he was entitled, and despite the fact petitioner initially acknowledged he was not entitled to the higher salary, the Commissioner's decision in Trenton Education Association, supra, commands that the Board take no affirmative action to recover salary monies erroneously paid to teachers, particularly teachers who have acquired a tenure status. See also, Conti and Cutler v. Montgomery Bd. of Ed., supra. Rather, "the appropriate step for a board to take when the issue of erroneous salary level arises is to hold the salary level in place, not to reduce it through deductions." This rule is not intended to allow the Board to recover the entire salary monies erroneously paid to an affected teacher. It is intended, however, to hold the teacher's salary at the erroneous level until such time as experience and training would otherwise command that that teacher be paid at the level erroneously fixed by the board.

In this case, the amount erroneously paid petitioner by the Board during 1986-87, $27,920, is, under the Board's own salary policy, surpassed as petitioner's proper salary amount, in February 1988 when he was entitled to be paid $29,150. Therefore, and absent an action to withhold a salary increment or an adjustment increment from petitioner by the Board for good cause under N.J.S.A. 18A:29-14, petitioner's salary must be established by the Board according to its salary policy as of February 1988.

Accordingly, since February 1, 1988 forward petitioner is entitled to a total salary of $29,400. The Board is directed to immediately compensate petitioner the difference between the salary amount to which he is entitled and the salary he did receive. The Board is not authorized to recover from petitioner salary overpayments made to him by virtue of the Board's own error and despite the fact petitioner freely acknowledged he was not entitled to that money and despite his initial agreement to repay to the Board the money erroneously given him.

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It is so **ORDERED.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

March 23, 1988
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

3/31/88
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAR 28 [redacted]
DATE

OFFICE OF ADMINISTRATIVE LAW

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MICHAEL MARKOT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Board's exceptions and petitioner's reply exceptions thereto were timely filed pursuant to N.J.A.C. 1:1-18.4.

The Board excepts to the ALJ's initial decision of March 23, 1988. In support of its position, the Board relies on its letter memorandum in support of its Motion for Summary Decision, which is incorporated herein by reference.

In reply to said exceptions, petitioner relies on the decision of the ALJ below as well as his letter memorandum in support of his Motion for Summary Decision, which is also incorporated herein by reference.

Upon his careful and independent review of the record before him, the Commissioner adopts as his own the findings of fact and conclusions of law as stated in the initial decision as amplified below.

The Commissioner hopes that this decision will lay to rest the issue of how a board must resolve the issue of an overpayment of salary made by good faith error to a tenured teaching staff member.

As suggested by the ALJ in the initial decision, ante, "'the appropriate step for a board to take when the issue of erroneous salary level arises is to hold the salary level in place, not to reduce it through deductions.'" The Commissioner concurs with the ALJ's quoting this statement from Trenton Education Association v. Trenton Board of Education, decided by the Commissioner October 6, 1986, Slip Opinion at p. 24. He also concurs with the ALJ's next statement:

> This rule is not intended to allow the Board to recover the entire salary monies erroneously paid to an affected teacher. It is intended, however, to hold the teacher's salary at the erroneous level until such time as experience and training

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> would otherwise command that that teacher be paid at the level erroneously fixed by the board. (emphasis supplied) (Initial Decision, ante)

Thus, the goal of this rule is not to allow a board to recoup every penny erroneously paid out, although if that can be accomplished before the teacher has reached the point where his or her salary level surpasses the level erroneously fixed by the board, so much the better. Therefore, the Board may hold such teaching staff member in place in an effort to correct for any such overpayment, but only until such employee's level of experience and training meets that level erroneously fixed by the Board, lest he be reduced in salary contrary to N.J.S.A. 18A:28-5. See Agnes D. Galop v. Bd. of Ed. of Hanover, 1975 S.L.D. 358, aff'd State Board 366. See also Trenton Education Association, supra, and Conti and Cutler v. Bd. of Ed. of Montgomery, N.J. Superior Court, Appellate Division, A-77-86T1, October 13, 1987 (unpublished).

The error in the Board's action (as incorporated at page six of the initial decision by reproduction of its entire argument) was in freezing petitioner's salary "until the concededly erroneous overpayment has been recouped." (emphasis supplied) The erroneous presumption made by the Board is that it might recoup all that which it erroneously paid, albeit in good faith, to petitioner. If all such money is not corrected for by the time petitioner's level of experience and training rises to the step on the guide to which he is entitled, petitioner shall not suffer a detriment therefrom. Rather, the Board shall absorb the difference. See Galop, supra, wherein the Commissioner stated:

> She [Petitioner Galop] was nevertheless voted a salary of $19,525 for the school year 1973-74 upon the faulty, though inadvertent, recommendation of the Superintendent. Petitioner was in no way responsible for this unfortunate error and having received notice thereof and payment for a period of several months, had reason to rely upon the Board's official act establishing her salary at that level for the period of one school year. N.J.S.A. 18A:6-10; De Renzo, supra; Docherty, supra; Harris, supra; Kawaida Towers, supra. Therefore, the Board is not entitled to recover any portion of the salary paid to petitioner during the months of July 1973 through February 1974. Nor was it legally entitled to reduce her monthly rate of payment thereafter through June 1974. The Commissioner so holds and directs the Board of Education of the Township of Hanover to compensate petitioner the appropriate sum of moneys in accordance with this determination. (emphasis in text) (at 364)

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The error in petitioner's logic is in suggesting that a board may recover none of the monies it paid out erroneously to a teaching staff member in excess of his/her rightful salary level. As noted above, a board is authorized to freeze an employee's salary at a higher paid level in order to correct for any overpayment but only until such time as that employee would have been entitled, by virtue of training and experience, to that step on the salary schedule. Any recovery of funds to the board accomplished during such period is appropriate. In this regard, the Commissioner again refers to Galop, supra, wherein he went on to state:

> Petitioner has no residual entitlement to such a favored position beyond the end of her 1973-74 contract and is to be paid for the 1974-75 school year, and thereafter, as provided by her proper step and level on the Board's negotiated salary guide and authorized by the Board's official action. (at 364-65)

Accord, Conti and Cutler, supra, Slip Opinion at page 5 which states:

> ***We can find no error in the decision of the State Board which permitted the local Board to correct its mistake in a manner which required no repayment from appellants, but placed them in their correct salary levels for the second year of their employment.

In the instant matter, the Board was correct, as conceded by petitioner, to hold his salary at the $27,920 level since that amount represented a greater amount than that to which he was entitled according to the salary schedule at the time, until February, 1988, when the new schedule came into effect. At that point, he was entitled to be paid $29,150, plus $250 in recognition of his tenured status, or $29,400.

Accordingly, the Commissioner adopts as his own the findings of the ALJ in the initial decision, ante, wherein he states:

> ***[S]ince February 1, 1988 forward petitioner is entitled to a total salary of $29,400. The Board is directed to immediately compensate petitioner the difference between the salary amount to which he is entitled and the salary he did receive.***

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

May 9, 1988

Pending State Board

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2237-87
AGENCY DKT. NO. 34-3/87

JOHN GERMAN,
Petitioner,
v.
BOARD OF EDUCATION OF THE CAPE MAY COUNTY VOCATIONAL-TECHNICAL CENTER,
Respondent.

Barbara E. Riefberg, Esq., for petitioner (Selikoff & Cohen, attorneys)

John T. Barbour, Esq., for respondent (Barbour & Costa, attorneys)

Record Closed: February 2, 1988 Decided: March 25, 1988

BEFORE **RICHARD J. MURPHY**, ALJ:

On December 11, 1987, I issued an order of partial summary decision in this case concluding that the appeal was timely and not barred, and that the rule authorizing the award of post-judgment interest, N.J.A.C. 6:24-1.18, could be retroactively applied. Decision was reserved on the outstanding issue of the exact amount of interest owing, as well as petitioner's claim for attorney's fees and costs.[1] This opinion determines the interest owing, but denies the award of attorney's fees and costs.

---

[1] Petitioner filed a supporting memorandum on January 5, 1988 and the Board submitted its calculation of interest on January 19, with petitioner replying on January 25. The Board also responded to petitioner's fees and costs argument on January 27, and the record was held open for an additional five days until February 2 for petitioner's reply. The due date for the decision was extended from March 18 until March 25 because of illness.

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INTEREST

The underlying facts of this dispute are set forth fully in the partial summary decision order of December 11, and those findings of fact are hereby incorporated by reference. The remaining issue is that of interest and the respondent has submitted a calculation pursuant to N.J.A.C. 6:24-1.18, with which the petitioner largely agrees:

> As to the issue of the correct amount of interest that would be due under that order, we calculate it as follows:
>
> 1) Interest on principal sum due for the 1981-82 school year. Principal sum was $1,800.00.
>
> | | | |
> |---|---|---|
> | a) | 4/1/84-12/31/84 equals | $ 144.00 |
> | b) | 1/1/85-12/31/85 equals | $ 216.00 |
>
> 2) Interest on principal sum due for the 1982-83 school year. Principal sum due was $11,203.
>
> | | | |
> |---|---|---|
> | a) | 4/1/84-12/31/84 equals | $ 896.24 |
> | b) | 1/1/85-12/31/85 equals | $1344.36 |
>
> 3) Interest on principal sum due for the 1983-84 school year. Note not all of the principal sum of $987 was due the entire school year and therefore petitioner erred in calculating interest on that portion of the principal sum not yet due. The correct method is to calculate the interest due on the principal sum due on or before 4/1/84 and then by month thereafter for the principal sum due through the remainder of the 1983-84 school year.
>
> | | | |
> |---|---|---|
> | a) | 4/1/84-12/31/85 | |
> | | (1) (8 months) ($98.70/mo.) (.12) (8/12)= | $ 63.17 |
> | | (2) (1 month) ($98.70/mo.) (.12) (7/12) = | 6.91 |
> | | (3) (1 month) ($98.70/mo.) (.12) (6.12) = | 5.92 |
> | | Subtotal | $ 76.00 |
> | b) | $987 for 1/1/85-12/31/85 equals | $ 118.44 |
>
> 4) Interest on principal sum due for the 1984-85 school year. Note not all of the principal sum of $1,389 was due from 9/1/84 and therefore the same is used as in 3) above.
>
> | | | |
> |---|---|---|
> | a) | 9/1/84-12/31/84 at 12% | |
> | | (1) (1 month) ($138.90/mo.) (.12) (4/12) = | $ 5.56 |
> | | (2) (1 month) ($138.90/mo.) (.12) (3/12) = | 4.17 |
> | | (3) (1 month) ($138.90/mo.) (.12) (2/12) = | 2.78 |
> | | (4) (1 month) ($138.90/mo.) (.12) (1/12) = | 1.39 |
> | | Subtotal | $ 13.90 |

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b) 1/1/85-12/31/85 at 12%

(1) monies due 9/1/84-12/31/84 (4 months) ($138.90/mo.) (.12)	$ 66.67
(2) Interest on monies due each month 1/1/85 through 6/30/85 for 1/1/85 to 12/31/85 at $138.90/mo.	
January (a) (138.90) (.12) (11/12) =	$ 15.28
February (b) (138.90) (.12) (10/12) =	$ 13.89
March (c) (138.90) (.12) (9/12) =	$ 12.50
April (d) (138.90) (.12) (8/12) =	$ 11.11
May (e) (138.90) (.12) (7/12) =	$ 9.72
June (f) (138.90) (.12) (6/12) =	$ 8.33
Subtotal	$ 70.83

5) Interest on principal sum due for the 1985-86 school year. Note not all of the principal sum of $498.00 was due from 9/1/85 through 12/31/85; therefore, the same method as used in 3) and 4) above is used.

a) $49.88 per month from 9/1/85-12/31/85

(1) ($49.88) (.12) (4/12) =	$ 2.00
(2) ($49.88) (.12) (3/12) =	1.50
(3) ($49.88) (.12) (2/12) =	1.00
(4) ($49.88) (.12) (1/12) =	0.50
Subtotal	$ 5.00

6) Total principal sum due from 1/1/86 through 6/30/86 was $15,877.80; therefore, the interest due over that period would be:

($15,877.80) (.095) (6/12) = $ 754.20

7) Total of the above interest due would be $3705.64

8) Note that the legal court inters [sic] provided by the New Jersey Rules of Court was:

1) 1984 - 12%
2) 1985 - 12%
3) 1986 - 9.5%

See R 4:42-11

Petitioner takes issue with Item 1(a) above, which he feels should be calculated as $162.00 based on $18 of interest per month for nine months due for the period of 4/1/84 to 12/31/84. Petitioner also objects for the same reason to Item 2(a) which he estimates

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to be $1,008.27 and not the $896.24 calculated by the respondent Board. Petitioner's total calculation is $3,835.65 versus the respondent's claim of $3,705.64, a difference of $130.03.

The rule provides that the rate of interest shall be awarded as follows:

> Post-judgment interest shall be awarded based on the prevailing rate of interest established by court rules at the time that the right to the monetary claim was determined. (See, New Jersey Court Rules, R. 4:42-11(a).) N.J.A.C. 6:24-1.18(d)(2).

The court rule currently in effect sets post-judgment interest as follows:

> (a)(i) For periods prior to January 2, 1986, the annual rate of return shall be as heretofore provided by this rule, namely, 6 percent for the period prior to April 1, 1975; 8 percent for the period between April 1, 1975 and September 13, 1981; and 12 percent for the period between September 14, 1981 and January 1, 1986.
>
> (ii) Commencing January 2, 1986 and for each calendar year thereafter, the annual rate of interest shall equal the average rate of return, to the nearest whole or one-half percent, for the corresponding preceding fiscal year terminating on January 30, of the State of New Jersey cash management fund (state accounts) as reported by the Division of Investment in the Department of Treasury. . . . R. 4:42-11.

The interest amounts utilized by the respondent in its calculation, and agreed to by the petitioner, (8) are accurate.

I agree with the petitioner's calculations and **CONCLUDE** that the interest set forth in Items 1(a) and 2(a) of respondent's calculations should be based on the full nine month period between 4/1/84 and 12/31/84 so that the total award would be $3,835.67.

ATTORNEY'S FEES AND COSTS

I disagree, however, with petitioner's claim that the Commissioner has implied authority under N.J.A.C. 6:24-1.18 to award attorney's fees and costs to the prevailing party. Petitioner concedes that the Commissioner has consistently held that he does not

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have such authority, but argues that this is an unusual case in that it is a separate action instituted to collect interest payments based on an earlier awarded judgment. It was therefore instituted by the Commissioner to enforce the Commissioner's own authority. Respondent cites the recent case of Wilbur Edwards v. Bd. of Ed. of Village of Ridgewood, Bergen County, 1987 S.L.D. - 54-87 (Mar. 10, 1987) in support of its claim that the Commissioner lacks authority to award attorney's fees and costs. The rule, N.J.A.C. 6:24-1.18 is silent on the subject. In light of the Commissioner's consistent ruling that he lacks the authority to award attorney's fees and costs and given the silence of the rule in this regard, I **CONCLUDE** that there is no lawful basis upon which the Commissioner may award attorney's fees or costs. Nor do I think that such authority can reasonably be implied as a matter of law on the basis of the Commissioner's other express powers. The power to award post-judgment interest, which was recognized as implied in the case of Bd. of Ed. City of Newark v. Livitt and Sasloe, 197 N.J. Super. 239 (App. Div. 1984), is distinguishable from the authority to award attorney's fees and costs. The imposition of post-judgment interest is intended to compensate a prevailing party for the loss of monies to which it has been found entitled when the responsible party has failed to satisfy the claim. The award of attorney's fees and costs is not compensatory in this sense, and is generally limited circumstances where authorized by statute, as in the case of civil rights violations (see 42 U.S.C. §1988), or where specifically authorized by court rule. See, R. 4:42-8, 9. On this basis, I **CONCLUDE** that the petitioner is not entitled to an award of attorney's fees and costs because the Commissioner is not authorized to make such an award.

ORDER

On the basis of the above findings of fact and conclusions of law, it is **ORDERED** that the respondent Board shall pay to the petitioner in the form of post-judgment interest under N.J.A.C. 6:24-1.18 the sum of $3,835.67. It is further **ORDERED** that the petitioner's claim for attorney's fees and costs in connection with this action is **DENIED.**

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This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

MAR. 25, 1988
DATE

RICHARD J. MURPHY, ALJ

Receipt Acknowledged:

MAR 26 1988
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAR 30 1988
DATE

OFFICE OF ADMINISTRATIVE LAW

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JOHN GERMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CAPE MAY COUNTY VOCATIONAL-TECHNICAL CENTER, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed, including the December 11, 1987 order issued by the ALJ granting petitioner partial summary decision which the Board did not request the Commissioner to review on an interlocutory basis pursuant to N.J.A.C. 1:1-14.10. Therefore, the Commissioner is exercising his authority to review that order at the present time as authorized under N.J.A.C. 1:1-18.6.

Upon independent review of the record the Commissioner reverses the ALJ's determination of December 11, 1987 that this matter was not time-barred and the initial decision recommending that petitioner be granted post-judgment interest as explained below.

BACKGROUND

In order to understand the issues and sequence of events in this matter, the following facts the ALJ found to be undisputed are reproduced from the December 1987 order:

> There is no dispute as to the facts. Petitioner is a tenured teacher previously employed by the respondent Board as a distributive education teacher/coordinator and filed an appeal in 1982 after the Board abolished his position and then refused to place him in the position of job success orientation teacher, which he claimed was held by an individual possessing only an emergency certificate. He also sought credit on the salary guide for military service, but made no mention of interest. The administrative law judge who heard the case recommended reinstatement with full back pay and the military service credit and specifically found that during April 1982, petitioner was notified that his salary for 1982-83 was established at $19,158. The Commissioner of Education agreed on January 12, 1984, and directed the Board to reinstate petitioner as a job success orientation teacher and to compensate him for all salary and

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benefits he would have earned during the 1982-83 school year, less mitigation, had the Board not violated his seniority rights. He further directed that petitioner's salary for 1982-83, and henceforth, be determined by the Board "increasing by three salary steps the salary he would have earned, and shall earn," in order for him to receive the benefit of N.J.S.A. 18A:29-11 (military credit).

Without seeking a stay of the Commissioner's decision, the Cape May Board appealed to the State Board of Education, which affirmed and ordered reinstatement with compensation, including credit from military service since 1981, less any mitigation. An appeal was taken to the Superior Court of New Jersey, Appellate Division, again without any stay being granted, and the State Board's decision was affirmed on December 6, 1985. Between the time of the Commissioner's decision in January 1984 and the Appellate Division affirmance in December 1985, the Board of Education made no effort to calculate or remit back pay to the petitioner, although it did reinstate him to the position as ordered. There is also no evidence in the record reflecting that petitioner made any effort to formally or informally demand payment of any specific back pay amount. Apparently, both parties decided to await the outcome of the Appellate Division before taking any action on the back pay issue, notwithstanding the absence of any stay.

On December 16, 1985, shortly after the Appellate Division's affirmance, petitioner John German, through counsel, wrote to the lawyer for the Board demanding back pay of $19,083, as well as interest, calculated at 12 percent per anum (sic), in the sum of $3,745.56. Almost two months later, on February 14, 1986, the petitioner reduced his demand for back pay to $16,626 and that of interest to $3,229.59, and forwarded income information to the respondent Board. There were no further written communications, but on or about June 30, 1986, the Board remitted and the petitioner accepted payment of $15,877.80. The successive reductions to the amount were based on discrepancies in the original earnings figures and other factors agreed upon by the parties. After receiving the $15,877.80, petitioner requested interest on August 13, 1986, arguing that the Board had unreasonably delayed payment of an amount which was easily ascertainable. The demand for payment

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> of interest was reiterated on December 24, 1986, when German indicated that barring a positive response by January 15, 1987, an appeal would be filed. This appeal followed on February 24, and the matter was forwarded to the Office of the Administrative Law for hearing as a contested case on April 2, 1987. Subsequent to that, the Commissioner adopted N.J.A.C. 6:24-1.18, effective May 5, 1986, which authorizes the award of pre- or post-judgment interest in appropriate cases as set forth below.
>
> There is no dispute as to the above facts, and I so FIND. (Order, at pp. 2-3)

With respect to the timeliness issue, the ALJ summarized the parties' positions and ruled that the petition was timely as indicated below:

> The Board argues that it had clearly informed the respondent prior to his payment in June 1986 that it was not paying the interest demanded by the respondent and that the appeal, which was filed some eight months later, was therefore well beyond the 90-day appeal time specified by N.J.S.A. 6:24-1.2. Petitioner replies that the Board never formally indicated that it would not pay the post-judgment interest until it failed to respond to the January 15, 1987 deadline and that the appeal was taken in a timely fashion within 90 days of that date.
>
> Based on the evidence in the record, I agree with the petitioner on this point. At no point prior to or after the June payment did the Board decline in writing to pay interest. The petitioner reiterated [his] demand for interest on August 13, 1986, and again on December 24, when the Board did not respond with a letter to either demand. It may be, as counsel for the respondent indicates in his letter of September 28, 1987, that the Board's refusal to pay the interest was verbally communicated. But I find this inadequate to toll the filing deadline given the fact that petitioner supported his position in writing by citing various cases, which were never responded to by the Board until this proceeding. Accordingly, I CONCLUDE that the petition should not be dismissed as being out of time under N.J.A.C. 6:24-1.2. (Order, at p. 4)

ANALYSIS AND CONCLUSIONS

On December 16, 1985 petitioner presented to the Board a demand for $3,745.56 in post-judgment interest along with his claim

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for $19,083 in back pay. A second demand was made on February 14, 1986 for such interest in the amount of $3,229.59 and $16,626 in back pay. On or about June 30, 1986, the Board remitted and petitioner accepted a check in the amount of $15,877.80 which clearly excluded his demand for post-judgment interest, given the amount tendered versus the amount demanded. Thus, in the Commissioner's judgment, when petitioner received the check for an amount he considered "wrongful", it was at this point notice of "other action" was provided to him within the meaning of N.J.A.C. 6:24-1.2(b) which reads:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education which is the subject of the requested contested case hearing. (emphasis supplied)

Such a conclusion has been reached because petitioner knew or should have known upon receipt of the check that the Board had not acceded to his demands for post-judgment interest. Thus, his cause for action accrued on or about June 30, 1986. Therefore, the Petition of Appeal in this matter is deemed untimely as it was not filed until some eight months after the cause for action arose.

Moreover, the Commissioner emphasizes that the factual circumstances in this matter are not similar/analogous to those in Charles Stockton v. Board of Education of Trenton, decided by the Commissioner November 19, 1984, rev'd State Board April 3, 1985, rev'd/rem'd 210 N.J. Super. 150 (App. Div. 1986) wherein the petitioner in that case had been tendered a contract for a salary at a given salary guide step and had received paychecks at that amount in the beginning months of the school year and then in November received a paycheck for a lesser amount when a school board employee unilaterally took it upon her or himself to correct a three-year-old error.

Even assuming arguendo that petitioner was awaiting a response to his August 1986 demand for interest (his third since December 1985), he clearly sat on his rights when not acting to file a petition until March 3, 1987.* When a response to that request was not received within a reasonable period, petitioner knew, or should have known, that a controversy existed between the Board and himself. Given the fact that the Board had never replied to his interest requests previously, its continued failure to respond after his August 1986 request was surely a clear signal the Board had no intention of acceding to his interest demands. Rather than acting to file a Petition of Appeal, petitioner chose to wait four more months and sent yet a fourth demand for interest in December 1986, delivering to the Board a "this is your last chance" ultimatum. Such action is clearly not the type of "negotiations" referred to by

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* The ALJ erroneously reports a February 24, 1987 filing on page 3 of the order granting partial summary judgment to petitioner.

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the court and State Board in Polaha v. Buena Regional School District, decided by the Commissioner December 17, 1984, rev'd State Board October 16, 1985, rev'd/rem'd N.J. Superior Court, Appellate Division, October 7, 1986, decision on remand November 20, 1986, rev'd State Board March 2, 1988, nor the type of effort taken in Stockton, supra, to ascertain if a controversy, in fact, existed. Rather, it represents a failure by petitioner to act in a timely fashion under N.J.A.C. 6:24-1.2 by sitting on his rights.

Accordingly, for the reasons stated herein the Petition of Appeal is dismissed. The Commissioner finds no compelling circumstances to relax the 90-day rule.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

May 9, 1988

Pending State Board

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